

***ROMER V. EVANS* AND THE PERMISSIBILITY OF MORALITY LEGISLATION**

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[T]o extend the bounds of what may be called moral police until it encroaches on the most unquestionably legitimate liberty of the individual is one of the most universal of all human propensities.

—John Stuart Mill¹

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1. JOHN STUART MILL, ON LIBERTY 152 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

I. INTRODUCTION

In the late 1950s and early 1960s, two of England's most respected jurists engaged in an on-going debate that would take the legal world by storm. The debate concerned whether and to what extent morality should be reflected in the law and was instigated by the publication of the Wolfenden Report, a study presented to Parliament as it considered whether to repeal certain antisodomy laws in Great Britain.² On the one hand was Lord Patrick Devlin, a Lord of Appeal in Ordinary later elevated to the House of Lords, Britain's highest court. Devlin opposed the conclusions contained in the Wolfenden Report and supported the continuation of the antisodomy laws.³ On the other hand was H.L.A. Hart, Professor of Jurisprudence at the University of Oxford, who believed that the use of the criminal law to enforce popular morality, in particular sexual morality, was inappropriate.⁴ For many years, the two men led the public discussion in England and abroad about the efficacy and jurisprudential propriety of morality legislation, sometimes invoking novel arguments and sometimes invoking theories that were centuries old.⁵

2. The report, which was created by Parliament's Committee on Homosexual Offenses and Prostitution, was presented to Parliament in 1957 and published in 1959. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 13-14 (1963). The report recommended that homosexual practices between consenting adults be decriminalized, and based its conclusions on the ground that even if such practices were held by society to be immoral, they were beyond the proper scope of the law. *Id.*; see also Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of Making Men Moral*, 71 NOTRE DAME L. REV. 671, 673 (1996) (book review) (discussing Wolfenden Report and Hart-Devlin debate).

3. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* at vi-vii (1965); see also Bradley, *supra* note 2, at 673-74 (discussing Devlin's position). Many of the arguments made by Devlin were made 100 years earlier by Sir James Fitzjames Stephen, an eminent judge of the Victorian period and an opponent of John Stuart Mill's utilitarian approach to law. HART, *supra* note 2, at 16.

4. HART, *supra* note 2 *passim*.

5. The debate continues into the present day, often invoking the names of the principals themselves. See, e.g., SIMON LEE, *LAW AND MORALS* (1986); BASIL MITCHELL, *LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY* (1967); Bradley, *supra* note 2, at 673-77 (noting Robert George's revision of conservative position enunciated by Devlin); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487 (1989) (attacking Devlin's premise that societies rely on moral outrage to survive); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 345 n.67 (1995) (discussing Hart and Devlin in context of larger discussion on proper role of morality in law); Candace Groot Hill, Note, *Public Employees and Private Conduct: Cohabitation and the Vagueness of "Immorality,"* 23 J. FAM. L. 111 *passim* (1984/85) (discussing civil enforcement of popular morality); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73 *passim* (1995) (discussing modern applications of Hart-Devlin debate); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 659-61 (1990) (discussing Devlin's position in conservative theory regarding importance of traditional morality in law); Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 906-09 (1987) (book review)

The subject of morality legislation has arisen yet again, this time in the context of the U.S. Supreme Court's recent decision in *Romer v. Evans*.⁶ In the *Romer* majority opinion (which is discussed in Section II of this Article), six justices agreed that Colorado could not create a special class of citizens, that is, homosexuals, and "prohibit[] all legislative, executive or judicial action at any level of state or local government designed to protect the named class."⁷ Three justices, however, would have upheld the constitutionality of the provision, relying, in part, on the justifications proposed by Devlin over thirty years ago. In fact, some aspects of the dissenting opinion bear traces of jurisprudential theories first proposed by ancient Greek philosophers.

The purpose of this Article is to review the dissent in *Romer v. Evans* in the context of the continuing debate regarding the proper role of morality in law and to analyze the legitimacy of a variety of theories that support the enactment of morality legislation. The term "morality legislation" can be somewhat nebulous, but is used herein to refer to those laws that are specifically aimed at curing so-called immoral behavior, that is, acts that violate a social norm or taboo.⁸ Although

(reviewing Hart's and Devlin's arguments on "disgust" as a necessary predicate to enforcing morality).

6. 116 S. Ct. 1620 (1996). Interestingly, in 1963, Professor Louis Henkin stated that Devlin's theory regarding morality legislation might one day be adopted by certain justices on the Supreme Court who would subsequently find that the Constitution did not stand in their way. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 414 (1963). In many ways, that prediction has now come true.

7. *Romer*, 116 S. Ct. at 1623.

8. Virtually all such laws reflect a majority morality, since minorities are often unable to garner sufficient electoral support to impose their moral framework on others. See Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 303 n.11 (1984). The laws may operate within a larger moral framework, see JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 354 n.29 (1988) (discussing "seamless web" theory of morality), but their immediate goal is to limit certain behaviors rather than coerce positive moral virtues. This negative, "thou shalt not" quality of morality legislation is due, in large part, to the law's preference for barring undesirable behaviors rather than setting forth affirmative duties. LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969).

Many persons who oppose morality legislation have as their actual or presumed goal the creation of a morally neutral society. This approach is often challenged by those who believe that neutrality is impossible and that proneutrality theorists are doing nothing more than imposing their own values on others. Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 313-16 (1990) (discussing the impossibility of true neutrality in law). In one sense, such claims are correct; in matters of morality, there is no such thing as an "anti-value" that can "hold the spot" of a missing value without influencing that empty space in some way. See *id.* However, advocates for neutrality in law argue that the morality that is imposed in a less-restrictive society (that is, one that severely limits the number and types of morality laws enacted) is one that encourages and advances individual choice as the primary goal of society, rather than the creation of a conformist society. *Id.* at 311-12. Nevertheless, proponents of morality legislation point to the fact that morality has always

the law at issue in *Romer* will be used as a primary example of morality legislation, this Article will explore the legitimacy of such laws in other contexts as well.

The *Romer* dissent, which was authored by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, took the position that popular morality not only could but should form the basis of both criminal and civil law. This theory is firmly embedded in the conservative legal tradition embraced by Scalia⁹ but is radical in terms of American constitutional jurisprudence in its express adoption of "animus" or "moral disapproval" as an appropriate basis for law.¹⁰ Scalia's opinion, which is discussed in Section III, was premised on the perceived ability of the law to protect "traditional sexual mores." This argument raises the question not only of whether enforcement of morality is a legitimate governmental goal, but also whether the means used to further that legal end are capable of accomplishing their intended goal. The legitimacy and wisdom of such an approach is discussed in Section IV, which reviews each of the historical methods of justifying morality legislation and analyzes their applicability to *Romer*.

Although the primary purpose of this Article is to review the *Romer* dissent in light of past jurisprudence, some suggestions as to alternative justifications for morality legislation will be included in the concluding remarks in Section V.

had a strong influence on law, and vice versa, in order to justify their position. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958).

This type of argument can be confusing, for once it is agreed that every law advances some vision of morality to some extent, virtually any law could be described as morality legislation. Therefore, the term "morality legislation" is used herein to refer to a narrow category of laws regulating conduct that violates established social norms but poses no concrete or tangible harm to persons other than the actor, and possibly not even to him or herself. Henkin, *supra* note 6, at 407; see also FEINBERG, *supra*, at xix-xx (discussing categories of "liberty-limiting principles" or morality legislation); Michaelson, *supra*, at 303 n.11. The most commonly mentioned morality laws include prohibitions and burdens on homosexuality, abortion, suicide, euthanasia, and sexual expression (including pornography and prostitution). While the author is not necessarily prepared to defend all such acts to their logical extremes (since there may be times when such acts begin to affect and harm others), the author believes, for reasons that will be discussed *infra*, that laws concerning these acts are illegitimate to the extent that they are enacted to protect morality or morals rather than to avoid harm to others. See FULLER, *supra*, at 29 n.24 (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.")).

9. See West, *supra* note 5, at 652-63 (discussing conservative theory and jurisprudence).

10. Robin West has argued that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the first Supreme Court case to adopt "an explicitly conservative jurisprudence account of the 'natural' right of the community to define and enforce the good in law," West, *supra* note 5, at 663, but the *Romer* dissent has extended the *Bowers* reliance on popular morality to a new level, see *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

II. THE *ROMER* MAJORITY

The six justices constituting the majority in *Romer* overturned the Colorado provision known as "Amendment 2" based on an equal protection rationale, finding that, contrary to the state's argument that the law in question "puts gays and lesbians in the same position as all other persons," the provision actually created a special class of citizens and discriminated against them unlawfully.¹¹ The state had argued that "the measure does no more than deny homosexuals special rights,"¹² an argument which Scalia later supported. However, the majority found that "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."¹³ The majority found that Amendment 2 not only denied gays and lesbians the protection of specific antidiscrimination laws enacted for their benefit (of which there had been several),¹⁴ but could also deny them the protection of general antidiscrimination laws.¹⁵ Rather than putting homosexuals on the same footing as other groups, the majority found that Amendment 2 "impose[d] a special disability on th[e]se persons alone,"¹⁶ not only affecting current rights but also limiting the ability of

11. *Romer*, 116 S. Ct. at 1624–25. The text of the amendment to the Colorado Constitution that is commonly known as "Amendment 2" reads as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer, 116 S. Ct. at 1623 (quoting Amendment 2).

12. *Romer*, 116 S. Ct. at 1624.

13. *Id.* at 1625.

14. *See, e.g.*, COLO. REV. STAT. ANN. § 10–3–1104(1)(a)(VI–IX) (West 1990); DENVER REV. MUNICIPAL CODE, tit. II, ch. 28, art. IV, §§ 28–92 (1991) <[http://www.municode.com/folio.cgi/10257.nfg/query=*/doc/{10758,0,0,0}?>](http://www.municode.com/folio.cgi/10257.nfg/query=*/doc/{10758,0,0,0}?); BOULDER REV. CODE § 12–1–1 (1987) <<http://128.138.129.27/boulder/cao/12-1.html>>; ASPEN MUNICIPAL CODE § 13–98 (1977) (current version at ASPEN MUNICIPAL CODE § 15.04.570 (1997) <<http://www/bpcnet.com/codes/aspen.htm>>; Colorado Exec. Order No. D0035 (December 10, 1990).

15. *Romer*, 116 S. Ct. at 1626. These general provisions forbade "arbitrary and capricious" or "unfair" discrimination. *See, e.g.*, COLO. REV. STAT. ANN. § 24–4–106(7) (West 1990) (using "arbitrary and capricious" standard); *id.* § 18–8–405 (West 1990) (using "arbitrary and capricious" standard); *id.* § 10–3–1104(1)(f) (West 1990) (using "unfair" standard); 4 COLO. CODE REGS. § 801–1, Policy 11–1 (1986) (prohibiting discrimination in employment context based on any "other non-merit factor").

16. *Romer*, 116 S. Ct. at 1627.

homosexual rights advocates to reap any political gains in the future.¹⁷ The protections that were denied to gays and lesbians were not considered by the majority to be “special” in any way, but were instead deemed by the Court to be “taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹⁸

The majority did not reach the question of whether to classify homosexuals as a suspect class or whether discrimination against them violated any fundamental rights. In making its decision, the majority relied on the least stringent equal protection analysis, that is, the rational relation test, stating that even under that most deferential standard, Amendment 2 failed to pass constitutional muster.¹⁹

The majority noted that, in a democracy, a single named group may be burdened if it is necessary in order to further a legitimate government interest.²⁰ However, the majority also found that the Constitution requires some sort of nexus between the classification of burdened individuals and the legislative end in order to avoid classifications being drawn for the sole purpose of disadvantaging the named group.²¹

17. One of Scalia’s main arguments was that the denial of a right at the state level merely made overturning the law more difficult, an event that may be unfortunate for the disadvantaged group but that is perfectly legitimate in a democracy. *Id.* at 1630 (Scalia, J., dissenting). *But cf.* *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 433 (S.D. Ohio 1994) (“To single out a group of citizens and place upon them the added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly undermines the spirit of our constitution.... [A] state may not single out and disadvantage any *independently* identifiable group by making it more difficult for that group to enact legislation in its behalf; and so doing does not ‘demonstrate [a] devotion to democracy,’ but rather makes a mockery of it.” (citations omitted)), *rev’d*, 54 F.3d 261 (6th Cir. 1995), and *vacated*, 116 S. Ct. 2519 (1997); *see also id.* at 443 (“[W]e can conceive of no legitimate governmental purpose *rationaly related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated—and likely insurmountable—burden of amending the city charter.... The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective.”).

18. *Romer*, 116 S. Ct. at 1627.

19. *Id.* The dissent interpreted the majority’s use of the rational relation test as a sign that homosexuality should not be protected in the same way as race or religion. *Id.* at 1629, 1631 & n.1 (Scalia, J., dissenting). There is nothing in the majority opinion, however, to justify that conclusion; instead, the majority’s actions represent classic constitutional procedure, namely to avoid reaching issues that are not central to the case at bar.

20. *Id.* at 1627.

21. *Id.* at 1627–28 (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”)). Because laws based on mere animosity have as their primary intent an adverse impact on the named class, they are suspect under *Fritz* and now, apparently, *Romer*. *See Gey, supra* note 5, at 401–02

Notably, the majority held that mere animus cannot constitute a legitimate purpose for disfavoring certain groups.²² In reaching this conclusion, the Court quoted *United States Department of Agriculture v. Moreno*, stating, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²³

The majority acknowledged the state’s enunciated rationale for Amendment 2, namely “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,”²⁴ but found that these purposes were neither legitimate nor discrete. Instead, Amendment 2 was held to constitute a “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”²⁵

III. THE ROMER DISSENT

Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas, took a very different view of Amendment 2, and supported its constitutionality as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.”²⁶ The dissent claimed that “Coloradans are...*entitled*

(suggesting method by which courts could evaluate and strike laws based on mere moral disapproval).

22. *Romer*, 116 S. Ct. at 1628.

23. *Id.* (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). *Moreno* also cited with apparent approval the district court’s rejection of the government’s contention that “the challenged classification might be justified as a means to foster ‘morality.’ In rejecting that contention, the District Court noted that ‘interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions.’” *Moreno*, 413 U.S. at 535 n.7 (citation omitted). By the time *Moreno* reached the Supreme Court, the government had dropped its morality argument. *Id.* Interestingly, Scalia made much of the *Romer* majority’s failure to cite *Bowers v. Hardwick*, 478 U.S. 186 (1986), see *Romer*, 116 S. Ct. at 1632–33 (Scalia, J., dissenting), but himself failed to distinguish *Moreno* and that line of cases.

24. *Romer*, 116 S. Ct. at 1629. The state also claimed the need to conserve its resources to fight discrimination against other groups. *Id.* It is unclear how the state justified discrimination against one group as the price that had to be paid in order to stop discrimination against an unrelated group.

25. *Id.*

26. *Id.* (Scalia, J., dissenting). Throughout his dissent, Scalia argued that homosexuals could not be considered “politically disfavored” due to their “geographic concentration and disproportionate political power.” *Id.* at 1634 (Scalia, J., dissenting). However, his claim that he is uncritical of the legislative successes of gay rights activists is somewhat undermined by his later assertion that “[i]t is nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in American media and

to be hostile toward homosexual conduct," and that it is perfectly legitimate to burden homosexuals in order to "prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans."²⁷ According to Scalia, Amendment 2 was an appropriate method by which the majority could combat advocates for homosexual rights who "devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."²⁸ In addition, Scalia opposed the proposition that homosexuality should be deemed similar to race or religion for equal protection purposes.²⁹

politics." Compare *id.* at 1634 (Scalia, J., dissenting) with *id.* at 1637 (Scalia, J., dissenting). The unfortunate effect of these statements is to bring to mind those people who once claimed to condemn anti-Semitism while simultaneously railing against the allegedly disproportionate number of Jews in certain industries or professions. See NORMAN F. CANTOR, *THE SACRED CHAIN: THE HISTORY OF THE JEWS* 311-12 (1994) (noting common perception of Jews as corrupt schemers in higher levels of finance, commerce, and industry).

27. *Romer*, 116 S. Ct. at 1633, 1637 (Scalia, J., dissenting).

28. *Id.* at 1634 (Scalia, J., dissenting).

29. Although no one can doubt the sincerity of Scalia's belief that homosexuality is not akin to race or religion, the factual and legal basis of his position is unclear. Many experts now believe that there is little, if any, choice involved in a person's sexual orientation, just as there is little, if any, choice involved in determining a person's race. See William A. Henry III, *Born Gay? Studies of Family Trees and DNA Make the Case that Male Homosexuality Is in the Genes*, TIME, July 26, 1993, at 36 (noting possible genetic origins of homosexuality but acknowledging complexity of issue); Larry Thompson, *Search for a Gay Gene: A DNA Transplant Made These Male Fruit Flies Turn Away from Females—What Does that Say About the Origins of Homosexuality?*, TIME, June 12, 1995, at 60 (same); see also William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2419 (1997); Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 876 (1990). In addition, a person's sexual orientation is as important to his or her self-identification as is religion, so that discrimination on the basis of sexuality can be highly damaging to a person's psyche. See Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 118 n.100 (1995) ("To the extent that degrading behavior affects a victim's psyche, altering both his attitudes and ambitions, it prevents him from implementing a virtuous life plan."); Eskridge, *supra*, at 2411. Obviously, there is at least as much animosity towards gays and lesbians as there once was (or arguably still is) towards persons of minority races or religious faiths. See Henry, *supra*. Therefore, it seems logical to conclude that because sexuality is a potentially immutable trait that is of vital importance to all persons, discrimination on the basis of sexual orientation (whether it be homosexuality or heterosexuality) is impermissible under current American constitutional law. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (denying constitutionality of "status" crimes that impose penalties based on traits "which may be contracted innocently or involuntarily"); see also J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323-24, 2366-67 (1997) (noting immutability is not a necessary or sufficient element to create a status group; also noting it is the attached social meaning that is relevant, not the trait itself).

