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R01 – Neil Ruiz
17.01J/24.04
03/17/06 (rewrite)

Justice by Mill

The principle aim of the United States Constitution is to protect the liberties of the individual in a fashion most beneficial to all parties. Yet, sometimes, personal prejudices or community morale lead to interpretations that are not always beneficial to the party in question. In the Supreme Court case *Bowers v. Hardwick*, the liberties of Hardwick are in question, and the Court ruled that he does not have the right to perform sodomy in the privacy of his own home. It is possible that in this case, another theory of justice would rule differently and better protect the rights of the individual. One such theory, Mill's Utilitarianism, aims to maximize the sum of total happiness in the community. Not only does Mill's utilitarianism back Hardwick in order to promote happiness, it also endorses freedom of expression, which Hardwick is practicing through the act of sodomy. Although the United States Constitution was written with the intention of protecting the personal liberties of individuals, in this situation, such is not the case. On the other hand, if this case had been judged based on the Mill's theories of utilitarianism, I believe the outcome would have been contrary to that of the Supreme Court.

In the case of *Bowers v. Hardwick*, respondent Hardwick was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the privacy of his own home. Hardwick claimed that criminalizing sodomy infringes upon his constitutional right to privacy in the First and Fourteenth amendments, which guarantees personal liberties. Although previous cases brought to the Court decided in favor of a constitutional right to privacy, the Court claims that those cases do

not bear any resemblance to the case at hand. They claimed that the fundamental liberties that require protection under the constitution are either “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed’” or “‘deeply rooted in this Nation’s history and tradition,’” neither of which are applicable to homosexual sodomy, as ruled by the Supreme Court (*Bowers v Hardwick*, paragraph 4). In response to the argument put forth by Hardwick claiming that his behavior should be acceptable in the privacy of his own home, the Court points out that “‘victimless crimes, such as possession and use of illegal drugs, do not escape the law where they are committed at home’” (*Bowers v Hardwick*, paragraph 8).

Mills puts forth several arguments that lead to the conclusion that the State does not have the right to criminalize sodomy. The first and most obvious is simply that the act of sodomy brings pleasure to those involved. The main goal of Utilitarianism is to increase the general happiness of the community. Since the act for which Hardwick has been convicted took place in the privacy of his own home, the fact that his acts may be considered wrong and disgusting in the eyes of the general public is not an issue because the community is unaware of the fact that the act occurred. Thus, it cannot be argued that the displeasure to Hardwick and his partner caused by prohibiting sodomy would be outweighed by the pleasure of the community in having condemned the behavior. Conversely, the happiness created by allowing Hardwick to perform such acts outweighs the discontentment of the community, who is ignorant of the events that transpire in Hardwick’s own home. Mill distinguishes between higher order pleasure brought by intellectual stimulation and lower order pleasure that brings happiness through other means. Although the act of sodomy may appear to be a lower order pleasure, I believe

that Mill would argue that the pleasure derived from a deep relationship between two individuals is a higher order pleasure. Also, by expressing his beliefs, Hardwick promotes discussion on the topic in the direction of the truth, and finding the truth is a higher order pleasure, according to Mill. Thus, if Mill's theory of utility were applied to this case, he would rule that the overall happiness of the community would be increased by allowing men to perform the act of sodomy.

It could also be argued that the knowledge that men are allowed to perform the act of sodomy, which is considered by most as immoral and disgusting, would cause great general displeasure. Yet, according to Mill, this displeasure, although great in quantity would be far outweighed by the displeasure brought upon Hardwick when forbidden to perform said acts, being of a higher order pleasure. As Mill claims, "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" (On Liberty, ch1, paragraph 13). Since Hardwick's deeds do not prevent others from pursuing good in their own way, these acts are justified in Mill's opinion. Clearly, when judging the general happiness involved in the situation, Mill's Utilitarianism would rule in favor of Hardwick.

One main point brought up by both the Supreme Court and the Vatican is that the belief that homosexuality is wrong has deep roots in history and thus must be a correct belief. Mill would be very much opposed to the concept that if our ancestors believed it, it must be the truth. Mill, as an example, brings up the stories of two historical figures persecuted for having different opinions that are now widely accepted. The first case is that of Socrates, who we know as the head and prototype of all subsequent teachers of

virtue and who was put to death by his countrymen for impiety and immorality. Another example is that of Jesus Christ, who was put to death as a blasphemer. These men were both punished for expressing their beliefs of what is true that the community was unwilling to accept. In Mill's belief, we should not punish Hardwick for his differing opinion on the basis that it has been thought wrong in the past, since in the past people could have had wrong beliefs.

