

## LAW AND MORALITY

### 1. From *Bowers* to *Lawrence*

- Michael Hardwick was arrested in 1982, handcuffed in his bedroom by the Atlanta police, and charged with the crime of sodomy for engaging in oral sex with another adult in his bedroom: a Georgia statute designated sodomy a felony, carrying a penalty of not less than one and not more than 20 years in prison. Hardwick challenged the constitutionality of the law, and, ultimately, the Supreme Court rejected his challenge.

- In June 2003, the Supreme Court overturned *Bowers* in the case of *Lawrence v. Texas*. In this case, John Lawrence and Tyron Garner were observed having anal sex, arrested and charged for violating a Texas statute making it a crime to “engage in deviate sexual intercourse with another individual of the same sex,” eventually entered a plea of “no contest,” and were fined roughly \$350 each. The Court overturned the Texas statute and made a very strong statement against the constitutionality of laws that impose criminal sanctions for violating the community’s sexual morality. Agreeing with Bentham’s condemnation of the legal enforcement of community morality, the majority opinion says: “Our obligation is to define the liberty of all, not to mandate our own moral code.”

### 2. What is the constitutional privacy right?

The constitutional basis of *Bowers* and *Lawrence* lay in the notion of a constitutionally-guaranteed privacy right.

- The American constitution does not mention a right of privacy. But in a series of cases beginning in 1965, the Supreme Court held that a privacy right is implicit in the Constitution. The Due Process clauses of the Fifth and Fourteenth Amendments state that neither the federal government nor the states can deprive persons of life, liberty, or property without due process of law, and the Court held that the protection of privacy is an element of that constitutional protection of liberty. The Court relied on that right in upholding the right to use contraceptives by married and unmarried couples<sup>1</sup> and—most famously—the right to have an abortion.<sup>2</sup>

- In arriving at this conclusion, the Court argues that one of the constitution's animating values—a value that is reflected in and provides a rationale for several provisions—is that individuals are entitled to make certain basic, personal decisions independent of political regulation. So the Court in effect says that the basis for a privacy right lies in the value of **independent personal decision-making**. And while the precise content of the value and associated right are uncertain—a point I will return to later on—certain matters clearly fall within its scope, including decisions relating to marriage, procreation, family relationships, and child rearing and education.<sup>3</sup>

### **3. The reasoning in Bowers**

In *Bowers*, the Court majority accepted that the constitution includes a privacy right, but denied that a law criminalizing Hardwick's conduct violates that right. Justice White's majority opinion makes two central points.

- First, the opinion denies that Georgia infringed Hardwick's right of privacy, reasoning as follows. The cases in which the Court has recognized and given content to the right of privacy have all involved issues of family, marriage, and procreation. But, the argument continues, "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other" has been "demonstrated."<sup>4</sup> We will return later to this *no connection thesis*. Relying on it, the majority concludes that the privacy right does not cover consensual homosexual sodomy, nor is there a constitutional basis for extending the privacy right so that it does cover homosexual sodomy.<sup>5</sup>

- Though the statute does not infringe a fundamental right, it would still be unconstitutional if it lacked a "rational basis," in the jargon of constitutional law. Suppose that Congress passed a law banning the production of large rubber bands: not because of any special problem with them, but simply because a majority in Congress do not like them. Lacking a rational basis, the law would be an unacceptably arbitrary infringement of liberty.

The second main point, then, is that community morality provides an acceptable rationale. Thus the Court cites "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." In thus affirming that notions of morality provide an acceptable reason for regulation, the majority is at odds with Bentham's view on the permissibility of enforcing community morality.

- In *Bowers*, then, the majority denies that the Georgia law infringes a fundamental right. But had the law infringed a right, the majority would have denied the sufficiency of community morality as a basis for regulation. Thus the

Court accepts that there are basic rights that trump the moral consensus of the community. But moral notions do provide sufficient reasons for regulating conduct not protected by a basic right.

#### 4. Bowers to Lawrence

In his dissenting opinion in *Bowers*, Justice Blackmun<sup>16</sup> rejected the majority's two principal contentions. The majority in *Lawrence* is less clear, but appears to follow Blackmun, finding a violation of a due-process privacy right and criticizing the legal enforcement of morals.

- On privacy, the majority reviews the past Court's previous privacy decisions, which have focused on family, marriage, and procreation. But they treat these as instances of rather than definitive of a broad right, and hold that protections of family, marriage, and procreation secure a more fundamental value. If that same value is also implicated in consensual homosexual sodomy, then the protection should be extended.

More particularly, the majority proposes that the right of personal privacy already acknowledged in areas of family, marriage, and procreation is founded on the importance of choosing personal bonds. Thus:

1. The Due Process Clauses protect liberty as a fundamental value.
2. That liberty includes an interest in developing a sense of one's identity and aspirations, and in pursuing the conduct recommend by one's identity and aspirations. This is what I earlier called *independent personal decision-making*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

3. Enduring personal bonds are a way that people develop and pursue their identity and aspirations: thus important to independent decision-making.
4. Sexually intimacy *may* be one element in the enduring personal bonds that are important to independent decision-making.
5. So the Due Process Clauses protect rights of individuals to form those personal bonds.