Scalia claims in *Romer* that the political majority may use the civil law to protect certain societal customs and mores. His argument rests upon the initial premise that the law is not only permitted to shape popular morality but is effectively able to do so. This theory, which is the topic of this Article and which is discussed in Section IV, is illustrated by Scalia's comments that the majority can preserve traditional morality and "prevent" its "deterioration" through legislation.³⁰ Though subtly made, the argument is critical to Scalia's dissent, for if legislation is unable to preserve or protect societal mores, then the law loses its claim to legitimacy³¹ and becomes little more than a tool for the strong to use against the weak in order to create a conformist society.

Scalia's second premise is that hostility and moral disapproval constitute a legitimate basis for enacting laws. This conclusion, which falls outside the scope of the current Article, is based on Scalia's belief that morality is a mere political issue that is most appropriately resolved through the political and legislative process. Clearly, this second argument relies on the soundness of the first argument, for if morality legislation is impermissible per se, then it does not matter what the laws are based on; they are still illegitimate. According to Scalia, a decision that burdens a minority group based on that group's breach of the majority's moral code does not violate human rights or basic democratic principles but merely reflects the proper workings of the political system.³² If, however, hostility is not by itself a legitimate purpose for legislation, then one of Scalia's express justifications in favor of Amendment 2 fails.

Scalia's third argument is that the state may use the civil law to burden whatever it may criminalize. Here, Scalia claims that *Bowers v. Hardwick*³³ should have controlled the issue at bar.³⁴ However, if the criminal law and the civil law are

30. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

31. This concept is described by Lon Fuller in his list of the eight ways in which the rule of law may fail. FULLER, *supra* note 8, at 39. One "route[] to disaster" was the creation of laws requiring the impossible. *See id.* at 39, 70-79 (citing John Lilburne as calling such provisions "lawless unlimited power"). In other words, if the law is unable to preserve or protect morality, it has set out to do the impossible and is therefore unlawful.

32. *See Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting). It bears noting that some courts have held that criminal or civil legislation that burdens individuals on the basis of their sexual orientation does in fact violate international human rights. *See generally* Norris v. Ireland, 13 Eur. H.R. Rep. 186 (1988) (holding Article 8(2) of European Convention, which permits some restrictions to privacy based on "protection of morals," could not be used to permit national governments to limit consensual homosexual acts); Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981) (same).

33. 478 U.S. 186 (1986) (upholding constitutionality of laws criminalizing sodomy).

34. *Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting). As a threshold matter, however, Scalia may have made a mistake common to many lower courts that believe precedents set in privacy cases (e.g., *Bowers*) control equal protection cases and vice versa. Gey, *supra* note 5, at 398 n.295; D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 72 n.17 (1993). The *Bowers* Court

found not to be interchangeable but to have different goals and remedies, then Scalia cannot rely on *Bowers*'s precedential value. Although this third point is also beyond the scope of this Article, it too relies on the first argument, for if morality legislation is impermissible per se, it does not matter whether the law is criminal or civil.

IV. LOGIC AND LEGITIMACY: WHAT IS PERMISSIBLE AND WHAT IS POSSIBLE IN THE REALM OF MORALITY LEGISLATION

One of the primary requirements of the rule of law is that each law enacted have a particular and legitimate purpose and that the articulated purpose of or justification for the law be somehow furthered by the law itself.³⁵ Without such limitations, state action becomes nothing more than the raw exercise of power.³⁶ In *Romer*, Scalia stated that the purpose of Amendment 2 is the preservation of traditional sexual morality and the prevention of its piecemeal deterioration.³⁷

expressly declined to consider equal protection claims against the Georgia statute, since no such claims had been raised by the parties. *Bowers v. Hardwick*, 478 U.S. at 186, 196 & n.8 (1986). *But cf.* *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 573 n.9 (9th Cir. 1990) (interpreting *Bowers* as foreclosing or discouraging equal protection claims); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same).

35. See FULLER, *supra* note 8, at 145–48 (noting not every substantive aim can be adopted without compromising entire legal system); Henkin, *supra* note 6, at 402–04. This concept is not limited to the field of jurisprudence, but is also reflected in, inter alia, the Supreme Court's rational relation test, which is used in the context of both due process and equal protection claims. See Welch, *supra* note 34, at 71, 80; see also *Lyng v. International Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) ("The rational-basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals."). Interestingly, the express constitutional requirement that the purpose of a law be "legitimate" has only evolved in the last several decades. Welch, *supra* note 34, at 83 n.105. This has proven to be a difficult standard to define. *Id.* at 79–83.

36. Legal and political commentators have long recognized that tyranny is not the exclusive province of dictatorships or oligarchies. Democracies, too, can become tyrannical when the majority is granted absolute and unlimited power. See HART, *supra* note 2, at 77–81; MILL, *supra* note 1, at 62 (discussing tyranny of the majority); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 116–17 (Richard D. Heffner ed., 1956) (1835 & 1840) (noting that because American public officials "are protected by the opinion, and backed by the power, of the majority, they dare do things which even a European, accustomed as he is to arbitrary power, is astonished at"); *id.* at 310 ("Another tendency, which is extremely natural to democratic nations and extremely dangerous, is that which leads them to despise and undervalue the rights of private persons."); see also David A.J. Richards, *Human Rights and Criminal Punishment*, 49 U. CHI. L. REV. 235, 239–40 (1982) (book review) (noting Mill's recognition that "identification of wrongs to the individual is frequently shaped by an unreflective public opinion whose moral views lack rational basis").

37. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

Therefore, the question must be asked whether (i) protecting and preserving traditional morality (sexual or otherwise) is a legitimate purpose and (ii) whether laws that either criminalize or civilly burden the disfavored conduct can be reasonably expected to further that goal.³⁸

Since morality legislation has been justified under a wide variety of theories, this Article will first review each of the major schools of thought to analyze their legitimacy on a theoretical basis and then determine whether and to what extent they have influenced the *Romer* dissent. Some of these justifications have existed since the days of the ancient Greeks, while others have more recent origins. Each, however, attempts to describe why it is proper for the state to impose a particular moral code on society and why the method used is effective as a practical matter. If the *Romer* dissent relies on a theory that can be proven legitimate in both theory and practice, then it might be argued that Scalia's opinion should have prevailed; if, however, the dissent cannot be found to be based on a jurisprudentially permissible basis, then the six justices who refused to sign onto Scalia's opinion were correct. This Article will discuss ten different theories in roughly chronological order, beginning with the ancient Greeks and ending with Scalia himself as a modern advocate of morality legislation.

A. The Platonic Ideal

Plato was one of the first philosophers to comment on the interaction between law and morality, and supported morality legislation on the grounds that "the State exists to promote virtue among its citizens."³⁹ Plato's view, simply put, was that the majority "must have the right and duty to declare what standards...are to be observed as virtuous and must ascertain them as it thinks best."⁴⁰ Despite its antiquity, the Platonic ideal is very similar to one of the models proposed by modern conservatives to justify morality legislation. Although contemporary commentators do not suggest that the state's sole purpose is to promote virtue, they argue that it is a permissible extension of the state's *parens patriae* powers to

38. See generally Henkin, *supra* note 6, at 401-07 (arguing that although morality has always been assumed to be a concern of government, such thesis has never been properly explored; noting usual questions are whether state's involvement in morality is "proper public purpose" and whether means used to achieve it are "reasonable").

39. DEVLIN, *supra* note 3, at 89; see also H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 1 (1967).

40. DEVLIN, *supra* note 3, at 89; see also Bradley, *supra* note 2, at 675 (stating contemporary conservative constitutionalism, of which Scalia is a leading voice, affirms the "people's right to act on sentiment, authority, and on religious faith, unfettered by judicial preferences masquerading as constitutional law"); Gey, *supra* note 5, at 366 (citing Bork and Scalia as believing morality is what majority says it is). Bork has written that "[w]hen the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason." *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (permitting sailor to be discharged from navy based on homosexual conduct; opinion joined by then-Circuit Judge Scalia).

promote morality within society.⁴¹ Today, however, few political theorists speak of promoting virtue in individuals; instead, they focus on promoting virtue within "society." Presumably, the shift in emphasis is intended to avoid potential infringement of individual rights in a world that values personal liberty. In addition, the change in focus dovetails nicely with the modern conservative emphasis on collective, rather than individual, rights.⁴²

However, the Platonic approach has two fundamental problems. First, the notion that any particular law may have as its purpose the promotion of virtue in either individual citizens or society as a whole alarms many jurists. Even Devlin argued that the Platonic model is "not acceptable to Anglo-American thought" in that it "destroys freedom of conscience and is the paved road to tyranny."⁴³ However, a number of modern commentators disagree with Devlin's conclusion, stating that whereas Devlin assumed morality laws coerced belief, not merely behavior, such laws in reality affect only behavior, not belief.⁴⁴

An emphasis on behavior is necessary if promotion of virtue is to remain a permissible goal of modern law, since most modern commentators agree that two longstanding principles make it inappropriate for the state to attempt to coerce belief.⁴⁵ First, freedom of conscience and belief has been established as a fundamental human right in most Western nations for many years.⁴⁶ Second,

41. See West, *supra* note 5, at 654 ("For the conservative, the state will often have a duty to exercise its power to promote, through legislation, the good life on behalf of its citizens [, which is] derived from the normative teachings of some dominant communitarian authority...."). Some would say that the protection of morality was not only a permissible goal of government but a necessary one. DEVLIN, *supra* note 3, at 11.

42. Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 344 (1994); Gey, *supra* note 5, at 348.

43. DEVLIN, *supra* note 3, at 89.

44. Bradley, *supra* note 2, at 676-77; see also ROBERT P. GEORGE, *MAKING MEN MORAL* 75, 81 (1993).

45. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); see also Bradley, *supra* note 2, at 676-77. Although modern opposition to laws purporting to compel religious or political beliefs is based on the ground that such laws constitute an unwarranted interference with individual liberty, some theorists have condemned such laws as attempting to compel the impossible. FULLER, *supra* note 8, at 79.

46. While this notion may have once been limited to freedom of religious beliefs and practices, the concept has expanded and now encompasses a wide realm of opinions and ideologies. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR 3d Sess., pt. 1, at 71, 74, art. 18, U.N. Doc. A/810 (1948) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief...."); *id.* art. 19 ("Everyone has the right to freedom of opinion and expression...."); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, pt.3, U.N. GAOR 21st Sess., Supp. No 16, at 55, art. 18, U.N. Doc. A/6316 (1966)

coercion implies some sort of penalty for noncompliance. However, "thought crimes" are inherently incapable of extrinsic proof and prosecution, and are therefore alien to modern Anglo-American jurisprudence.⁴⁷

Even if morality laws have as their purpose and effect the coercion only of behavior and not of belief, problems exist because laws that purport to mandate virtuous behavior still require a determination of which acts are desirable and which are undesirable.⁴⁸ The Platonic model attempts to resolve this quandary by granting to the majority the right to decide what behavior is socially acceptable.⁴⁹ Modern jurists who support the moral majoritarianism inherent in the Platonic model include Bork,⁵⁰ Scalia,⁵¹ and others.⁵² The thrust of these persons' argument is that society cannot exist without some moral parameters,⁵³ and, in a democracy, the best arbiter of morality is the majority.⁵⁴ Notably, this approach presupposes

("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice...."). Some have argued that American courts' definition of religion requires the state to grant First Amendment-type protections to minority moralities. Michaelson, *supra* note 8, at 313; *see also* Eskridge, *supra* note 29, at 2412 (noting acceptance in American jurisprudence of benign religious variation); Gey, *supra* note 5, at 386-90.

47. For example, the criminal law requires both a mens rea and an actus rea; either one alone is an insufficient basis for prosecution. *But see* FEINBERG, *supra* note 8, at 20, 23 (discussing evil and impure thoughts as candidates for "free-floating evils" that might be addressed by morality legislation).

48. *See infra* notes 84-88 and accompanying text.

49. DEVLIN, *supra* note 3, at 89. Unfortunately, there are a number of problems with the argument that the political process accurately reflects the moral tone of a community or a nation, the most important being that it does not take into account the reality of voter apathy. For example, it is estimated that an election can be decided by a mere 6 to 15% of the eligible voters. ANTI-DEFAMATION LEAGUE, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* 31 (1994). Many times, it is a highly dedicated single-issue interest group that decides the outcome of an election, as Scalia himself has noted. *Id.*; *see also* *Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting) (noting effectiveness of gay-rights activists). Therefore, to say that popular morality is demonstrated by the outcome of political elections is not necessarily true.

50. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2, 11, 30 (1971) (stating that moral truth is what the majority says it is at any particular time); Gey, *supra* note 5, at 366. Of course, this theory implicitly means that truth can, and will, change in the future. *Id.* at 403.

51. *See, e.g., Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting); Gey, *supra* note 5, at 365-66 (noting Scalia's misconstruction of "central focus of democratic theory").

52. *See* DEVLIN, *supra* note 3, at 94, 100; Bradley, *supra* note 2, at 675; West, *supra* note 5, at 654-55.

53. *See* Smith, *supra* note 8, at 328 (noting that legal system without moral perspective is meaningless).

54. *See* Bradley, *supra* note 2, at 675; West, *supra* note 5, at 654; *see also* *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) ("When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or

the *absence* of any objective, externally cognizable morality outside of majority opinion, for if such an objective morality did exist, then majority opinion would be irrelevant.⁵⁵

Many of those who object to morality laws do so not on the grounds that there is an objectively identifiable, "correct" morality that is in opposition to the majority morality, but on the grounds that to allow the majority to impose its morality on others is a "misunderstanding of democracy."⁵⁶ The problem with moral majoritarianism (called "moral populism" by Hart) is that it takes the concept that political power in a democracy rests in the hands of the majority and transforms it into the idea that the majority may do whatever it wishes with that power.⁵⁷ Under such an approach, liberty becomes nothing more than the freedom to act in accordance with the moral code of the alleged majority. To some people, this may seem perfectly acceptable, but to others, it signals a return to the preliberal era in which Plato lived.⁵⁸ Many modern commentators have condemned a purely majoritarian regime as analogous to a "gunman writ large," where the power of the state is total but arbitrary.⁵⁹ The concern about the power of the

those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.").

55. See HART, *supra* note 2, at 20 (discussing critical versus positive morality); Gey, *supra* note 5, at 364, 368 n.189 (noting there is no external standard to judge what is morally right or wrong).

56. HART, *supra* note 2, at 77-81; see also Balkin, *supra* note 29, at 2368. The greatest danger of democracy, according to Hart, Mill, and Tocqueville, was not the mere oppression of a minority by the majority but the belief that such an action "might come to be thought unobjectionable." HART, *supra* note 2, at 77-78.

57. HART, *supra* note 2, at 77, 79-80; Balkin, *supra* note 29, at 2368. A variation of moral populism, called "constitutional populism," has been criticized as a "backward looking test" that accepts the "current moral fashion as a rational basis" for law. Welch, *supra* note 34, at 101-02 (noting shift began with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

58. Preliberal societies are marked by a single official orthodoxy that is protected through state coercion and repression. Smith, *supra* note 8, at 308. These societies are usually succeeded by a system in which one official orthodoxy still exists but where repression is replaced by tolerance. *Id.* The final stage of liberalism advocates neutrality and equality and denies the existence of any orthodox position. *Id.* Some commentators believe that this final stage has not, and cannot, be realized, at least in the near future, and support a return to the intermediate stage of liberalism in which tolerance is the social norm. *Id.* at 306.

59. Hart defined any system that equated law with the unfettered power to sanction disobedience to sovereign commands as "a gunman writ large." Hart, *supra* note 8, at 603 (criticizing Austin's version of positivism); see also David J. Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 802 (1991) (discussing Hart's criticism of Austin). Other commentators have argued that simple majoritarianism can never serve as a foundation for any proper legal system, since it fails to garner sufficient respect for the rule of law. In order for a legal system to inspire its subjects, there must be some substantive legal values that exist separately from mere majoritarianism. Smith, *supra* note 8, at 327; see also Gey, *supra* note 5, at 403 (arguing that morality legislation is

majority in a variety of contexts, including morality, has led to limits being placed on the majority's powers so that the rights of disfavored groups will not be burdened without good cause.⁶⁰ Because morality legislation is often used as a means of disguising raw majoritarianism, many commentators have focused on the particular problems associated with enforcing popular morality, noting that not every act that violates popular morality should be regulated by law.⁶¹

There is an additional concern associated with the Platonic model of legalized morality. Even assuming *arguendo* that the state may have the promotion of virtue in its citizens as a legitimate goal, it is not altogether clear that, as a practical matter, punishment (either civil or criminal) is the most effective means by which morality may be taught and encouraged.⁶² Although the legislature is not required to choose the most efficacious method of furthering its legitimate goals, there must be some consideration of whether other less intrusive means are equally likely to obtain the desired result when individual rights are at stake.⁶³ In the context of morality legislation, it is possible, if not probable, that the most effective method of encouraging people to act in accordance with established moral norms is not through the law but through other sources, such as independent religious institutions,⁶⁴ friends, and relations,⁶⁵ noncoercive explication from government;⁶⁶

essentially the exercise of raw power, where the politically powerful impose an unproven moral code on the politically weak).

60. See *supra* note 36; see also MILL, *supra* note 1, at 60 ("The aim, therefore, of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty."); *id.* at 59–62 (noting that "the majority, or those who succeed in making themselves accepted as the majority...may desire to oppress a part of their number, and precautions are as much needed against this as against any other abuse of power").

61. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS & LEGISLATION 313–14 (Laurence J. LaFleur ed., 1948) (1823) ("Every [immoral] act which promises to be pernicious upon the whole to the community (himself included) each individual ought to abstain from of himself: but it is not every such act that the legislator ought to compel him to abstain from."); see also HART, *supra* note 2, at 81 ("Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified."); Hart, *supra* note 8, at 599 (discussing theories of Austin and Bentham).