With a more in depth look into Mill's Utilitarianism, another reason for allowing Hardwick the right to perform sodomy becomes apparent: the importance of freedom of expression. Mill places great emphasis on allowing human beings to express themselves freely, through both their speech and their actions. Mill proclaims, "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still" (On Liberty, ch.2, paragraph 2). His first reason for this belief is that there is no possible way for us to know if the opinion being stifled is not indeed true. Even if something has been thought wrong for centuries, there is still a chance that it could be the truth; people *knew* for centuries that the earth was flat, yet they were wrong. Mill would argue that Hardwick is merely expressing his belief that a relationship between two males is acceptable, and there is no reason to restrict him in this form of expression.

Mill also believes that by allowing all opinions to be heard, the true opinion becomes stronger, since only when an opinion has withstood all arguments against it can it be deemed true. As Mill eloquently states, "If an opinion is right, [people] are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of the truth, produced by its

collision with error” (On Liberty, ch2, paragraph 1). He further supports this concept when he claims that our beliefs are made stronger by the fact that people have the opportunity to disprove them but cannot (On Liberty, ch2, paragraph 9). As applied to the case at hand, Mill would claim that it is better for the whole community to allow Hardwick to express his homosexual beliefs, for it will either allow people to realize that his beliefs are the true beliefs or confirm that the classic heterosexual relationship is indeed the true life to lead. Thus, Mill would decree that it is absolutely necessary to allow Hardwick to continue performing male sodomy, because only through these actions will humanity come closer to the truth or confirm the truth and, thus, benefit immensely.

Another very important argument that Mill makes is that no matter the displeasure brought to others by allowing Hardwick’s conduct, his behavior is not bringing harm to anyone and, thus, should not be restricted. Mill’s harm principle explains that it is only acceptable to coerce a member of civilized community into acting against his will in order to prevent harm to others. It is unreasonable to force a person to take an action solely based on the belief that said action would be better for him, either physically or morally, or because others believe that he should act in such a way. It is acceptable to guide him with advice and suggestion but not to use force or threats (On Liberty, ch1, paragraph 9). Although the many refer to Hardwick’s homosexuality as unnatural and immoral, it is clear that Hardwick’s behavior is not directly harming anyone. Therefore, by Mill’s theories, he should not be compelled to modify his behavior.

It could very well be argued that a union between two men, with the potential of adopting a child, could be harmful to the psychological health of that youth. The Vatican fears that homosexuality could potentially spread like a disease if men were allowed to

practice it freely. According to Mill's views on freedom of expression, if an opinion cannot withstand opposition, then it must not be the truth. If allowing a few homosexual men to practice their beliefs spreads to the rest of humanity, then the heterosexual lifestyle must not be the true one, and we must allow the "right" way of life to spread. Also, since Hardwick is not harming anyone by his behavior, Mill believes that rather than punishing him or forcing him to behave like the rest of the community, people should use other means, such as persuasion and discussion to convince him that his behavior is wrong. Thus, in accordance with Mill's harm principle, Hardwick is perfectly justified to act in a manner that he sees fit and to discover his mistakes for himself.

The only way one could argue that Mill would agree with the Supreme Court's decision relates to his belief that, "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end" (On Liberty, ch1, paragraph 10). Mill might view homosexuals as uncivilized people, judging by their behavior that in the past has been considered unnatural and wrong. If so, then his beliefs on freedom of expression would not apply to Hardwick's case. Instead, he would think it is our duty to force Hardwick and others to follow a heterosexual lifestyle because doing such would improve their lifestyle greatly. With this point in mind, Mill would agree with the Supreme Court's ruling. Yet, I believe Mill's definition of barbarian would not include homosexuals, who are in every aspect of their lives just as civilized as the rest of their community.

It is quite apparent from the majority of the above points that Mill would strongly oppose the Supreme Court's decision on this case. He would believe that Hardwick has the right to express his own beliefs that bring no harm to the rest of the community and

that by contending popular belief, could potentially strengthen it. Mill would most likely find similar arguments to protect the religious liberties in contention in the Supreme Court cases of *Sherbert v. Verner* and *Employment Division v. Smith*. He believes in allowing people to pursue their own beliefs as long as they bring no harm to others and in insisting that opposing opinions exist in order to strengthen correct opinions or replace incorrect ones. Thus, in any case that questions the right of an individual to pursue his own path to happiness, Mill would find that as long as he does not cause any physical harm, the individual has the right, in accordance with the teachings of Utilitarianism, to not be restricted from acting in a manner that is not generally accepted by the community.