This line of argument explains why the Court emphasizes that the stakes are much larger than a *right to engage in sodomy*. The issue is sexual intimacy, and, still more fundamentally, the formation of “more enduring” personal bonds that are important to the way that we formulate and live out our aspirations: important in short to our standing as free persons, in charge of our lives. But now we see the connection denied by the no-connection thesis. The interest in sexual intimacies that may be parts of enduring personal bonds extends to John Lawrence. He shares the interest in independent personal decision-making that underlies the heterosexual couple’s decisions about family, marriage, and procreation; the difference is that he pursues this same basic interest in less conventional terms.

- What about the rational basis of anti-sodomy laws? The Court suggests, though it does not say as sharply as the dissent in *Bowers*, that even if there were no privacy right at stake, the statute would be unconstitutional: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” It denies that community morality provides a defensible rationale for the law, though—because of the

phrase “which can justify...”—it is not entirely clear that it intends a blanket ban on laws that impose community morality.

The opinion does not disparage the moral convictions of the majority: “The Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” In defending the conclusion that it may not, the opinion (along with the dissent in *Bowers*) makes two important points:

1. As a general matter, enforcing the status quo morality may reflect and reinforce deep-rooted prejudices. In June, 1958, two Virginians, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in Washington, DC, and then returned to live in Virginia. In late 1958, a grand jury charged them with violating Virginia’s ban on interracial marriages.<sup>7</sup> In January 1959, the Lovings pleaded guilty, and were sentenced to one year in jail; the trial judge suspended the sentence for 25 years on the condition that the Lovings leave the State for 25 years. “Almighty God,” he said, created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such

marriage. The fact that he separated the races shows that he did not intend for the races to mix.” After their convictions, the Lovings moved back to DC, and challenged the laws. In 1967, they won, in the case of *Loving v. Virginia*.

A majority of Virginians may have accepted the trial judge’s view. In 1958, 72 percent of southern whites—and more than 40 percent of Northern whites—supported a *legal ban* on interracial marriage, and may well have been deeply offended by interracial marriages. After all, if they genuinely believed what the judge stated, then such marriages would, in their eyes, have violated God's intention. But can these attitudes—themselves a reflection of slavery and racial apartheid—count as reasons for restricting conduct?

2. Failure to punish sexual practices of which the majority disapproves will not, contrary to certain allegations, lead to the collapse of morality quite generally: the web of social morality is neither so seamless nor so fragile.

In short, the importance of enforcing morality—to the extent that is important—is not so compelling as to outweigh the great burdens such enforcement imposes on independent personal decision-making.<sup>8,9</sup>

## 6. Marriage?

- Both the *no-connection thesis* and strong endorsement of the legal enforcement of sexual morality reemerge in a recent statement by the Vatican condemning gay and lesbian marriage: “There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law. Homosexual acts ‘close the

sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.” Does the Court’s rejection of the no-connection thesis and rejection of the enforcement of sexual morality imply that current marriage law is unconstitutional? Is it consistent to agree with the Court in thinking that the majority may not enforce its sexual morality through criminal law, while at the same time endorsing laws restricting marriage to heterosexual couples?

Two considerations might be advanced to support the contention that this position is at least consistent.

- A first consideration is that the criminal law is a different legal instrument than marriage law: marriage law confers a status with certain associated benefits; if you do not meet the conditions of the law, you are not imprisoned, but simply are not entitled to the benefits. So it might be said that, because of the special nature of criminal punishment—its particular burdensomeness—the community cannot justify making criminal laws based on its sexual morality, but that the community can express its sexual morality in other sorts of laws without imposing the same intrusion on personal liberty. Thus the fact that the majority would be trying to enforce its views “through operation of the criminal law” would be decisive.

I am skeptical that position has much to be said for it, for two reasons. First, the Court bases its decision on the importance of independent personal decision-making, and rejects the idea that, when it comes to addressing life’s sweet mysteries, state compulsion should play a role. But it is difficult to see how that is impermissible, while it is permissible for the majority to use other powerful

instruments of discouragement—like marriage law and associated incentives—to individuals who reject the dominant morality.

Second, difficulties emerge because a person in Virginia may say he is married—having been married in Vermont—but then get in trouble with the criminal law for misrepresenting his marital status for tax purposes or the purposes of an employment-related benefit plan.

The second consideration has more force, at least in principle. In particular, we need to allow that while restrictions on sexual conduct, of the kind reflected in the Texas law, have no rationale other than the enforcement of community morality, restrictions on same sex marriage have been defended on other, non-moralistic grounds as well. Consider again the statement by the Vatican: “As experience has shown, the absence of sexual complementarity in these [gay and lesbian] unions creates obstacles in the normal development of children who would be placed in the care of such persons. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children [by placing] them in an environment that is not conducive to their full human development.”