62. HART, *supra* note 2, at 58.

63. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (noting freedom of belief is absolute under First Amendment, but freedom to act is subject to regulation; however, "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom").

64. Devlin believed that religion had a critical and complementary role to play in teaching morality. DEVLIN, *supra* note 3, at 4, 22–25 (noting that if morality laws are to succeed, they must concern matters about which community is "deeply imbued with a sense of sin"). Alexis de Tocqueville was also impressed with the vigor and efficacy of the independent religious institutions in America and believed them a necessary part of a

and the ubiquitous presence of social pressure.⁶⁷ Permitting other entities to act as moral educators would achieve the same purpose as state coercion but without the troubling legal implications.

There are a number of instances where the state has already conceded its ability to educate but not regulate. For example, for years the federal government has tried to improve U.S. residents' health through encouragement and education.⁶⁸ The state could guarantee an improvement in people's health by forcing everyone to run three miles each day, but most people would oppose this sort of law because it would exceed the state's ability to act and infringe impermissibly on individual liberty,⁶⁹ even if running three miles a day is for citizens' "own good"⁷⁰ and even if regular exercise builds a better, stronger, healthier nation. Laws that force citizens to conform to the majority's moral ideal are similarly suspect, especially since (i) the benefits of one particular moral system over another are less clear cut than the

healthy, well-functioning democracy. TOCQUEVILLE, *supra* note 36, at 155–56. However, Tocqueville recommended that law and religion remain separate in order to maintain equally strong religious and secular institutions. *Id.* at 145; *see also* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 35 (1993).

65. Galston, *supra* note 42, at 378.

66. HART, *supra* note 2, at 76–77; HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 855–57 (William N. Eskridge & Philip P. Frickey eds., 1994) (noting nonforceful methods of government action); *see also* MILL, *supra* note 1, at 163. Bentham also opposed the use of legal punishment in cases where instruction would suffice. BENTHAM, *supra* note 61, at 177. He identified such situations as those concerning "matters of *duty*; of whatever kind the duty be; whether political, or moral, or religious." *Id.*

67. In some cases, social coercion can be as dangerous as legal coercion. For example, Mill cautioned against the overweening "tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them." MILL, *supra* note 1, at 63; *see also id.* at 68. In fact, Mill believed "social tyranny [to be] more formidable than many kinds of political oppression, since...it leaves fewer means of escape." *Id.* at 63; *see also* TOCQUEVILLE, *supra* note 36, at 148–49 (noting tendency in democracies to supply "ready-made opinions for the use of individuals").

68. Marian Burros, *Federal Report Promotes Commonplace Exercise*, WASH. POST, July 12, 1996, at A12.

69. Because the health of the population can be said to affect both national safety (that is, healthy citizens are needed in case it becomes necessary to defend the nation) and the economy (that is, healthy citizens cost the state and the insurance industry less in health-care costs), this type of law can arguably be said to affect public, and not purely private, concerns.

70. *See* MILL, *supra* note 1, at 68–69 (opposing the legitimacy of coercion for citizens' "own good").

benefits of an athletic lifestyle versus a sedentary lifestyle and (ii) there are few costs (monetary or otherwise) to the state if purely moral laws are repealed.⁷¹

In virtually every regard, the *Romer* dissent fits solidly within the Platonic ideal. First, Scalia's opinion implicitly supports the notion that the state's *patris patriae* powers may be used to promote virtue within society by preserving or protecting traditional mores. Although Scalia does not claim that this is the state's sole purpose, he argues that it is a permissible purpose. Second, Scalia grants the majority, as represented by the legislature, the right and duty of defining and enforcing the moral standards of the community. It is not surprising that the dissent in *Romer* combines moral majoritarianism with an implicit requirement that the protected morality be traditional, since Scalia tends to rely heavily upon tradition in most of his judicial opinions.⁷² Unfortunately, however, Scalia's approach denies the existence of individual rights to the extent that those rights have not been traditionally recognized by the majority.⁷³ Not only is this approach inconsistent with the countermajoritarian elements of the Constitution,⁷⁴ and, to some extent, Scalia's own populist approach,⁷⁵ it is unwise as a matter of jurisprudence since, as shall be discussed in Section IV.F, it approaches mere moral conservatism.

71. On the contrary, there is little for the state to gain by being involved in legislating morality. Dalton, *supra* note 5, at 908 n.117.

72. Jeffrey Rosen, *Antonin Scalia, in 5 THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1714, 1725* (Leon Friedman & Fred L. Israel eds., 1994).

73. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1304-07 (1990); Rosen, *supra* note 72, 1715; West, *supra* note 5, at 660 (discussing conservative legal positivism, which appears to describe Scalia's approach to law); see also Balkin, *supra* note 29, at 2320 (arguing that Scalia has misunderstood the key issue in *Romer*, which concerns unjust social hierarchies as much as it does morality *per se*).

74. West, *supra* note 5, at 644.

75. See Gey, *supra* note 5, at 365-66 (noting despite Scalia's claimed reliance on popular will, his traditionalist approach is actually antidemocratic); West, *supra* note 5, at 673 (noting arguable inconsistency between idea that Court should give effect to original intent and idea that it should defer to popular will). One problem with Scalia's traditionalist approach has always been the absence of any discussion of when a law based on tradition would cease to be valid. Ostensibly, once a law is passed prohibiting a certain behavior, then even a change in the cultural or social atmosphere would not necessarily permit a change in the law, since the fact that such behavior has been burdened in the past is deemed controlling. As long as a certain segment of society wishes to retain the law on the books, it may do so, since legal tradition is on its side. However, this would allow one era's moral majority to limit future generations' ability to effectuate political change, something that is strongly disfavored. This approach is also inconsistent with those aspects of Scalia's dissent that claim that moral populism is the basis for Amendment 2. For example, if traditionalists were in the minority in a certain case, Scalia would have to choose between upholding popular morality, as reflected by the political will of the legislature, and traditional values. See Gey, *supra* note 5, at 365-66; West, *supra* note 5, at 673; see also Henkin, *supra* note 6, at 398-99, 401 ("Nor should it be assumed, without re-examination, that the morality of an older day remains a legitimate aim of government with social import outweighing growing claims of individual freedom.").

B. The Aristotelian Ideal

Plato is not the only ancient Greek whose writings have received renewed attention recently. Aristotle's political theories have also provided fodder for those who would impose a standard moral order on society.⁷⁶ Although neo-Aristotelian theorists may fall into different political classifications⁷⁷ and may differ on some issues,⁷⁸ they universally decry the "intellectual and moral poverty" of individualist-oriented liberalism⁷⁹ and describe issues of legalized morality in terms of collective, rather than individual, rights.⁸⁰ However, there are many who criticize

76. Galston, *supra* note 42, at 331.

77. Some theorists who support Aristotelian principles are considered conservatives, while others are identified as civic republicans. *Id.* at 333-34 & n.15; see also Gey, *supra* note 5, at 346-47. Sunstein describes classical republicans as fostering civic virtue in order to improve the character of individuals (in accordance with Platonic principles) but identifies modern republicans as utilizing civic virtue as a means of promoting social justice, not as a means of elevating the character of the citizenry. Galston, *supra* note 42, at 342. For a more complete discussion of civic republicanism, see Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). See also H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703 (1988).

78. The sharpest division between conservatives and civic republicans concerns homosexuality. Whereas civic republicans almost uniformly attempt to insulate homosexuality from regulation, conservative opinions vary regarding its immorality and illegality. See Gey, *supra* note 5, at 348 n.90.

79. Galston, *supra* note 42, at 334-35. Galston describes modern republicans as exalting the alleged Aristotelian concept of self-sacrifice as a necessary aspect of fully realized human existence but criticizes that argument as inconsistent with Aristotle's original philosophy. *Id.* at 334-36; see Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 (1986) ("Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for social achievement of those values."); see also Gey, *supra* note 5, at 348 (same). Interestingly, students of comparative religion have noted that those faiths that require the most self-sacrifice are the most successful over the long term; it is possible that the same could be said of moral-political theories. See ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 238, 254 (1992).

80. See Dworkin, *supra* note 5, at 479-80 (discussing four methods by which the concept of community is used to attack liberal ideal of tolerance). Essentially, this philosophy claims that individuals have no cognizable ethical existence separate from that of society. Gey, *supra* note 5, at 346-47; cf. Vernon van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in *THE RIGHTS OF MINORITY CULTURES* 31, 31 (Will Kymlicka ed., 1995) [hereinafter *RIGHTS OF MINORITY CULTURES*] (arguing liberalism's focus on individuals is too narrow and recognition should be given to certain types of groups); *id.* at 41 (noting shift in U.S. jurisprudence toward the recognition of community rights); *id.* at 52 (noting concomitant rights of majority groups). Under this theory, individual values formed outside the community's political framework are "presumptively illegitimate," and although moral dissenters may be heard during the deliberative process, once a conclusion has been reached about the parameters of the

the emphasis on collective rights, since they believe that group rights cannot exist unless they are based on individual rights.⁸¹ In addition, the collective rights approach seems to adopt many of the principles of group rights theory, despite the fact that such group rights are only protectible when claimed by minority, not majority, groups.⁸²

common good, the dissenters must abandon their views. Gey, *supra* note 5, at 346–47. Although this approach may work when all that is at stake is political ideology, it is less supportable when issues of morality are at stake, since morality, like religion, is highly personal and inherently resistant to change. See Faye Ginsburg, *Saving America's Souls: Operation Rescue's Crusade Against Abortion*, in *FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMICS, AND MILITANCY* 557, 579–80 (Martin E. Marty & R. Scott Appleby eds., 1993) (noting that the more religion is opposed, the more likely it is to reinforce believers' perception of its truth). However, because civic republicans and other neo-Aristotelians view politics as the highest form of human interaction, they are likely to politicize all or most aspects of life. See Galston, *supra* note 42, at 349–54; Gey, *supra* note 5, at 347; see also *Romer v. Evans*, 116 S. Ct. 1620, 1636 (1996) (Scalia, J., dissenting) (noting issue of homosexual rights and popular morality is mere political battle).

81. See Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 *NOTRE DAME L. REV.* 1311, 1347–48 (1991).

82. Group rights theory supports the notion that groups have rights and qualities independent of those of their constituent members, and allows groups to protect their own distinct cultures. Most commentators who support group rights theory require that such legally protected groups allow dissenters to exit the society without any negative repercussions. See Chandran Kukathas, *Are There Any Cultural Rights?*, in *RIGHTS OF MINORITY CULTURES*, *supra* note 80, at 228, 251–52 (noting differences between cultural communities and wider society and need for escape from cultural communities in order to justify granting group rights); see also Stephen G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 *U. PA. L. REV.* 801, 819–20 (1993) (noting possibility of forced citizen participation in civic republican model of government). It is this requirement that proves that group rights can only belong to minority, not majority, groups. For example, if the majority imposes a highly restrictive moral-legal code on society, there is no opportunity for dissenters to exit. However, if the majority creates a neutral or highly permissive moral-legal code (that is, a code that refuses to insert issues of personal morality into the political realm), then dissenters may create separatist enclaves in which a more restrictive moral code may be voluntarily adopted. However, those enclaves (i) may only create a voluntary moral code, not a legal one, since a localized legal code would violate the laws of the larger society and would be unnecessary, assuming members of the community have banded together by choice; and (ii) must permit members to exit if they disagree with the voluntary code. *But cf.* FEINBERG, *supra* note 8, at 57–58 (discussing problems if and when some members of such enclaves begin to circumvent their own voluntary moral code); Leslie Green, *Internal Minorities and Their Rights*, in *RIGHTS OF MINORITY CULTURES*, *supra* note 80, at 257, 261–70 (discussing rights of dissenting members within minority groups). In addition, a majority group has no need to protect its culture since it has already defined the culture. Majorities often begin to claim a group right, however, when the threat of change arises. See Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 *MICH. J. INT'L L.* 307, 334–35 (1994) (noting Iranian officials claimed universal, voluntary acceptance by women of restrictive Islamic

Many neo-Aristotelians support the philosopher's theory that there exists a single ideal lifestyle to which all persons should aspire,⁸³ and advocate the creation of a highly deliberative or reflective political life that requires the moral education of the citizenry.⁸⁴ Helping individual citizens attain the ideal lifestyle is the purpose of Aristotelian morality laws. Through moral education, people acquire sufficient strength of character to make the "right" choices, even though those choices may be in conflict with an individual's short-term goals or preferences.⁸⁵ Many commentators have denounced the Aristotelian model, with its emphasis on the singularity of one "right" choice, as unworkable, undesirable, and elitist, especially in a pluralist society.⁸⁶ Although the state is permitted to choose one social or economic policy over other policies, they argue, it is less clear, and to some extent less desirable,⁸⁷ that the state may also choose one moral code over another.⁸⁸ This is particularly true when the behavior at issue involves no one other

dress code yet imposed severe sanctions upon noncompliance; concluding discrepancy between law and media statements showed official position lacked cultural authority).

83. Bradley, *supra* note 2, at 677-78; Galston, *supra* note 42, at 338; *see also* FULLER, *supra* note 8, at 5 (describing Greek approach to morality as full realization of human potential).

84. *See* Galston, *supra* note 42, at 339.

85. Dworkin, *supra* note 5, at 484; Galston, *supra* note 42, at 375-78; *see also* Gey, *supra* note 5, at 347-49. Aristotle argued that traditional or even biological desires did not necessarily constitute the "right" choices for society; only after deliberative, rational inquiry could the "right" decision be made. Galston, *supra* note 42, at 348; *see also* Gey, *supra* note 5, at 347 (noting civic republicans' argument that some moral perspectives are better than others and that some preferences are irrational or wrong). Therefore, Aristotle's views conflict both with conservatives who support traditional mores at all costs and with liberals who claim that biological desires cannot be overcome.

86. Bradley, *supra* note 2, at 677-78; *see also* Galston, *supra* note 42, at 338, 379, 387 (noting both liberals and nonliberals oppose such moral homogeneity). *But cf. id.* at 393 (suggesting Aristotle did not "endorse a single vision of the good life").

87. Dalton, *supra* note 5, at 905, 908 n.117 (discussing ways in which changes in morality can strengthen society).

88. *See* Michaelson, *supra* note 8, at 386-90; *see also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *Wisconsin v. Yoder*, 406 U.S. 205, 223-41 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."). *But cf. McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation.").

than the actor(s)⁸⁹ and does not affect society at large.

Critics of the Aristotelian approach question not only its purpose but its methodology as well. For example, Aristotle believed that in order for a person to reach personal fulfillment, that person must develop a good moral character in order to guarantee a lifetime of right choices.⁹⁰ The best way to develop a good moral character was through habituation, which resulted from repetitive conduct, especially at a young age.⁹¹ However, because many people could not be relied upon to adopt these good moral habits through reason alone, the state had to resort to coercion.⁹² Although Aristotle opposed the use of brute force as the sole method of moral education, since reason and understanding were both necessary in forming people's character, he believed that reason alone was unable to affect some people, and so permitted the use of the laws to assist the power of argument.⁹³

Aristotle, however, unlike Plato, did not require that the state have as its goal the development of good moral character in its citizens.⁹⁴ Although it was helpful to have the assistance of the state machinery in habituating the population, Aristotle acknowledged the possibility that private individuals alone could persuade their friends and families to acquire good moral characters.⁹⁵ Therefore, as discussed previously, the passage of morality laws may not be necessary because a less intrusive alternative exists in the form of private education.⁹⁶ In addition, by

89. Of the types of behaviors that are most often regulated by morality legislation, homosexual acts are the least likely to affect persons other than the actors themselves. See *supra* note 8. Prostitution arguably contains an element of economic exploitation that could vitiate claims that the act is fully consensual. Abortion implicates potential rights or interests of other persons, including the fetus, the father, and other family members. Similarly, suicide and euthanasia affect friends and family on an emotional level, although these acts involve no rights other than those of the decedent and few, if any, legally cognizable interests on behalf of the other parties. Consensual homosexual relationships, however, are no more coercive or exploitative than heterosexual relationships, and affect no rights or interests other than those involved.

90. Galston, *supra* note 42, at 376.

91. *Id.* at 376-77; see also FULLER, *supra* note 8, at 163-67 (discussing problems with legal system that conditions people to be good).

92. Galston, *supra* note 42, at 377-78. However, the use of legally condoned habituation reeks of totalitarian excesses that are alien to modern democratic theory. *Id.* at 379; see also Luban, *supra* note 59, at 802 (discussing Hart's "gunman writ large" theory).

93. Galston, *supra* note 42, at 378.

94. *Id.*

95. *Id.* Presumably, Aristotle would support the use of intermediate institutions, such as churches, synagogues, and mosques, to help teach and encourage positive moral attributes. See FEINBERG, *supra* note 8, at 121. However, such intermediate religious institutions did not exist in Aristotle's day, due to the consolidation of religious and secular power in the Greek city-state. See J.G.A. Pocock, *Religious Freedom and the Desacralization of Politics: From the English Civil Wars to the Virginia Statute*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 43, 43-44 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

96. See *supra* notes 64-67 and accompanying text.

recognizing that a good moral character was not necessarily a legitimate concern of the state, Aristotle laid the foundation for a noncoercive society.

Although the *Romer* dissent does not propose the existence of a single objective moral standard to which all persons should be held, it does support the idea that society may, if it wishes, support only one set of sexual mores by prohibiting or burdening all competing visions of morality. The choice and enforcement of this moral standard is not based on a rational determination of what is the best moral position to take, but is instead based either on tradition or "animus," an emotion that is seldom disinterested or deliberate.⁹⁷ In this sense, the *Romer* dissent contradicts an Aristotelian model of morality and permits pure majoritarianism to rule the day. Some, including Scalia, might argue that the political process is itself a means of social deliberation, but that theory is undercut by (i) the fact that electoral outcomes are highly influenced by voter apathy; (ii) the structuring of most elections in such a way that only two or three choices are available to voters, rather than a full range of options; and (iii) Scalia's express adoption of animus as a legitimate basis of law.

Once the *Romer* dissent decides on the proper standards for societal morality, however, it adopts the Aristotelian approach of legally enforced habituation in order to shape citizens into the correct moral mold. Through Amendment 2, Scalia believes the law can protect and preserve morality by habituating the residents of Colorado to adopt antihomosexual beliefs and behaviors. However, in addition to the fact that habituation has not proven successful in the past,⁹⁸ Scalia's premise is theoretically illegitimate even under an Aristotelian analysis, since neither unexamined tradition nor animus provides a rational basis for the initial decision regarding the moral standard that is to be imposed on society.

C. The Augustinian Approach

Few modern political theorists cite Augustine as a source of inspiration, preferring to compartmentalize him as a mere theologian or as a Christian natural lawyer, but his influence can still be found in certain aspects of modern legal

97. *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting); see Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986, 1000-01 (1966) (noting that laws cannot be based on prejudices, personal aversions, or rationalizations).

98. Scalia himself cites to the centuries of moral and legal disapproval of homosexuality, see *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting), yet provides no evidence that such laws had any effect on the incidence of homosexual behavior or orientation. If such methods (many of which were more severe than those in force today) were actually effective, there would be no homosexuals today. See, e.g., Reinig, *supra* note 29, at 870-71, 876 n.66 (citing historical means of punishing homosexuals, including genocide). However, homosexuality has existed throughout recorded history, regardless of whether society accepted or condoned it. See *id.* at 867-73 (recounting legal status of homosexuals since biblical times).

theory. At least one aspect of his philosophy requires attention in the context of the present discussion.

As discussed above, modern theorists believe that morality laws affect behavior alone, not belief.⁹⁹ However, Augustine, like Aristotle, saw the connection between behavior and belief, and permitted coercion of external behavior on the grounds that legal enforcement of a certain set of behaviors could eventually bring about the modification of internal belief.¹⁰⁰ In Augustine's mind, coercion was justified because, "through fear and suffering," the dissident either renounced his or her beliefs or was compelled to reexamine the veracity of those beliefs and thereby came to see the error of his or her ways.¹⁰¹

Some modern conservative theorists term this approach "educating people about moral right and wrong."¹⁰² However, education alone cannot be the goal of these laws. If the state were only concerned with educating people as to what was morally right and wrong, it could require schools to teach classes in popular morality and leave the ultimate moral choice to the individual. Mere education about morality is irrelevant unless the education leads to a change in behavior, which can be either preceded or followed by a change in belief.¹⁰³ However, as has been stated previously, coercion of belief is currently considered an illegitimate governmental goal.¹⁰⁴

Some conservatives argue that it is not the coercive aspect of the laws that teaches morality but the mere passage of laws that demonstrates society's condemnation of certain acts.¹⁰⁵ This argument holds little weight, however,

99. See *supra* notes 43–47 and accompanying text.

100. AUGUSTINE OF HIPPO, *POLITICAL WRITINGS* 202–03 (Henry Paolucci ed., 1962).

101. *Id.*; cf. Galston, *supra* note 42, at 368 (discussing ways in which the Supreme Court "can be a source of moral education, a force for questioning and revising beliefs, and an instigator of public dialogue with deep, pervasive, and permanent effects on both the opinions and characters of the citizens at large").

102. See Bradley, *supra* note 2, at 681.

103. Changing a person's behavior through "moral education" necessarily requires a change in belief. Either the person comes to believe that (i) the behavior is immoral, and thus changes his or her behavior, or (ii) the behavior may not be immoral but that the rest of society believes it to be so, and refrains from such behavior on the belief that such behavior is not necessarily morally wrong but is at least socially inappropriate. In either case, belief has been changed. Deterrence through fear of punishment does not result from moral education but from education of legal penalties, which is different from teaching what is morally right and wrong.

104. See *supra* notes 43–47 and accompanying text; see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

105. However, most commentators agree that it is unwise to pass laws in order to demonstrate society's moral disapproval of a certain practice while nevertheless intending not to enforce such laws because of de facto toleration of the practice, since to do so not only makes a mockery of the law in question, but compromises the legal system as a whole. FULLER, *supra* note 8, at 153. In addition, there is no such thing as a truly "dead letter" law;

because illegality is not synonymous with immorality in the minds of most Americans.¹⁰⁶ For example, people know that driving above the marked speed limit is illegal, yet few abstain from speeding and even fewer think it is immoral. Conversely, there are other behaviors that are often considered immoral but that are not illegal: masturbation, for example. Thus, the means used to promote moral education are as suspect as the goal itself, based on the law's inability to achieve its express purpose.

Nowhere does Scalia expressly adopt an Augustinian rationale to support his dissent in *Romer*, but the elements exist as an underlying foundation for his position. For example, Scalia knows that status crimes are unconstitutional, and so would agree that it is inappropriate for the state to criminalize or civilly burden an immutable trait.¹⁰⁷ Therefore, in order for laws such as Amendment 2 to stand, there must be an underlying belief that members of the burdened class can choose not to be burdened by changing their behavior.¹⁰⁸ However, the *Romer* dissent

any provision that is still on the books can be recalled and enforced at any time. *See id.* For example, there had only been three reported cases of conspiracy to corrupt public morals since the crime was first mentioned in dicta in 1763, yet the House of Lords in *Shaw v. Director of Public Prosecutions*, (1962) A.C. 220, was able to rely on such ancient precedent in order to achieve the outcome desired. *See* DEVLIN, *supra* note 3, at 87–88.

106. *But cf.* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW passim* (1990) (discussing survey research that suggests people comply with law because of its perceived moral legitimacy, not its deterrent threat). In addition, some civil or regulatory laws are passed not because society deems the behavior criminal or immoral but because the behavior is sufficiently undesirable to warrant some deterrence by the state. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1336 (1991).

107. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding status crimes that impose penalties based on traits “which may be contracted innocently or involuntarily” unconstitutional); *cf.* *Romer v. Evans*, 116 S. Ct. 1620, 1632–33 (1996) (Scalia, J., dissenting) (admitting that there may be some distinction between those who engage in homosexual acts and those who are merely of homosexual orientation but still permitting orientation to act as “an acceptable stand-in for homosexual conduct”). Immorality is also condemned only when there is an element of voluntariness involved. *See* FULLER, *supra* note 8, at 130–31 (noting similarities between law and morality). However, some commentators have noted that supporters of antihomosexual and antireligious discrimination typically claim to be acting not on the basis of status but on behavior. Eskridge, *supra* note 29, at 2421.

108. One of the key problems for homosexual rights lobbyists is the continued insistence by their opponents that homosexuality is an immoral “perversion” of choice, despite the fact that a number of researchers have presented evidence that homosexuality is a virtually immutable, possibly congenital, trait. *Compare* DEVLIN, *supra* note 3, at v (“[H]omosexuality is usually a miserable way of life and...it is the duty of society, if it can, to save any youth from being led into it...although it may mean much suffering by incurable perverts who seem unable to resist the corruption of boys.”), *with* Henry, *supra* note 29, at 36 (noting possible genetic origins of homosexuality but acknowledging complexity of issue), *and* Thompson, *supra* note 29, at 60 (same).

implicitly adopts the position that morality legislation can affect belief, not just behavior, by including celibate persons of homosexual orientation in the burdened class.¹⁰⁹ In order for those persons to change their classification, they cannot rely on a mere change in behavior (since they do not engage in homosexual activities); they must change their *beliefs* about their sexuality and decide that they no longer are of homosexual orientation in order to avoid the burdens associated with Amendment 2.

In fact, those of homosexual orientation are not the only ones whose beliefs are at risk of coercion. Heterosexuals, too, can find their beliefs challenged by morality laws that burden homosexuality. Under this approach, Amendment 2 is clearly not intended to affect heterosexuals' behavior, since there is no evidence that laws burdening homosexuality will increase or decrease heterosexuals' participation in homosexual activities. In fact, Scalia does not defend Amendment 2 as a way of controlling behavior. Instead, he states that the law is justified on the basis of its ability to protect and preserve traditional perceptions, that is, beliefs, about morally acceptable sexual practices. According to Scalia and other Augustinians, the law can bring about this result since, by criminalizing or civilly burdening certain types of behavior, society can make potential dissidents (in this case, those who do not consider homosexuality immoral) believe that the burdened act is, in fact, immoral. Because both homosexuals and heterosexuals have beliefs about what is sexually permissible, both groups are targeted by this law.

In fact, heterosexuals may be the primary targets of Amendment 2 under a Platonic-Augustinian rationale, since they constitute the majority population in Colorado. For example, proponents of morality legislation support coercion of belief not only because they want to influence how others believe, but because conformity of belief is critical if, as Plato argued, laws are to be based on majority morality. In other words, if the current majority is to maintain its majority status and thus its ability to impose its morality on others, it must convince potential dissidents that its morality is correct. One method of doing so is to insist that what is illegal is, in fact, immoral, and then to create laws that reflect the desired moral code. Therefore, despite proponents' arguments to the contrary, morality laws that are justified as means of moral education are in actuality aimed at coercing belief, not behavior. However, if coercion of belief is truly illegitimate, as has been agreed by virtually all legal commentators, conservative and liberal alike,¹¹⁰ then such laws cannot stand.

D. Harm to Observers

Another theory that builds off of the work of classical and Christian theorists advocates state enforcement of popular morality in order to prevent corruption and vice not in the primary actor, but in observers. At issue are attractive immoralities, that is, those actions that have some inherent positive value

109. See *Romer*, 116 S. Ct. at 1632–33 (Scalia, J., dissenting).

110. See *supra* notes 43–47 and accompanying text.

to the actor (pleasure, profit, etc.) but that have either no tangible negative results to offset the immediate benefit to the actor or a sufficiently low level of negative results so as to justify the immorality in the mind of the actor.¹¹¹ Because there is no inherent incentive for people to avoid attractive immoralities, this theory permits the state to intervene to protect uncorrupted observers who might learn from the initial actor's bad example. Under the harm-to-observers approach, the state assumes that observers are unable to decide what is best for them and legislates according to its perception of what is in the observers' best interest.¹¹² This philosophy has sometimes been thought to presuppose the existence of an exploitative element to immorality that requires state intervention to protect weaker members of society.¹¹³

However, it is difficult to differentiate this argument from other theories that justify morality legislation on the basis of harm to self or that outlaw immorality *qua* immorality.¹¹⁴ In effect, this argument gives a certain segment of

111. Those immoralities that have no positive value to the actor or are completely neutral will not, in all likelihood, pose a significant threat to society, since few people will choose to do that which has no intrinsic value to them.

112. Galston, *supra* note 42, at 379. Various levels and types of paternalism have always existed in society. See Smith, *supra* note 8 *passim* (noting preeminence of state-supported orthodoxy, whether enforced or not, through most, if not all, of history).

113. DEVLIN, *supra* note 3, at 11, 22, 92 (citing avoidance of corruption of youth as permissible basis for morality laws). However, society's opinion regarding which groups need protection changes constantly. For example, women at first received no special treatment in the workplace. Later, highly paternalistic policies were implemented for their "own protection." See, e.g., *Muller v. Oregon*, 208 U.S. 412, 420-21 (1908). These protective devices were soon regarded as unduly restrictive and were replaced with affirmative action provisions intended to eliminate the effect of past discrimination. Modern trends have been to repeal such provisions in order to recreate the original open marketplace. See Jonathan Kaufman, *Moodswing: White Men Shake Off that Losing Feeling on Affirmative Action*, WALL ST. J., Sept. 5, 1996, at A1 (noting return to economic market where "white men will continue to get the lion's share of the benefits"). Compare Lino A. Graglia, *Affirmative Action—Yes: Reverse Discrimination Serves No One*, A.B.A. J., May 1995, 40, 40, with Kathryn J. Rodgers, *Affirmative Action—No: Look at the Facts, Not Rhetoric*, A.B.A. J., May 1995, 41, 41. As an official requirement, affirmative action has virtually ceased to exist. See *Adaran Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Bras v. California Pub. Utils.*, 59 F.3d 869 (9th Cir. 1995). For a review of the history of women's rights, see INTERNATIONAL HUMAN RIGHTS OF WOMEN: THE INSTRUMENTS OF CHANGE (Daniel B. Magraw et al. eds., forthcoming 1998) (including documents reflecting women's rights from 1791 to present). Children have also been the subject of varying levels of protection, with the totally open social and economic marketplace of the 1800s being replaced by a highly paternalistic approach that is currently being reconsidered by many experts. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 451-57 (1996).

114. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional

society up for lost, and concentrates on those who have not yet been corrupted. The state is presumably acting on behalf of the uncorrupted others in order to protect them from themselves, since if there were any other sort of external harm (other than mere immorality), then the state could enforce laws prohibiting the original immoral act on its own merits.¹¹⁵ Therefore, although this theory is intuitively attractive, since it seems to focus on limiting harm to others, it is, on closer examination, little more than a front for other legal theories, each of which is problematic in some regard.

In addition, it is unclear whether morality laws based on avoiding corruption in observers actually bring about the desired effect. If the purpose of the law is to protect weaker citizens from the corrupting influence of others, then permitting the immorality to continue could be the best way to persuade others not to adopt such behavior.¹¹⁶ For example, if immorality is allowed to continue unabated, then others can witness first hand not only the full effect of the harm to the actor but also the social stigma that attaches to such an act.¹¹⁷ Of course, for this premise to work, there must be (i) a social stigma and (ii) some sort of ill effect on the actor. Where there is no ill effect and no social stigma, permitting an individual to act "immorally" will have no educational effect on observers. However, if there is an ill effect, then the state is essentially acting on a "harm to self" basis and is protecting the uncorrupted members of society from harming themselves.¹¹⁸ More importantly, if there is no social stigma attached to the behavior, then the act cannot be immoral, at least if one is using a societal standard of morality (as

phrase, '*contra bonos mores*,' i.e., immoral." (citations omitted)). One argument in favor of morality legislation that will not be discussed in this Article is the claim that laws may enforce morality *qua* morality. Discussing, let alone rebutting, such arguments is difficult, if not impossible, since they represent an unassailable theoretical choice about the scope of law by assuming the legitimacy of that which they attempt to prove. The rebuttal arguments that are posed throughout this Article speak to the wisdom of such laws in a practical sense but cannot address their ultimate legitimacy, since, by their very nature, they have adopted a certain theoretical stance that cannot be deconstructed in any helpful manner, at least in the scope of the present work.

115. Virtually all commentators support state intervention in order to avoid harm to others. MILL, *supra* note 1, at 68; *see also* HART, *supra* note 2, at 4. However, liberals do not necessarily believe that contravention of popular morality constitutes harm to others, especially in the realm of consensual acts. MILL, *supra* note 1, at 68-69; *see also* HART, *supra* note 2, *passim*; *cf.* MILL, *supra* note 1, at 147-49 (noting instances in which immoral acts may be actionable based on harm to others). Devlin argued that consent should not factor into any analysis of morality legislation, based on his belief that consent was not a defense in other areas of the law. DEVLIN, *supra* note 3, at 6. In addition, Devlin's belief that immorality harmed society *per se*, and not necessarily individuals, required legislators to disregard the existence of individual consent when drafting morality legislation. *Id.* at 6-7.

116. MILL, *supra* note 1, at 149-51.

117. *Id.*

118. As shall be discussed below, many believe this goal to be illegitimate. *See infra* notes 122-44 and accompanying text.

opposed to an external "true" morality, which exists even in the absence of social consensus).¹¹⁹ In the absence of any social stigma, the enforcement of morality becomes nothing more than the naked exercise of power by the majority.¹²⁰

The *Romer* dissent does not seem to contain any concern about harm to observers, at least on the behavioral level. Nowhere does Scalia claim that permitting homosexual activity to continue (albeit burdened at civil law) will "corrupt" others and lead to an increase in the number of homosexuals, as some conservatives do.¹²¹ Instead, Scalia seems to be more concerned with protecting the idea of a traditional sexual morality, a position that the harm-to-observers approach, which appears to focus on behavior rather than belief, does not address. However, Scalia may have justified his support of Amendment 2 on the grounds that Amendment 2 protected the beliefs, not just the behavior, of the uncorrupted others, and in that sense relied on a harm-to-observers approach to law. The problem is that this latter justification of Amendment 2 devolves into other legal theories, none of which is able to stand on its own merits.

E. Harm to Self

Implicit in many of the philosophies discussed above is the notion that immoral behavior is somehow "bad" for the individual. However, advocates of morality legislation also use harm to self as an independent justification for state action.¹²² At one time the theory was justified on religious grounds, in that immorality in one person constituted a sinful act that not only jeopardized the opportunity for that person to attain salvation, but affected others' chances for

119. As was discussed above, there once was believed to be a single objective morality that formed the standard for behavior. *See supra* note 83 and accompanying text. That morality, however, was often based on a divine rule that is no longer applicable in those nations that have adopted an institutional, or at least a functional, separation of church and state. *See* DEVLIN, *supra* note 3, at 17, 86; *see also* HART, *supra* note 2, at 73 (differentiating between true and critical morality). Now that morality laws may no longer be based on a religious rule, commentators who advocate the inclusion of morality in law have come to depend on other qualifiers such as tradition or popular accord. *See* West, *supra* note 5, at 657. However, all of these alternative standards require there to be some social stigma attached to the alleged immorality, since it is that stigma that identifies the behavior at issue as immoral.

120. Feinberg has classified corruption of others as a potentially "free-floating evil," which, despite having no ascertainable effect on any particular person, is still considered *malum in se*. FEINBERG, *supra* note 8, at 19–25. Liberals tend to oppose criminalizing these sorts of evils. *Id.* at 20, 38.

121. *See id.* at 75 (noting the "more hysterical conservative response" is that decriminalizing homosexuality will make it the behavioral norm); *see also* DEVLIN, *supra* note 3, at v.