This assertion about what experience has shown is certainly a disputable proposition. But I refer to the passage to make a point of political philosophy: namely, that several different rationales are given for restrictive marriage laws, including moralistic reasons, and considerations about the good of children. So it will not do in rejecting them to show that one reason lacks sufficient weight to justify them. They may be unjustified, but a larger argument is needed to make that case.

## 7. The utilitarian case against enforcement?

Lets return now from *Bowers* and *Lawrence* to Bentham's utilitarianism. As a way back in, let me mention three lines of argument about the legal enforcement of morality.

- First: that moral reasons always provide some grounds for criminalization of conduct that conflicts with them. This view does not deny the value of protecting liberty, or say that the moral reasons for abridging it are always overriding. But it does deny that there are any fundamental rights that override the moral reasons for abridging them.

Second (the *Bowers* majority) that there are fundamental rights, and that those rights block the legal enforcement of morality. But when conduct is not protected by such rights, moral reasons suffice for regulating conduct.

Third: (the dissent in *Bowers* and perhaps the *Lawrence* majority): there are fundamental rights, but moral reasons should be filtered out of political justification, even when fundamental liberties are not at stake.

Now Bentham rejects the enforcement of morality. But the question I want to ask is: does his utilitarianism provide a strong basis for rejecting the first view in favor of either the second or third? Why isn't it plausible that aggregate utility maximization be achieved by endorsing a very permissive position about enforcing morality?

- To see why that might be so, consider Bentham's "pleasures of malevolence" or antipathy—pleasures in the pains of others, perhaps the pains of people whom we hate or whose conduct we disapprove of. We are often inclined

to think that such pleasures are simply irrelevant to the justification of policy—that the pleasures experienced by a racist who witnesses the sufferings of the target of a racist assault should not count in the deciding what to do. But that option of simply excluding pleasures is not available to Bentham: pleasures are pleasures, and their value is determined simply by their intensity and duration. Bentham, then, stakes his case for moral liberty not on any account of the special importance of personal liberty and a special case for protecting it but instead on the optimistic assumption that such pleasures are uncommon. “Happily,” he says, “there is no primeval and constant source of antipathy in human nature.”<sup>10</sup>

But Bentham does not really make a forceful case that these pleasures of malevolence are generally outweighed by the pains of punishment. As a result, it may often be profitable to severely punish behavior that violates common moral sensibilities. And threat posed by the pleasures of malevolence may extend well beyond moral liberty. No target of popular distaste will be secure. We may well have punishment for despised innocents, and restrictions on ethnic minorities who may be targets of hatred.

- A utilitarian might agree that there is trouble here, but argue that it comes not from the essential utilitarian idea that rightness is a matter of maximizing happiness, but derives instead from Bentham’s claim that the value of a pleasure is given entirely by its quantity, and the associated idea that the value of liberty is simply a matter of the quantities of pleasure it brings. That is what John Stuart Mill thought. Like Bentham, Mill is a utilitarian. But, he says, one pleasure can “be more valuable than another” on grounds of its “higher quality,” not simply its greater quantity.<sup>11</sup> This conception of higher and lower

quality pleasures could, Mill thought, provide the basis for a more compelling utilitarian account of the value of liberty and the true costs of restricting it—an account that would make the case for personal liberty turn less on optimistic assumptions about human antipathies, and more on an account of the special importance of liberty.

## Notes

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<sup>1</sup> *Griswold v. Connecticut, Eisenstadt v. Baird*

<sup>2</sup> *Roe v. Wade*

<sup>3</sup> See *Carey v. Population Services* 431 US 678, 685 (1977). (For all these cases, see <http://www.findlaw.com/casecode/supreme.html>).

<sup>4</sup> See 4920.

<sup>5</sup> Nor is there a constitutional basis for extending the constitutional understanding of privacy so that it does cover homosexual sodomy. See 4921-22 on "judge-made constitutional law."

<sup>6</sup> Justice Stevens wrote a second dissenting opinion.

<sup>7</sup> "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

<sup>8</sup> The dissent might also have noted that the principal reasons for condemning homosexuality as immoral have religious roots. According to Catholic Natural Law theory, homosexual conduct violates the divinely ordained purpose of sexuality, which is reproduction, and that it conflicts with the complementarity central to God's design of the universe. So in this case, there might also be reasons, rooted in constitutional concerns about religious establishment, for resisting a role for the moral justification

<sup>9</sup> The dissent, of course, nowhere asserts that the majority of Georgia is wrong in its assessment of homosexuality. Instead, it seeks to remain neutral on the moral question, and to base its argument principally on the priority of a constitutional commitment to personal liberty, together with a view about the kinds of reasons that suffice to justify state action. The 1998 Georgia Supreme Court decision is even more explicit on this point. They say that they would not condone the activity if they were asked. But they add: "While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity."

<sup>10</sup> *Introduction*, 6.27.22.

<sup>11</sup> See *Utilitarianism*, chap. 2, 5.