122. In the context of this Article, "harm to self" presupposes the absence of any harm to others.

salvation as well.¹²³ Religious salvation, however, cannot be the goal of those states that have adopted the full or partial separation of church and state and that espouse theories of religious liberty.¹²⁴ Therefore, if modern theorists are to justify morality legislation on the grounds that immorality is “bad” for individuals, they must do it on the grounds that immorality negatively affects a person’s ability to live up to his or her potential and/or achieve happiness.¹²⁵

The difficulty with defending morality legislation on the basis of harm to self lies in the impossibility of determining whether popular or traditional morality is objectively better than dissidents’ morality.¹²⁶ When Devlin advocated the legal enforcement of popular morality, he admitted that his system avoided the larger question of whether a certain act was good or bad; his primary focus was on whether the law in question was, in fact, an accurate reflection of popular culture.¹²⁷ The ultimate decision as to what was moral and what was immoral was

123. See DEVLIN, *supra* note 3, at 2–3; JOHN LOCKE, A LETTER CONCERNING TOLERATION 18–19 (Prometheus 1990) (1689). This is still the attitude of certain Islamic states, based on the Muslim belief that one must work to create a good (that is, religious) society in order to improve one’s chances for individual salvation. MALISE RUTHVEN, ISLAM IN THE WORLD 353 (1984). Judaism also adheres to a collective, rather than individual, theory of religious redemption, thus arguably requiring a Jewish state such as Israel to exercise certain moral powers. DAVID S. ARIEL, WHAT DO JEWS BELIEVE? THE SPIRITUAL FOUNDATIONS OF JUDAISM 113 (1995). In fact, there are those who believe that the Enlightenment only could have occurred in a Christian society, with its emphasis on the separation of secular and spiritual authority. See Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 903–04 (1993). However, both Islam and Judaism have religio-legal traditions that permit institutional separation of religion and state, thus rebutting the argument that Muslims and Jews have a religious obligation to enforce morality. See RUTHVEN, *supra*, at 157–58, 226 (noting liberalizing influences in Islamic political theory); Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1052–56 (1991) (discussing trends in Islamic liberalism); Chaim Povarsky, *Jewish Law v. The Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941, 942–48 (1991) (discussing separation of Jewish religious law and secular law).

124. LOCKE, *supra* note 123, at 60 (“The care of each man’s soul, and of the things of heaven, which neither belong to the commonwealth, nor can be subjected to it, is left entirely to every man’s self.”).

125. See FEINBERG, *supra* note 8, at 22–23 (noting how a bad character can injure individual’s opportunity for happiness); Galston, *supra* note 42, at 347.

126. See Gey, *supra* note 5, at 364, 368 n.189 (noting there is no external standard to judge what is morally right or wrong).

127. DEVLIN, *supra* note 3, at 94 (“It is not necessary that [the community] appreciation of right and wrong...should be correct.... [W]hat the lawmaker has to ascertain is not the true belief but the common belief.”); Hart, *supra* note 39, at 1 (describing Devlin’s disintegration thesis).

left to the community or nation at large.¹²⁸ Scalia, also, leaves the ultimate wisdom of morality legislation to the legislature.¹²⁹

However, history suggests that choosing one moral code over another based only on majoritarian beliefs is not perhaps the wisest course of action.¹³⁰ For example, popular morality adamantly resisted women's suffrage, miscegenation, and racial integration, and permitted the prosecution of religious and ethnic minorities well into the current century.¹³¹ The emphasis on individual rights as existing contrary to populist sentiment is well recognized in the international community.¹³² Indeed, for centuries, many preeminent philosophers have admitted their concerns about the whims and vagaries of the populus. Mill noted the deleterious effect of custom and tradition on various practices,¹³³ while de Tocqueville emphasized the problems associated with majoritarian prejudices and passions.¹³⁴ Therefore, trusting the majority to "do the right thing" may be a dangerous way to govern a nation.¹³⁵

While opponents of morality legislation do not suggest abolishing democracy, they do support certain limits on what a democracy may do in the area

128. DEVLIN, *supra* note 3, at 94, 100.

129. *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting); *see also Gey, supra* note 5, at 364–67 (discussing Scalia's justification for morality legislation); Kannar, *supra* note 73, at 1303 (quoting Scalia as saying that constitutional adjudication is "a process [in which] the task at hand is not to determine what seems like good policy at the present time, but to ascertain the meaning of the text"); West, *supra* note 5, at 674 (discussing one of several jurisprudential bases for conservatives' belief that the judiciary should submit to legislative authority).

130. *See supra* notes 56–61 and accompanying text.

131. These practices existed, and in some cases continue to exist, in virtually every country in the world. Although in some instances change occurred as a result of popular vote (usually after long, bitter struggles), in other instances change was wrought as a result of countermajoritarian measures. In the United States, *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Loving v. Virginia*, 388 U.S. 1 (1967), are the prime examples of such measures. Scalia belittles the current conflict over gay rights as a mere "Kulturkampf" but fails to recognize that each of the rights he now considers traditional and well established was also the subject of similar culture wars prior to being recognized. FEINBERG, *supra* note 8, at 65.

132. *See* ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 91 n.11, 122 (1993); Michael Joseph Smith, *Liberalism and International Reform*, in *TRADITIONS OF INTERNATIONAL ETHICS* 201, 201 (Terry Nardin & David R. Mapel eds., 1992) (discussing how liberalism protects "a certain minimum area of personal freedom which may on no account be violated" (citations omitted)).

133. MILL, *supra* note 1, at 122–23.

134. TOCQUEVILLE, *supra* note 36, at 121–22.

135. This perspective is consistent with that of most liberal theorists. *See* West, *supra* note 5, at 645, 652–53 (noting differences in conservative and progressive perceptions of danger stemming from majorities).

of morality.¹³⁶ Some jurists would permit government to legislate only where there is actual harm to others;¹³⁷ others would permit the state to act when the activity, though harmless, is public and therefore likely to cause offense and a public disturbance.¹³⁸ This latter approach is not limited to morality legislation; even those acts that are considered moral may be limited in order to prevent public disturbance or nuisance.¹³⁹

Because the state no longer has a religious obligation to save its citizens' souls, there seems to be little reason for allowing the state to act to prevent moral harm to the actor. The idea that laws purporting to address "harm to self" are illegitimate *ab initio* is not a novel invention of the decadent twentieth century; it has existed for a considerable time. For example, Mill and his followers flatly denied the legitimacy of the state's acting for someone's "own good,"¹⁴⁰ claiming that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection."¹⁴¹ Mill's approach provides a qualitatively different justification for state action than has yet been discussed and denies the state any paternalistic interest in individual or societal morality.¹⁴² His philosophy recognizes that although there may have been some need for moral conformity in ancient times, there is no longer such a need, especially when most people voluntarily adhere to social codes regarding both behavior and belief.¹⁴³ As Mill stated, where "unity of opinion...is not desirable and diversity not an evil," there is no need for the state to act for someone's "own good."¹⁴⁴ Because even the most conservative of commentators

136. FEINBERG, *supra* note 8, at 108–10; Balkin, *supra* note 29, at 2313–14 (noting that true democracy must exist in democratic culture); West, *supra* note 5, at 652 (discussing classical liberal ideal).

137. See LEE, *supra* note 5, at 22–25 (but noting "[m]erely incanting 'harm-to-others' is not sufficient to provide a recipe for when law should enforce morality. At best, it provides a starting-point. At worst, it begs all the important questions.").

138. HART, *supra* note 2, at 45–48; see also *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) ("Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality."); *infra* notes 203–09 and accompanying text.

139. For example, it is moral for a married couple to engage in consensual sex; however, they cannot do so in the middle of a train station, since that would cause a public disturbance.

140. MILL, *supra* note 1, at 68.

141. *Id.*

142. Mill identified three areas in which society, as distinguished from the individual, had no interest: (i) freedom of conscience; (ii) freedom of conducting one's life in accordance with one's tastes (subject to the proviso that such acts harm no one else); and (iii) freedom of association. *Id.* at 71.

143. *Id.* at 125; see also HART, *supra* note 2, at 57 ("[I]t is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves.").

144. MILL, *supra* note 1, at 120.

has recognized the reality of modern pluralism, there can therefore be no need and no justification for reinstating a conformist moral code.

"Harm to self" is not an explicit justification used by Scalia in his dissent in *Romer*, nor is it mentioned by the drafters or supporters of Amendment 2. However, it often forms the basis for arguments favoring morality legislation as well as an unspoken foundation for other theories.

F. Moral Conservatism

Moral conservatism is a theory that has not been explicitly linked with a single theorist but still carries weight in certain legal circles. The goal of moral conservatism is to avoid any change in morality whatsoever; the status quo is to be maintained at all costs.¹⁴⁵ Although moral conservatives may have some sort of visceral belief that traditional morality is superior to any proposed alternatives, they make no attempt to defend traditional mores on any objective ground, or indeed, to undertake any comparative analysis whatsoever.¹⁴⁶ However, while the protection of traditional mores (sexual or otherwise) regardless of content and for the mere reason of preserving the status quo may have been appropriate in a theocratic state in which the traditional morality mirrored a divinely ordained morality,¹⁴⁷ pure moral conservatism has fallen out of favor, and there are few who now support such a theory.

For those persons who do advocate some form of moral conservatism, the primary motivation seems to be the assumption that all societal change will be for

145. FEINBERG, *supra* note 8, at 39; see Hart, *supra* note 39, at 2; cf. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

146. Some commentators interpret this lack of analysis as an intentional recognition that moral conservatism does not defend the one "true" morality but only a relativist morality that is considered binding on the culture in question. FEINBERG, *supra* note 8, at 40. However, if moral conservatives are not protecting a "true" morality, then their argument devolves into either (i) moral populism or (ii) a violation of the democratic principle that the actions of one generation cannot limit the political acts of future generations. For example, moral conservatism resembles moral populism if the traditional morality that is to be upheld is the same as that of the current majority, and violates democratic principles if it permits a long-gone, traditional morality to control present-day politics despite the majority's wish that such morality be discarded. See West, *supra* note 5, at 672-73 (noting incongruity between these two principles); see also *supra* note 75.

147. HART, *supra* note 2, at 72-73. At one point, Devlin was classified as a type of moral conservative, based on his assumed support for a legal system that would "freeze" society for perpetuity into a single moral mold. See *id.* at 51-52, 72. However, Devlin argued that he did not support an immutable legal system based on an immutable morality. DEVLIN, *supra* note 3, at 13 n.1. Although he believed that morality per se did not change over time (a conclusion justified by his belief that morality was based on an unchanging divine law), Devlin believed that the legal application of morality was, in fact, very likely to change over the years, since the "limits of tolerance" often varied from generation to generation. *Id.* at 18; cf. Dalton, *supra* note 5, at 905, 908 n.117 (discussing ways in which changes in morality can strengthen society).

the worse,¹⁴⁸ despite evidence that many shifts in morality have, in hindsight, been beneficial to society.¹⁴⁹ Therefore, because some change has been for the good, it may not be in the best interest of society to curtail opportunities for change.¹⁵⁰ This conclusion is supported by basic democratic principles that encourage the creation of a free marketplace of ideas in order to ferret out the truth through debate as well as through trial and error. Yet in some situations, the exchange of ideas alone is an insufficient method of communication and comparison. Certain acts also must be protected, as is the case in the context of both speech and religion.¹⁵¹ Assuming *arguendo* that Scalia is right and the debate over homosexual rights is not an equal protection or privacy issue but a “mere” culture war that should be decided by the citizenry,¹⁵² then basic concepts of democratic theory, similar to those advanced by First Amendment scholars, suggest that this culture war, like wars of other philosophic ideals, should be carried out in a free, rather than closed,

148. See FEINBERG, *supra* note 8, at 54, 66. Some moral conservatives believe that eliminating laws restricting immoral acts will result in society immediately adopting the heretofore illegal behavior. See *id.* at 75 (noting the “more hysterical conservative response” is that homosexuality will become the behavioral norm once it is decriminalized).

149. Because not all change is necessarily for the better, some commentators have attempted to create a framework by which potential shifts in morality can be evaluated before they are adopted by society. Dalton, *supra* note 5, at 908 n.117 (setting forth instances in which individual autonomy should bow to community values); see also Gey, *supra* note 5, at 390–402 (proposing new standard by which constitutionality of moral regulation can be adjudicated).

150. See FEINBERG, *supra* note 8, at 65; Dalton, *supra* note 5, at 903–05 (discussing changes in popular morality).

151. Gey, *supra* note 5, at 355 (noting government may not enforce any moral scheme in areas of thought, pure expression, and symbolic speech); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (noting freedom of belief is absolute under First Amendment, but freedom to act is subject to regulation; however, “power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom”); *id.* at 310 (noting political and religious beliefs differ but are allowed to exist despite “sharp differences” so that they can “develop unmolested and unobstructed”).

152. *Romer v. Evans*, 116 S. Ct. 1620, 1629, 1636 (1996) (Scalia, J., dissenting); see Gey, *supra* note 5, at 364–68 (discussing Scalia’s approval of moral regulation); see also West, *supra* note 5, at 648 (discussing conservative approach to morality legislation). At a certain level, Devlin would agree with Scalia that issues of morality should be left to the legislature, which is supposedly more able to adapt to changes in popular morality than are the courts. See Gey, *supra* note 5, at 365–66. Compare DEVLIN, *supra* note 3, at 95 (discussing proper role of legislators in enacting morality laws) with *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). But cf. DEVLIN, *supra* note 3, at 99 (noting legislative paralysis in certain areas and advocating use of common law to remedy problem); see *infra* note 164 (discussing differences between U.S. and U.K. legal systems).

marketplace.¹⁵³ Despite this longstanding tradition in favor of free speech, the effect of provisions such as Amendment 2 is to forestall the opportunity for debate regarding moral issues by eliminating the possibility of political change at the local, and to some extent state, level.¹⁵⁴ Although some people may mourn the passing of any opportunity for debate, moral conservatives, who presumably do not perceive any need for debate since any change from the status quo is presumptively disfavored, do not. Some commentators have suggested that the animosity demonstrated by moral conservatives toward other moral models is based on moral conservatives' fear that dissenters will force everyone to adopt their moral code should they gain the political upper hand.¹⁵⁵ The reality is that many dissenting members of society have no such goal in mind, and instead wish only to be left alone.¹⁵⁶

In many cases, moral conservatives only become active when society begins to depart from what were once perceived to be universal values.¹⁵⁷ The farther society moves away from a certain value, the more opponents to change insist that the value in question is in fact shared by the whole society and the more they fight to preserve the status quo through criminalization of "aberrant" behavior.¹⁵⁸ However, to take the *Romer* case as an example, if heterosexuality is,

153. See FEINBERG, *supra* note 8, at 52–55 (discussing rights of political minorities to influence the majority even after the loss of an election); Bradley, *supra* note 2, at 687–97 (discussing from conservative perspective the conflicting views of Joseph Raz and Robert George regarding the value of autonomy in the context of laws enforcing morality).

154. Reinig, *supra* note 29, at 885 (noting how gays and lesbians are limited politically in a society in which they are stigmatized); see also Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (noting homosexuals, "while not a wholly politically powerless group, do suffer significant political impediments"), *rev'd*, 54 F.3d 261 (6th Cir. 1995); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610–11 (Cal. 1979) (striking company policy of firing homosexuals as violative of California's labor code, which prohibited employers from limiting employees' participation in politics; holding that if homosexuals are to have political rights, they must be permitted to be open about their sexuality without fear of retribution by employers).

155. FEINBERG, *supra* note 8, at 54. Interestingly, those who are most aghast at the thought of being forced to behave in a manner that is morally repugnant to them are often the ones who are most in favor of imposing their own moral code on dissenting members of society.

156. *Id.* at 53.

157. Mayer, *supra* note 82, at 334–35.

158. *Id.* However, coercion for conformity's sake alone has not been considered an appropriate and necessary political end for several hundred years, and should not be reinstated now. MILL, *supra* note 1, at 125–26; HART, *supra* note 2, at 57; see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–41 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.... As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing

in fact, the majority sexual norm, then it will continue to be so even in the absence of laws disfavoring homosexuality.¹⁵⁹ Coercion is only necessary when people would act otherwise in the absence of a law.¹⁶⁰ However, coercion of belief, even if necessary to maintain the moral status quo, or, in Scalia's words, to "prevent piecemeal deterioration of the sexual morality favored by a majority" of citizens,¹⁶¹ is not a permissible legal purpose.¹⁶² In addition, legislation that has as its sole purpose the preservation of an existing moral order, without any analysis of the validity of competing moralities, seems highly suspect.

In *Romer*, Scalia does not expressly adopt moral conservatism per se, despite his longstanding reliance on tradition as a legitimate basis for lawmaking.¹⁶³ Nevertheless, had his dissent been adopted as the majority opinion, it would have effectively constitutionalized moral conservatism by embedding traditional morality into constitutional law and creating a fixed and unchanging legal-moral code.¹⁶⁴ Although this may have suited Scalia's personal views of constitutional

severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.").

159. See FEINBERG, *supra* note 8, at 75. The same is true of abortion. If most Americans truly believe abortion is immoral, as claimed by many moral populists and moral conservatives, then the number of abortions will not rise dramatically if it is available on demand, since the law would only permit people to do what they did not want to do. Abortions would increase significantly only if most people do not believe it to be immoral, in which case anti-abortion laws do not reflect the majority morality. If that were true, then the only reason to uphold restrictive laws would be to persuade the public that abortion is immoral. However, such a justification relies on coercion of belief, which is impermissible in Anglo-American law. See *supra* notes 43–47 and accompanying text. When put into these terms, it becomes apparent that the purpose of many morality laws is not to reflect the moral nature or quality of society but to force dissenters to conform to popular morality merely because the majority has the electoral strength to do so. However, such majoritarianism can call the legitimacy of the entire legal system into question. See *supra* notes 56–61 and accompanying text. Also, the absence of restrictions on morally questionable behavior does not force people to behave in ways repulsive to them; instead they are given the choice whether to act or abstain.

160. See Dalton, *supra* note 5, at 908 n.117 ("[W]here there exists private assent, public enforcement is not necessary.").

161. *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting).

162. See *supra* notes 43–47 and accompanying text.

163. See Rosen, *supra* note 72, at 1715; see also Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

164. Devlin did not face the problem of constitutionalizing moral conservatism because England has no written constitution, thus allowing constitutional principles to be much more flexible than is the case in the United States. Theoretically, even the most fundamental principle of law can be altered by the sovereign legislative body, which consists of the House of Commons, the House of Lords, and the Crown. In fact, many of the differences between English and American jurisprudence on the subject of morality legislation may be due to differences in legislative processes. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1005 (1995). For example, English statutes are drawn up by a highly skilled, professional body known as the Office of Parliamentary

adjudication,¹⁶⁵ it conflicts with his express justification for the constitutionality of Amendment 2.¹⁶⁶

G. Devlin's Approach

Devlin's theory of morality legislation is based on a belief that society is created by both political and moral consensus,¹⁶⁷ an idea that has long been popular among both liberal and conservative political theorists.¹⁶⁸ Because morality is an

Counsel. *Id.* Statutes are revised often and regularly, thus permitting mistakes to be corrected in a timely fashion and, critically, changes in popular opinion to be incorporated. *Id.* Judges interpret statutes strictly and uniformly, which assures the drafters of certain results once the statutes reach the courts. *Id.* In the United States, however, there is no such body of professional drafters. *Id.* As a result, many laws are badly crafted and are revisited irregularly, if at all, by the legislature. *Id.* at 1005–06. In addition, the fact that the executive and legislative branches of government are often at odds politically can lead to problems in interpretation and implementation. *Id.* Therefore, Scalia's and others' reliance on the ability of the legislature to reflect popular morality, if based on British jurists' opinions, may be misplaced.

165. See *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (opposing “those who think that the Constitution changes to suit current fashions”); Gey, *supra* note 5, at 368 (“Scalia’s view of democracy emphasizes the static, eternal nature of the community and its values.”). Although Scalia is not so strict a textualist that he only recognizes enumerated constitutional rights, he does require any newly recognized substantive due process right to be firmly embedded in the American legal or cultural tradition. See *Michael H.*, 491 U.S. at 127 n.6; see also Kannar, *supra* note 73, at 1305–07; Rosen, *supra* note 72, at 1715–16. In this sense, constitutional law is fixed for Scalia; he refuses to admit that modern influences have any significant role to play in constitutional interpretation. Kannar, *supra* note 73, at 1306; see also *supra* note 75 (discussing problem of identifying when a law based on tradition should be discarded). Because Scalia cannot permit the law, once established, to adapt to reflect changes in the limits of public tolerance, as did Devlin, he must support what Hart called the “freezing” of society into a particular mold. See HART, *supra* note 2, at 51–52, 72; see also *supra* note 75.

166. See Gey, *supra* note 5, at 365–66 (noting that despite Scalia’s claimed reliance on popular will, his traditionalist approach is actually antidemocratic); West, *supra* note 5, at 672–73 (noting arguable inconsistencies between idea that Court should give effect to original intent and idea that Court should defer to popular will); see also *supra* note 75 and accompanying text (discussing Scalia’s reliance on populist arguments to uphold Amendment 2).

167. DEVLIN, *supra* note 3, at 10, 89 (“What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives.”). However, most political theorists, from ancient times to the present, have assumed certain levels of homogeneity in the communities about which they wrote, a presumption that may not have been entirely accurate. Michael Walzer, *Pluralism: A Political Perspective*, in RIGHTS OF MINORITY CULTURES, *supra* note 80, at 134, 134. Pluralist societies, though often the norm, have received much less attention. *Id.*

168. One of the most prominent liberal supporters of this theory is John Rawls. Rawls agrees that moral and political consensus is necessary to form a society but disagrees with Devlin about the level of moral consensus that is possible and therefore should be

integral part of society, it may and should become part of society's legal infrastructure in Devlin's opinion.

Unlike Scalia, Devlin does not permit the political will to have absolute sway over matters of morality.¹⁶⁹ Nevertheless, society may act to protect and perpetuate popular morality not because the breach of a moral principle is an injury to an individual (for many immoral acts are practiced by consenting adults), but because society as a whole suffers harm.¹⁷⁰ According to Devlin, "[t]here is

reflected in the laws. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987). Whereas Devlin views Christian morals as the basis of Western society, DEVLIN, *supra* note 3, at 4–5, Rawls believes that religio-moral consensus is impossible in a pluralistic modern world, Rawls, *supra*, at 5. According to Rawls, religiously based ideals about morality must be eliminated from the political sphere so that political discourse can be maintained on a common level. *Id.*; see also Henkin, *supra* note 6, at 406–07 (arguing that morality is “not in the realm of reason and cannot be judged by standards of reasonableness; [it] ought not, perhaps, to be in the domain of government”); David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 879–80 (1993) (discussing Rawls's and others' theories regarding the role of religion and “the good life” in public life). In addition, Rawls argues that those moral issues upon which there is insufficient popular consensus should be removed from the political realm. Jean Hampton, *How You Can Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy*, 37 ARIZ. L. REV. 105, 108 (1995); Rawls, *supra*, at 4; see also Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2477–81 (1997) (discussing Rawls's new theory of “political liberalism”). For advocates of the Rawlsian approach, moral disapproval of a certain group or practice, even by a majority of citizens, does not constitute a legitimate basis for law. *But cf.* Hampton, *supra*, at 112–13 (arguing that Rawlsian concept of overlapping consensus could support Devlinesque theory of legal moralism). Rawls has his opponents, however, who claim that issues of morality cannot and should not be eliminated from the public arena. See, e.g., George, *supra*, at 2481–86; Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1060–64 (1986); Hollenbach, *supra*, at 900–01; see also Hart, *supra* note 8, at 626 (noting method by which moral positions can be classified as “cognitive” or “rational”).

169. Although advocates of morality legislation claim that issues of morality should be left entirely to the legislatures to decide, those same people also admit that there are certain rights that are exempt from majoritarian influence. See Gey, *supra* note 5, at 344 (noting Bork's concession that “in a constitutional democracy, some matters are withdrawn from majoritarian control”).

170. DEVLIN, *supra* note 3, at 6 (stating that one who “is no menace to others” may nevertheless “threaten one of the great moral principles on which society is based”); see also HART, *supra* note 2, at 48–49; Cheh, *supra* note 106, at 1348 (discussing use of criminal law in redressing “offenses against society” or “public wrongs”). A variation of this argument was presented by antiabortionists in *Planned Parenthood v. Casey*, 505 U.S. 833 (1993). There, supporters of restrictions on abortions claimed that abortion threatened the state's interest in “life,” a value which the Supreme Court had recognized as at least partially protectible. *Id.* at 846, 876; see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 271, 282 n.10 (1990) (noting state interest in “preservation of life”). The “sanctity

disintegration [in a society] where no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration.”¹⁷¹ Therefore, society may only use the law to preserve morality if it is essential to do so to protect its own existence, not just because the majority has the political strength to do so.¹⁷²

of life” argument, like the “disintegration of society” argument presented by Devlin, assumes that there is an entity known as “life” or “society” that has some sort of freestanding, protectible interest separate from the interests of the individuals involved. See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 62–64 (1993) (discussing “sanctity of life” theory in abortion law); see also Dworkin, *supra* note 5, at 492–99 (discussing integrated theory of community in which individual interests are subsumed into community interests; including analysis of anthropomorphic view of political community); George, *supra* note 168, at 2489.

Scalia, on the other hand, does not advocate the protection of society, as does Devlin, but the protection and preservation of morality, which is distinct from society. Whereas society consists of a community of moral, political, and ethical ideas and of constituent individual members, see DEVLIN, *supra* note 3, at 10, 89, morality is nothing more than a set of beliefs. When Scalia advocates the protection of morality, he is supporting the protection of a certain belief system (in *Romer*, that of “traditional sexual mores”). However, a belief system, unlike an individual or group of individuals, has no separate concern for its continuation; a belief system consciously experiences no harms to it, whereas an individual or group of individuals does. Therefore, if one must choose between harming an individual and harming a belief system, it seems logical to conclude that the belief system should be sacrificed first. See FEINBERG, *supra* note 8, at 120.

171. DEVLIN, *supra* note 3, at 13. *But cf.* HART, *supra* note 2, at 50 (noting the lack of historical support for such an argument). Of course, it could also be said that many societies disintegrate, not because of a lack of consensus on moral issues, but because majorities bent on conformity have repressed minorities until they reached the breaking point. See Bradley, *supra* note 2, at 691–97 (discussing forthcoming article by Joseph Raz in which Raz opposes creation of “second class citizens” whose viewpoints and experiences are ignored or marginalized by majority); Erik Cohen, *Citizenship, Nationality and Religion in Israel and Thailand*, in *THE ISRAELI STATE AND SOCIETY: BOUNDARIES AND FRONTIERS* 66, 70–74 (Baruch Kimmerling ed., 1989); Eide, *supra* note 80, at 1334; Ginsburg, *supra* note 79, at 574 (quoting historian Thomas Rose as saying, “violence is a political resource when the bargaining process provides no other alternatives, or at least when some groups perceive no other alternatives”).

172. DEVLIN, *supra* note 3, at 11–13. One problem with this theory is that Devlin does not discuss the extent to which morality must be shared in order to preserve society. See FEINBERG, *supra* note 8, at 136. Hart suggested that the “moral minimum” necessary to create a viable society would include universal principles such as prohibitions on murder, theft, etc., all of which can be justified on a “harm to others” principle. *Id.*; HART, *supra* note 2, at 50–51; Hart, *supra* note 39, at 9–10.

In the 1960s, eminent sociologist Emile Durkheim proposed a theory of social cohesion that could be used to bolster certain aspects of Devlin’s social disintegration thesis. *Id.* at 5. Durkheim noted that most communities reflected two types of social bonds. *Id.* The first, called mechanical solidarity, required social conformity in order to emphasize shared traits within a community. *Id.* The second, called organic solidarity, required social dissimilarity in order to reap the benefits accruing from the complementary skills of

In supporting morality legislation, Devlin argued that it made little sense to entrust a democratic majority with issues of public policy while simultaneously denying it the ability to decide issues of morality.¹⁷³ However, this argument seems somewhat naive. Very few people become impassioned about whether to tie federal funding for roadwork to national speed limits of fifty-five versus sixty-five miles per hour, nor do more than a handful diligently and fervently track changes in capital gains tax policy.¹⁷⁴ These are matters of policy that the majority is perfectly able to decide due, in part, to their being subject to objective, rational discussion. Matters of morality are seldom subject to this type of unemotional discussion; debates about abortion, same-sex marriage, or legalization of euthanasia often devolve into shouting matches that conclude with, "it's wrong because I, God, or any authoritative Someone say(s) it's wrong!"

In this way, morality is very similar to religion.¹⁷⁵ Both morality and religion intimately affect people's lives and their perceptions of the world, and both are unable to be proven by extrinsic evidence. Some would say that concepts of morality grow out of religion, while others would argue the reverse, but it is

different members. *Id.* "Generally, mechanical solidarity is the dominant form of solidarity in simple societies and diminishes in importance, though apparently it is never eliminated altogether as a unifying factor, as organic solidarity develops in more complex societies." *Id.* at 5-6. Therefore, as a society becomes more complex, it necessarily requires a higher degree of organic solidarity and a lesser degree of mechanical solidarity, or moral conformity. Although Devlin may have perceived such shifts as evidence of social disintegration, others would claim that such social change was necessary in order to accommodate different social needs.

173. DEVLIN, *supra* note 3, at 91, 100; *see also* Galston, *supra* note 42, at 379 n.206 (discussing Stephen Gardbaum's theory that "it is no more coercive for the state to take a position on conceptions of the good life than it is for a political majority to dictate to the minority on any other issue"); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1366-69 (1991) (same). *But cf.* West, *supra* note 5, at 671 (noting that conservative natural lawyers must concede that in cases where history proves the community is untrustworthy vis-à-vis some aspect of its authority to define social good, that community has lost its claim to authority in that area).

174. Courts have commonly deferred to the legislature when the only thing at issue is a determination of how best to spend the taxpayers' money. *See Welch, supra* note 34, at 78 & n.67 (citing *Lyng v. International Union*, 485 U.S. 360, 373 (1988) ("[T]he discretion about how best to spend money to improve the general welfare is lodged in Congress rather than in the courts.")). However, deferring to the legislature on economic policy, and to some extent social policy, is very different from abdicating judicial review on matters of legally enforced popular morality, especially when issues of morality involve deep personal beliefs that are more akin to religion (a constitutionally protected area) than they are to political, ideological, or economic values. *See Michaelson, supra* note 8, at 313; *see also Welch v. United States*, 398 U.S. 333, 342-43 (1970) (plurality opinion) (holding purely ethical and moral beliefs to be treated as religious); *United States v. Seeger*, 380 U.S. 163, 166, 176 (1965) (holding sincere and meaningful belief that is parallel to theism to be treated as religious, even if not theistic).

175. *See Michaelson, supra* note 8, at 313-14, 360-65 (arguing Supreme Court's definition of religion includes some conceptualizations of morality).

undisputed that the two are very closely linked.¹⁷⁶ Therefore, to many it seems incongruous to recognize religious freedom and tout the institutional separation of church and state while still allowing the state to regulate morality with a free hand.¹⁷⁷

Nevertheless, Devlin supported the enactment of morality legislation in order to preserve society from collapse.¹⁷⁸ His position is different from the moral conservatives' preservation of the status quo, since he advocates morality laws not to prevent society from changing but from disintegrating into chaos.¹⁷⁹ Thus, Devlin's approach allows some social change, when that change does not result in social disintegration;¹⁸⁰ moral conservatives, on the other hand, oppose all change, no matter how minor. However, if Devlin does not propose mere moral conservatism (which Hart and others have supposed him not to do),¹⁸¹ the question is whether his social disintegration theory can stand.

Many jurists have opposed Devlin's theory on the basis that changes in popular morality cannot cause the kind of total social collapse envisioned by Devlin.¹⁸² If society is not in danger of collapse, then any laws based on Devlin's theory are invalid, as they propose to do the impossible by curing a problem that does not exist.¹⁸³ However, in analyzing Devlin's theory, most commentators seem to focus on the moral element of his definition of "society."¹⁸⁴ If the social disintegration theory is to make any sense at all, "society" must mean more than a mere way of life or set of norms; "society" must also include the elemental political principles of the society in question, in this case, democracy. This interpretation

176. Devlin himself admitted that morality was not objective or free-standing. Instead, he believed that morality is a culturally based concept that draws heavily on the values and beliefs of the nation's majority religion. *DEVLIN*, *supra* note 3, at 89-90, 94.

177. See *MILL*, *supra* note 1, at 72; *Eskridge*, *supra* note 29, at 2412 (noting acceptance in American jurisprudence of benign religious variation but not benign sexual variation); *Gey*, *supra* note 5, at 386-90; *Henkin*, *supra* note 6, at 407-09; *Michaelson*, *supra* note 8, at 313.

178. *DEVLIN*, *supra* note 3, at 7, 22, 89; *HART*, *supra* note 2, at 48-50 (differentiating between Devlin's moderate thesis and Stephen's extreme thesis vis-à-vis preservation of morality).

179. See *FEINBERG*, *supra* note 9, at 136.

180. See *DEVLIN*, *supra* note 3, at 18 (noting how limits of toleration vary from generation to generation).

181. *FEINBERG*, *supra* note 8, at 40; *HART*, *supra* note 2, at 70-72.

182. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) ("[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."); *FEINBERG*, *supra* note 8, at 136.

183. See *FULLER*, *supra* note 8, at 39, 70-79.

184. *GEORGE*, *supra* note 44, at 70 (noting Hart's identification of key problem).

would give full weight to all aspects of Devlin's definition of society.¹⁸⁵ Presumably, it was Devlin's emphasis on the political aspects of society that justified his well-known analogy comparing breaches of common morality to sedition and treason.¹⁸⁶ Sedition and treason both threaten a society's fundamental political principles, that is, the bonds that hold a diverse group of individuals together. For Devlin, changes in morality threaten the same type of fundamental social principles.

It is this emphasis on the political element of society that Scalia may be implicitly or unconsciously relying upon in his dissent in *Romer*.¹⁸⁷ For example, Scalia stated that burdening a disfavored minority's rights so that future political change merely becomes more difficult is an appropriate use of the political process.¹⁸⁸ Normally, this type of interference with the political process might be considered inappropriate, since one of the fundamental rules of democracy forbids one generation from burdening the ability of future generations to effect political change.¹⁸⁹ However, in times of war (in this case, a culture war), normal rules of democracy may be suspended or limited, and acts that were permitted in peacetime are forbidden.¹⁹⁰ Even certain well-established liberties such as freedom of speech

185. DEVLIN, *supra* note 3, at 10 (stating that society is created by shared set of moral, ethical, and political beliefs).

186. *Id.* at 13. Most commentators have discredited this analogy. See FEINBERG, *supra* note 8, at 136, 145; HART, *supra* note 2, at 52.

187. See also FEINBERG, *supra* note 8, at 136 (comparing change in morality not to destruction of state but to change in political administrations).

188. *Romer v. Evans*, 116 S. Ct. 1620, 1630–31 (1996) (Scalia, J., dissenting). *But cf.* *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 433 (S.D. Ohio 1994) ("Allowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation unless they request it directly from the very majority that deprived them access to the legislature in the first place, violates even rudimentary notion of fundamental fairness [*sic*], and undermines the integrity of our nation."), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

189. See Galston, *supra* note 42, at 384 n.223; Gey, *supra* note 5, at 367.

190. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987) (noting that in times of war or insurrection, government's regulatory interest in community safety can outweigh individual's liberty interest); *Johnson v. Robison*, 415 U.S. 361, 379–80 (1974) (noting that only in times of war can government require involuntary conscription, which conflicts with individualistic, free enterprise way of life); *Scales v. United States*, 367 U.S. 203, 256–57 (1961) (holding that individual could be penalized for distributing allegedly educational pamphlets advocating the overthrow of the government among troops in Korean conflict; although pamphlets themselves did not constitute sedition, act was deemed potentially preparatory to violent overthrow of government by acting to undermine morale and faith in government during time of war); *Korematsu v. United States*, 232 U.S. 214, 223 (1944) (upholding relocation and detainment of persons of Japanese ancestry during World War II based on demands associated with war); *id.* at 224 (Frankfurter, J., concurring) ("[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless.").

may be subject to increased regulation.¹⁹¹ Because Scalia is highly suspicious of any newly recognized right even under normal circumstances, he is even less likely to provide protection for any such right during a cultural war, where change is equated with treason.

Under a Devlinesque theory of social disintegration, then, the political and moral society that Scalia is attempting to preserve is defined by traditional, antihomosexual mores and a judicially restrained political system. There are those who might even argue that Scalia's primary concern is not the proposed change to morality but the specter of a "living" Constitution, which is a dangerous, even treacherous, idea that, if adopted, would inevitably result in anarchy and chaos.¹⁹² If that is the case, then there is little reason to uphold the provision, since the law cannot be based on one individual's interpretive predilections. On the other hand, if Scalia upheld Amendment 2 because he believed it was intended to and did preserve not just a particular moral code but society as a whole, then the Colorado provision could arguably be said to be adequate as a matter of jurisprudence under Devlin's social disintegration thesis. Unfortunately for proponents of Amendment 2, most commentators have declined to support Devlin's social disintegration thesis. In addition, the facts of the case and the language of the provision at issue do not support the conclusion that civilization will be destroyed if Amendment 2 is stricken from the Colorado Constitution.

H. Curtailment of Moral Choices

Another rationale used by legal theorists to justify the enactment of morality legislation is the curtailment of available moral choices.¹⁹³ The theory is that people will be less likely to act immorally if only moral options are available, or if immoral options are more difficult or costly to obtain.¹⁹⁴

However, a simple analogy to First Amendment jurisprudence shows how inconsistent this rationale is with existing constitutional theory. In the United States (as in many Western nations), the government supports an individual's right to air his or her opinions even when those ideas or opinions are considered to be

191. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (noting that freedom of speech is curtailed during times of war in that publication of sailing and embarking times of troops and ships is forbidden); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (noting freedom of press may be limited in time of war); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hinderance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

192. For Scalia, chaos consists of a rights-based society that is unlimited by the letter of the Constitution. Kannar, *supra* note 73, at 1304; Rosen, *supra* note 72, at 1717.

193. See Bradley, *supra* note 2, at 680-84.

194. This is one rationale for imposing vice taxes on cigarettes and liquor.

immoral, offensive, and patently wrong.¹⁹⁵ The belief is that in a free marketplace of ideas, argument and persuasion will winnow out erroneous theories and expose the truth to common view. Because no one knows *ex ante* which ideas are true and which are false, all ideas must be allowed free expression. Therefore, if dangerous ideas about politics, science, and theology are allowed to circulate, so should dangerous concepts about morality; if the popular morality is “right,” then it will win in the end.¹⁹⁶ If it is not “right,” then perhaps change is for the best.¹⁹⁷

Supporters of morality legislation have two arguments to this analogy. First, they point out that First Amendment rights are not absolute. This is true; however, curtailment of First Amendment rights is subject to strict scrutiny and is not wholly subject to populist opinion.¹⁹⁸ Second, supporters of morality legislation argue that ideas are different from actions, which is again true. However, First Amendment jurisprudence has traditionally protected certain acts, such as symbolic speech, that carry expressive content.¹⁹⁹ Other acts are also protected where they

195. The theory rests on the assumption that the minority should be free to try to persuade others to join its cause, and thereby become a majority. FEINBERG, *supra* note 8, at 52–53. Of course, in some cases minorities do not wish to convince others to join them but merely wish to convince the majority to leave them alone. *Id.* Systems that allow minorities to be silenced under threat of retribution immediately upon their being determined to be in the minority defeat the purpose of free speech. *Id.*; see also *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 437–39 (S.D. Ohio 1994) (noting problems homosexual activists have in forming coalitions), *rev'd*, 54 F.3d 261 (6th Cir. 1995); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610–11 (Cal. 1979); Reinig, *supra* note 29, at 588 (noting how gays are limited politically in a society in which they are stigmatized).

196. FEINBERG, *supra* note 8, at 54–55; see also MILL, *supra* note 1, at 90 (noting benefit of truth is not that it always wins out but that “in the course of ages there will generally be found persons to rediscover it”).

197. See *Dalton*, *supra* note 5, at 903–05, 908 n.117 (noting examples of beneficial cultural change and raising question of whether prohibiting change is possible or wise in all circumstances).

198. “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 98 n.14 (1973).

199. The Supreme Court’s free speech jurisprudence indicates that “at least in the areas of thought, pure expression and symbolic speech, the government may not enforce any moral scheme against citizens who march to a different cultural drummer.” Gey, *supra* note 5, at 354; see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1993) (“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”) (emphasis added).

are inextricably linked with belief.²⁰⁰

To some extent, the theme of curtailment of moral options runs through any argument in favor of morality legislation. Since morality legislation has as its purpose the prohibition of certain immoral acts, it thus necessarily limits people's ability to engage in certain acts that reflect different types of morality. However, a law that proposes to avoid harm to others is very different from a law that intends to limit different moral options. The first law burdens only what people may do, based on the known outcome of the act in question. Such legislation is presumptively valid, since it focuses on behavior. The second law, on the other hand, burdens both individual belief and behavior by regulating the number and type of moral codes or belief systems that are available to the public. This type of legislation is presumptively invalid, since by banning or burdening various moral alternatives, the state hopes to limit not only what people do but what they think. The fundamental illegitimacy of such legislation is demonstrated by the fact that in no area of the law other than morality would the state even consider limiting the number or type of ideas that are available to the public.²⁰¹

The dissent in *Romer* relied very little on a curtailment of moral options argument and instead focused on a preservation of traditional morality argument. Although adoption of a provision such as Amendment 2 can result in the de facto limitation of moral options, that did not appear to be the legislature's express purpose in the *Romer* case. Nevertheless, it is important to analyze this justification since it appears with some regularity in the scholarly literature and can form an implicit basis for legislation.

I. The Bare Knowledge Approach

Although there are a number of commentators who oppose all laws except those that are justified as a means of controlling harm to others,²⁰² there are other

200. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (“[T]hrough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise.... Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances.”); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (noting freedom of belief is absolute under the First Amendment, but freedom to act is subject to regulation; however, the “power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom”).

201. Some might argue that obscenity laws curtail the number or type of ideas that are available to the public, but most courts that regulate obscene speech do so based on obscenity's lack of any “social value as a step to truth,” not as a limitation on legitimate ideas. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 n.12 (1973). But see *Henkin*, *supra* note 6, at 391 (arguing obscenity laws are based on state concern for morality). Other restrictions on speech are justified as a way of limiting harm or potential harm to others, a concern that overrides mere communication of ideas. Such harms include both physical (as in prohibitions on yelling “fire” in a crowded theater) and professional (as in a defamation case) injuries. *Id.* at 399 (noting utilitarian goals of other restrictions on speech).

202. FEINBERG, *supra* note 8, at xix–xx; HART, *supra* note 2, at 5.

jurists who, while continuing to oppose morality laws in principle, would permit the state to enact such laws when the act is public, as opposed to purely private.²⁰³ This distinction is made on the grounds that public immorality is actionable, even when consensual, because it can cause a public nuisance or disturbance.²⁰⁴ Conversely, purely private acts of immorality are considered by these same

203. HART, *supra* note 2, at 45–48.

204. For example, blasphemy, while no longer illegal per se, can form the basis of an action at law if it is done “in an offensive or insulting manner, likely to cause a breach of the peace.” *Id.* at 44. Over the years, the law’s concern about the moral elements of the crime has largely been replaced by a concern over public peace and safety. Compare *id.*, with 12 AM. JUR. 2D *Blasphemy and Profanity* § 1 (1964). This differentiation between public and private acts has been adopted by at least some courts with respect to discrimination against homosexuals. For example, in *In re Labady*, 326 F. Supp. 924, 925 (S.D.N.Y. 1971), the court granted a petition for naturalization filed by a 24-year-old homosexual. Although the court recognized a “general ‘revulsion’ or ‘moral conviction or instinctive feeling’ against homosexuality,” it refused to deny the petitioner’s request, noting that “private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality.” *Id.* at 927–28 (citing, inter alia, the Wolfenden Report); see also *Bowers v. Hardwick*, 478 U.S. 186, 212–13 (1985) (Blackmun, J., dissenting) (distinguishing between laws protecting public sensibilities and laws enforcing private morality); *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (“[T]he notion that it could be an appropriate function of the federal bureaucracy to enforce the majority’s conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity.”). Several other cases discuss civil sanctions for homosexual conduct or orientation. See, e.g., *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971) (permitting regents to deny employment to person who “foisted” tacit approval of homosexuality on employer by applying for license to marry other male); *Scott v. Macy*, 402 F.2d 644, 648–49 (D.C. Cir. 1968) (holding admission of homosexuality without evidence of homosexual acts insufficient basis for refusal to certify as eligible for employment); *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 856–57 (D. Md. 1973) (noting homosexuality alone is insufficient justification for dismissal of teacher but permitting school to deny teacher employment if homosexual activities tend to “spark controversy”); *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 393–94 (Cal. 1969) (refusing to revoke teacher’s life diploma based on noncriminal homosexual acts). See generally NORMAN DORSEN ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1008–10 (4th ed. 1976).

Interestingly, Scalia cited polygamy as an example of a moral issue that has been made the subject of restrictive legislation, see *Romer v. Evans*, 116 S. Ct. 1620, 1635–36 (1996) (Scalia, J., dissenting), despite the fact that a number of commentators have decried the decisions cited by Scalia on the grounds that they violate Mormons’ religious rights. See CARTER, *supra* note 64, at 133–35. Hart reviewed a similar crime, bigamy, in his discussion on public and private morality, and concluded that bigamy is illegal not because sexual relations or cohabitation outside of marriage is illegal or immoral but because others might be outraged by public defiance of majority religious sensibilities. HART, *supra* note 2, at 39–41. Hart believed that the law is most concerned with acts that affect others, not the morality or immorality of the acts themselves. *Id.* Hart, however, recognized that there are those who would oppose laws prohibiting bigamy, since such laws might not be premised on a sufficient level of harm to be actionable. *Id.* at 42; see also *infra* notes 208, 211.

commentators as beyond the law's legitimate reach.²⁰⁵ Supporters of this theory note that moral acts are equally actionable when performed in the public sphere, since public acts, by their very nature, intrude on the lives of others.²⁰⁶ Because other people are unable to avoid witnessing the immoral act, the law will protect those potential witnesses' ability to conduct their business free of offensive influences.²⁰⁷ However, defining what is purely private and what incorporates enough of a public interest to be actionable is a difficult question.²⁰⁸

205. See FEINBERG, *supra* note 8, at 57–64 (discussing example of Terrence Truview and Farley Fairjoy). Some theorists base their differentiation between public and private acts on the law's inability to enforce laws regulating purely private behavior, *see, e.g.*, FULLER, *supra* note 8, at 132–33, while others claim a privacy interest that cannot be overcome, HART, *supra* note 2, at 34–48; MILL, *supra* note 1, at 68–69.

206. See *supra* note 140 and accompanying text.

207. See Dalton, *supra* note 5, at 884–901 (discussing Feinberg's approach to "offense to others" principle).

208. For example, as stated *supra* note 204, Scalia cited polygamy as an arguably private act that has traditionally been regulated by the state in order to support his claim that the state may interfere even with private consensual acts concerning sexual morality. *Romer*, 116 S. at 1635 (Scalia, J., dissenting). Hart viewed bigamy, a very similar crime, in the opposite light, arguing that bigamists' acts have a large enough impact on public order (as opposed to public morality) to justify state interference. HART, *supra* note 2, at 39–43; *see supra* note 204 and *infra* note 211. Unfortunately, the majority of cases that decide issues of public versus private morality do so not on the basis of public-private concerns but on due process or equal protection grounds. Therefore, there does not seem to be any well-defined judicial test delineating what constitutes a sufficiently significant public interest to justify legislation. *But see Bowers*, 478 U.S. at 195 (discussing limitations on privacy of location argument based on *Stanley v. Georgia*, 394 U.S. 557 (1969)); noting that even certain victimless crimes may be addressed by law, despite the fact they occur in the home); *id.* at 212 (Blackmun, J., dissenting) (noting "[p]etitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality" but failing to create or cite a test that identifies such differences); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973) (discussing privacy of location in *Stanley*, 394 U.S. 557, versus privacy of relationship in *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), but failing to address issues of public and private morality).

Intuitively it seems as if there should be some point at which one's behavior begins to affect others impermissibly, but such tests are difficult to design in the abstract, especially in the area of morality. Nevertheless, a suitable starting point may be found in the area of intentional or reckless infliction of emotional distress, as discussed in the Restatement (Second) of Torts. The Restatement notes that:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

In addition, this approach raises two critical questions. The first is who has the right to control the use of public space: those who offend or those who are offended.²⁰⁹ Obviously, both parties have liberty interests that cannot be simultaneously upheld.²¹⁰ The second critical question raised by the public-private

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965). Although the determination of what constitutes "extreme and outrageous conduct" could devolve into a simple recitation of popular morality, the requirement that there be "severe" distress provides some protection against minimal emotional injuries. *See id.* at cmt. d ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). Judicially recognized protections for individual rights would also narrow the instances in which the claim was available, as would the scienter elements requiring an intentional or reckless mental state. *See id.* at cmt. g (noting an "actor is never liable...where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress"). In addition, the level of emotional distress required prior to recovery should be extremely high. *See id.* at cmt. j (listing actionable distress as including mental suffering, mental anguish, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea). One benefit of such a system would be the fact that injured parties would be required to bring their claims into court and prove all elements beyond a preponderance of the evidence, as with any tort claim. Defendants would thus be allowed the opportunity to defend their actions, something that is impossible under legislative enactments such as Amendment 2. In addition, the only type of recovery that a plaintiff could have against a defendant under a Restatement-style test would be monetary compensation and perhaps injunctive relief; both types of remedies are far more preferable than the type of blanket discrimination permitted under Amendment 2.

209. For an interesting discussion and enlightening hypothetical on this issue, see Dalton, *supra* note 5, at 891-900 (discussing Feinberg's approach to the "bare knowledge" problem).

210. After reviewing the conflict that occurred during the Civil War between the slaves' fundamental rights and the slave owners' nonright "interests," Feinberg concluded that "[w]hen the legitimate interests of one group appear to conflict with the basic rights of another, the basic rights must always triumph." FEINBERG, *supra* note 8, at 120. Similarly, whenever public and private rights conflict, one must identify what rights and interests are at stake and determine which party has the more meritorious claim, based on constitutional principles.

distinction is whether it addresses what has been called the “mere distress” or “bare knowledge” issue.²¹¹ The mere distress issue is based on the theory that the bare

211. In their discussions of bigamy and polygamy, Hart and Scalia focus primarily on the distinction between public and private acts, but both examples seem as illustrative of the mere distress principle as they are of the public-private distinction. For purposes of this discussion, the two crimes will be treated as identical, which they very nearly are, except when bigamy involves deception of one or several parties. In those cases, it is simply a case of fraud and should be actionable as such. In all other cases, bigamy is simply criminalized polygamy or polyandry.

In instances of consensual multiple marriages, it is difficult to identify what objections exist outside of objections based on popular morality. In an era where most women work, there is little concern that a man with multiple wives will end up on public assistance because he has to support a large, nonworking family. Nor is there a concern that women will be coerced into becoming second or third wives for economic reasons. Blood-type and DNA testing preclude any concerns about proving paternity in polyandrous marriages, even if it were an issue to the people in question. If all parties to the marriage consent, there can be no identifiable harm to the public that can justify state regulation other than the fact that other people do not like multiple marriages. See CARTER, *supra* note 64, at 29 (noting that antipolygamy laws were passed not because Mormons themselves disrupted public order but because popular anti-Mormon sentiment, which had religious roots, caused other people to act in a disorderly manner). Same-sex marriages have met similar opposition. See Adam Clyner, *Bitter Debate, Then a Vote for Rejecting Same-Sex Marriages*, N.Y. TIMES, May 31, 1996, at A1; David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar Door*, N.Y. TIMES, Mar. 6, 1996. However, the Supreme Court has steadfastly refused to permit laws based on distress to others to stand in other contexts. See Wright v. George, 373 U.S. 284, 292 (1963) (holding that violation of constitutional rights cannot be based on fact that activity in question “was likely to cause a breach of the peace by others”); see also *Watson v. Memphis*, 373 U.S. 526, 535 (1963) (holding “constitutional rights may not be denied simply because of hostility to their assertion or exercise”).

Alternatively, laws prohibiting multiple or same-sex marriages could be said to be based on religio-moral claims that heterosexual monogamy is or should be the sole marital norm in American society. See, e.g., *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), claiming society in United States is based on a family “consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony”). However, in *Murphy*, the Court stated that in order to create a society in which monogamy was the only legal sexual union, “no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.” *Murphy*, 114 U.S. at 45. In a way, this type of withdrawal of political power was also at issue in *Romer*, where homosexuals were denied their right to affect local legislation in ways that benefitted them. See also *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 443 (S.D. Ohio 1994) (“[W]e can conceive of no legitimate governmental purpose rationally related to a law which prohibits a minority group from ever obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated—and likely insurmountable—burden of amending the city charter.... The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective.”), *rev’d*, 54 F.3d 261 (6th Cir. 1995). Not only is such use of the political process strongly disfavored as a matter of political theory, but

knowledge that others are acting immorally causes a type of psychic harm in some people, thereby justifying the imposition of morality legislation for even purely private acts.²¹² This argument carries at least some intuitive appeal, as it attempts to address what is perceived as a legitimate injury and co-opts the utilitarians' "harm to others" principle for its own. Some commentators have justified morality laws based upon the mere distress principle by arguing that it is difficult, if not impossible, to ask people offended by others' morality to stop thinking about it.²¹³ Upon closer examination, however:

[i]f distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory.²¹⁴

It could also be said that the distress caused by knowledge of others' private acts requires a type of mental intrusiveness into others' affairs that is completely, or at least largely, voluntary and not actionable at law.²¹⁵

restrictions that are primarily based on religious conceptions of the good are suspect under First Amendment jurisprudence. For example, the Supreme Court has held that the government may not allow laws that "aid one religion, aid all religions, or prefer one religion over another" to stand, which would seem to challenge prohibitions on marriage that perpetuate Judeo-Christian religious sensibilities over those of other religions. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); see also S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements*, 29 CASE W. RES. J. INT'L L. 1, 32, 40 (1997) (discussing ways in which religious principles permeate American law). It is possible that a law based on religious or moral concerns and nothing more is invalid *ab initio*. *Id.* at 48-58, 70.

212. HART, *supra* note 2, at 46-47.

213. See Dalton, *supra* note 5, at 892 (noting offended persons cannot avoid private immorality "absent the gift of forgetfulness or a change in sensibilities").

214. HART, *supra* note 2, at 47; see also Dalton, *supra* note 5, at 891-900.

215. See FEINBERG, *supra* note 8, at 56-64 (discussing example of Terrence Truview and Farley Fairjoy). The situation can be likened to the "fruit of the poisonous tree" doctrine in criminal law. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (citation and footnote omitted). In cases where police have no legal right to enter premises or search a person, the fruits of such a search are inadmissible in criminal court. *Id.* Similarly, where one person has mentally ventured into a place where he or she has no right to be, that is, in another person's private life, then the alleged harm that ensues from such mental intrusiveness will not be actionable at law.

This defense tactic may provide some solace to gay rights advocates who will take issue with the argument outlined *supra* in footnote 208. Some activists will be concerned that recognition of a Restatement-style action will require homosexuals to closet themselves

Obviously there are significant problems with any theory that permits morality legislation based on a distinction between public and private acts. The most glaring of these is the lack of a workable test for differentiating between those acts that are sufficiently private so as to avoid regulation and those that are sufficiently public so as to be amenable to regulation. In addition, there is nothing within the mere distress doctrine that requires the type of morality that is to be prohibited to be a perfect mirror image of the the type of morality that is to be permitted. It is conceivable that a person could be guilty of offending one person by acting in one way and of offending another by refraining from performing that same act. Such conflicting results illustrate the impossibility of adopting the mere distress principle in any legal system.

The mere distress doctrine did not figure largely in the *Romer* dissent but very well could have provided the implicit foundation for the legislators' actions. For example, the state claimed that Amendment 2 was intended to act as a means by which employers and landlords who opposed homosexuality on religious or other grounds could discriminate against gays and lesbians. This action appears to have been based on a mere distress claim, since homosexuals committed no affirmative injury to employers or landlords to justify the discrimination. Instead, the employers and landlords were permitted to act based on their moral opposition to homosexuals' private actions. Although this sentiment on the part of employers and landlords is sometimes called animosity, hostility, or moral disapproval, it can broadly be defined as some sort of distress. Scalia's acceptance of animus as a proper basis for legislation demonstrates his approval of the mere distress principal. Nevertheless, even though the state may have initially been motivated by a mere distress argument, it failed to make that claim at trial and instead relied on a freedom of association argument,²¹⁶ thus avoiding the multitude of problems inherent in an explicit mere distress claim.

and their sexuality in order to avoid tort liability for reckless or intentional infliction of emotional distress. This is untrue. Homosexuals hope for the day when they can, for example, hold hands or modestly kiss in public without becoming objects of derision or worse. However, since heterosexual couples are permitted to engage in public displays of affection, neither handholding nor kissing between same-sex couples can be said to be per se examples of public immorality. Of course, as with heterosexual couples, excessive physical contact in public may violate good taste, but such conduct on the part of some heterosexuals has not led to the banning of mixed-sex hand holding or kissing in public. The charge of immorality comes only from some persons' suspicions that a same-sex couple is homosexual; however, mere suspicions are not, and never have been, actionable at law. Because those who are distressed at seeing a same-sex couple holding hands are really distressed at what they think goes on behind closed doors and not at what they actually see, such distress is based on mental intrusiveness that should not be actionable at law.

216. See *Romer*, 116 S. Ct. at 1629.

J. Scalia's Approach

Although Scalia's dissent in *Romer* is, presumably, not intended to be a comprehensive analysis of morality's role in law, it, along with his other opinions and articles, provides insight into how he believes law should interact with morality. If, however, Scalia plans to continue to permit morality to be regulated by the state, he should clarify the theoretical basis for his decisions so that courts relying on those opinions will know precisely how to proceed.

As an initial matter, there is no doubt that Scalia believes the law may, and in fact should, be involved in the enforcement of morality.²¹⁷ In order to implement a legalized moral code, he advocates giving great deference to the will of the legislature²¹⁸ to ascertain how to promote those legitimate ends.²¹⁹ His view is that legislating morality is not just an exercise in majoritarian power but that it can "preserve"²²⁰ and "enforce"²²¹ traditional morality and "prevent" it from deteriorating.²²²

The basis of this conclusion about the legitimacy and effectiveness of morality legislation is not precisely clear. *Barnes v. Glen Theatre, Inc.* suggests that Scalia supports the enforcement of morality *qua* morality, with no other justification necessary.²²³ However, Scalia's dissent in *Romer* indicates that he might also be relying on other jurisprudential models justifying morality legislation in order to bolster his position in *Barnes*. The strongest philosophical influences seen in *Romer* are those of the classical Greeks. Scalia demonstrates his approval of the Platonic ideal when he permits the state to promote virtue in its citizens and grants to the majority the right to decide which moral standards are to be enforced. Aristotle's voice is heard when Scalia supports habituation as a means of protecting and preserving a certain moral code, although it is arguable whether the Aristotelian requirement for social deliberation prior to deciding which moral code to adopt is met through the electoral process, something that Scalia seems to assume.

217. Compare *id.* at 1637 (Scalia, J., dissenting) ("Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before.") with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral.... [T]here is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality.'" (citations omitted)).

218. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

219. This deference to the legislature is typical of due process analyses, though not often found in equal protection cases. See Welch, *supra* note 34, at 969-97.

220. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

221. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

222. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

223. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

Although Plato and Aristotle are the only philosophers whose influence can clearly be seen in Scalia's opinions concerning morality legislation, other theories provide implicit support for his position. For example, Scalia seems somewhat swayed by Augustinian arguments regarding education of what is morally correct in that Scalia, like Augustine, would mold citizens' behavior as a backdoor method of affecting their beliefs. Although there is no indication that Scalia has adopted a strict harm-to-observers approach, he could be proceeding under a theory that allows morality legislation in order to avoid corruption in the beliefs of observers. Identifying the nuances in Scalia's interpretation of the harm-to-observers theory is somewhat unnecessary, however, since this approach eventually devolves into other legal theories. Other unspoken justifications for Scalia's reasoning seem to include protection against harm to self, curtailment of moral options, and protection against the bare knowledge problem. These theories are inherent in most theories supporting morality legislation, and they appear in *Romer* as well. In fact, they actually bolster Scalia's conclusion in *Barnes* that the state may prohibit any acts that are *contra bonos mores*, since the argument that the state may act to regulate immorality *qua* immorality is somewhat circular.

On the other hand, there is little evidence that Devlin's social disintegration theory has had much influence on Scalia, despite the fact that Devlin and Scalia take similar stances on certain other issues. Their most notable similarities concern the legitimacy of state action in the area of morality and the deference granted to the majority will as reflected by the legislature. Finally, moral conservatism constitutes a result rather than a purpose of Scalia's actions; by adopting a traditionalist approach to morality legislation, Scalia embeds a particular moral-legal code into constitutional law, thus freezing society into a single moral mold.

V. CONCLUSION

Although the theories discussed in this Article may not encompass every possible justification for morality legislation, they do reflect the major arguments presented by supporters of such laws.²²⁴ However, as demonstrated above, each theory has one or more problems—either with the legitimacy of the legal purpose itself or with the means used to accomplish that end—that would seem to deny the state the ability to enact morality legislation per se. In any event, imposing these principles has historically resulted not in the facilitation of harmony within a community, as is claimed by some, but in divisiveness and repression within and between communities, due to the fact that the purpose of such laws is to create moral conformity in society by forcibly quashing dissent. Nevertheless, despite

224. One interesting argument is that battles over morality legislation have less to do with jurisprudence per se and more to do with the sociology of group status and conflict. See generally Balkin, *supra* note 29, at 2321, 2331–32 & n.66. Under this theory, competing status groups appropriate the language of moral approval or disapproval as a means of combatting the claims of an opponent to social and legal legitimacy. See *id.* at 2331–32. For an application of this theory to the facts in *Romer*, see *id.* at 2335–38.

such problems, morality legislation has existed for thousands of years and will in all likelihood continue to exist in one form or another well into the future.

In the past, the ultimate question in the area of morality legislation has been whose morality was to be reflected in the law. Modern battles, on the other hand, are as much over whether any moral code should be contained in the law as they are over whose morality should be chosen.²²⁵ In addition, the issues themselves have become much more difficult. Instead of sparring over the morality of bikinis and bar rooms, society is now being forced to confront the morality of homosexuality, abortion, euthanasia, and suicide.²²⁶ The recent decision and dissent in *Romer v. Evans* have only heightened the controversy, as people now have to decide whether they want to allow morality legislation to continue and, if so, on what bases. In this environment of increased legal scrutiny, it seems appropriate to reconsider the issues that were raised by Lord Patrick Devlin and Professor H.L.A. Hart thirty years ago in their historic debate.

In some ways, the critical questions are the same: whether moral conformity, as enforced by law, is a legitimate aim of the modern state and whether the state even has the ability to effectuate such a goal through the use of law. For many, the pluralistic nature of today's society requires the state to abandon any attempt to create and impose a single moral code on society. Others believe that, even in a pluralistic community, the state has the right and the duty to require citizens to conform to a certain behavioral norm that may be based on some form of morality. However, by deconstructing the professed goals and justifications for morality legislation, it becomes apparent that most, if not all, are based on theoretically problematic grounds such as coercion of belief, simple majoritarianism, or the limitation of future generations' ability to implement political change. Some theories also operate in the absence of any critical deliberation as to the benefits and burdens associated with any particular moral code. The only justification for morality legislation that escapes these sorts of problems is the claim that enforcement of morality is per se permissible because

225. See Eskridge, *supra* note 29, at 2415 (noting that modern battles over morality legislation demonstrate clash of constitutional commitments).

226. To some extent, the law has always been faced with these sorts of difficult issues, but the conflict has become sharper in recent years due, in part, to modern scientific advances that have challenged many of the fundamental principles on which morality legislation is based. For example, many laws burdening or prohibiting homosexuality were based on the premise that homosexuality was a "perversion" of choice; however, some experts now believe that homosexuality is not a completely voluntary trait. See Henry, *supra* note 29; Thompson, *supra* note 29. Abortion laws are often reevaluated in light of continuing research into the genesis of life, which has provided important insights into the stage at which a fetus becomes viable and able to experience pain. Similar inquiries into the stages of death have made possible various life-extending technologies but have also forced courts to address difficult questions about euthanasia and suicide. Neither the courts nor the public have had to face these kinds of questions before. However, as science continues its inexorable march toward an uncertain future, both law and morality must do their best to keep up.

the state is allowed to protect morality, but even this justification, based as it is on circular and unsubstantiated reasoning, cannot stand as a jurisprudential base, since it assumes the legitimacy of that which it is trying to prove. The agreed absence of a single, immutable, and externally identifiable morality also makes it more difficult to justify modern morality legislation.

Yet these are not the only problems faced by those who support morality legislation. Even if there were found to be a legitimate reason for enforcing a particular moral code, proponents of morality laws would have to demonstrate that the provisions in question were capable of bringing about the desired result. In addition, some commentators argue that since morality laws affect people's fundamental beliefs and practices, any law that burdens those beliefs and practices should be narrowly tailored in order to minimize the effect on the burdened individuals. Despite this requirement, however, most morality legislation fails to provide a sufficient nexus between the justification for the law and the actual result.

One reason jurists scrutinize morality legislation so carefully is because it can so easily be used as a pretext by which the majority can vent its hostility toward certain disfavored groups. Although Scalia believed that this was an appropriate use of the law, most commentators disagree. In fact, the dissent in *Romer v. Evans* illustrates the truth of Hart's observation that the greatest danger of democracy is not the mere oppression of a minority by the majority but the belief that such an action "might come to be thought unobjectionable."²²⁷ Hostility and animus towards certain groups or individuals is and always has been an illegitimate basis for legislation, and clothing such sentiments in the language of morality merely makes the real basis for legislation more difficult to see. If a nation is to live under the rule of law, it must identify rational, dispassionate, and externally justifiable reasons for its laws. Since mere dislike of a certain group is neither rational nor dispassionate, it cannot provide a basis for law.

As a result of *Romer*, American jurists stand in the unique position of being able to choose the direction in which the law will proceed. Clearly, morality has played a role in the law in the past, but, as Justice Holmes aptly noted, "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."²²⁸ In fact, Devlin himself stated that "[i]n the field of jurisprudence one is at liberty to overturn even fundamental conceptions if they are theoretically unsound."²²⁹ At this point, there is an arguably sufficient level of

227. HART, *supra* note 2, at 77-78.

228. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896-97).

229. See DEVLIN, *supra* note 3, at 5-6; see also Henkin, *supra* note 6, at 398 ("The claims of history, generally, are subject to the caveat that laws and practices accepted as valid when a constitutional provision was adopted may yet be found invalid in the light of later readings of an organic, creative Constitution. In regard to 'morals laws' in particular, one may ask that the Court consider whether moral assumptions and assertions of a past day necessarily survive as exceptions to freedom today.").

precedent to justify the continued enactment of morality legislation,²³⁰ but there is an equally well-established body of law to support the decreased use of morality as a justification for law.

Although some opponents of morality legislation would limit all legislation to those cases where there is an identifiable harm to others,²³¹ there are others who believe some morality laws continue to be necessary in those areas where they serve a legitimate purpose. Of course, discovering precisely what those areas are is a difficult task, and the problem becomes how to construct a theoretically defensible basis for permitting some, but not all, morality laws. Although creating such compromises can be dangerous business, the legal community may be able to address some of the more egregious acts that are currently being regulated by morality legislation without relying on blanket statements about regulating morality. For example, certain public acts of immorality might be actionable under a tort cause of action analogous to the intentional infliction of emotional distress, while other legislation might require that certain irreversible acts not be taken until there was some assurance that the actor had given complete and informed consent.²³² In addition, there might be an argument that although certain immoral acts cannot be proven to constitute harm to an individual, they can constitute harm to a group and can be actionable on those

230. The majority of such precedent permits the state to act to protect the "moral welfare" of its citizens. See Henkin, *supra* note 6, at 413 ("It asks much of the Supreme Court to tell legislators, and communal groups behind them, that what has long been deemed the law's business is no longer, that even large majorities or a 'general consensus' cannot have their morality written into official law. And a reluctant Court can find support in history, and some among the philosophers."). *But cf. id.* at 414 (noting that at that time, Supreme Court had not yet held that popular morality could be enforced by law).

231. The effect of such a legal system would be similar to that proposed by theorists who advocate the creation of a morally neutral legal regime. Both theories, however, have been criticized by opponents as unworkable and excessively idealistic.

232. For example, persons wishing to commit suicide might be required to be suffering from a terminal illness and might be required to undergo a psychiatric evaluation confirming the lack of mental illness and/or social or familial pressure. See Gay Alcorn & Celia Hall, *Cancer Patient Ends His Life at the Push of a 'Death Machine' Button*, DAILY TELEGRAPH, Sept. 26, 1996, at 4 (discussing Australia's Terminally Ill Act of 1995, which permits assisted suicide if patient confirms diagnosis and prognosis with general practitioner and specialist, obtains signature from psychiatrist establishing absence of clinical depression, and complies with nine-day cooling off period; also discussing assisted suicide in The Netherlands). Legally, these requirements could be analogized to those required in abortion cases. However, those persons who oppose most or all burdens on abortion might find similar restrictions on suicide equally insupportable. Recently, the Supreme Court held that neither the Equal Protection Clause nor the Due Process Clause establishes a right to physician-assisted suicide. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997). Although *Glucksberg* did at one point discuss the "opposition to and condemnation of suicide," the opinion did not generally discuss the moral propriety of the laws in question. See *Glucksberg*, 117 S. Ct. at 2263.

grounds.²³³ Although these potential bases for morality legislation cannot be fully explored within the scope of this Article,²³⁴ they suggest possible compromises between those who advocate pure morality legislation and those who advocate legislation based solely on a harm to others principle. In any event, these alternate formulations require legislators and judges to look closely at whether laws have a permissible and legitimate justification, and whether the means used to effectuate those laws actually achieve the purpose intended. This, in itself, is a laudatory goal and creates a system that is more transparent and more theoretically defensible.

233. Pornography might be opposed under such an analysis, not because it degrades women (since degradation is not necessarily an actionable injury), but because it encourages violence against women. Because "encouragement" of a crime can form the basis for a criminal complicity charge, pornography could be restricted where it was proven to encourage unlawful activity. Although the causation element might be difficult to prove, the jurisprudential basis of such a law is sound.

234. One commentator noted that when Joel Feinberg was asked to write a brief article on the role of morality in law, Feinberg responded with a four-volume treatise on the subject. Dalton, *supra* note 5, at 882. This author can empathize with Feinberg's inability to give a short answer on this topic.