

## MORALITY TALES IN COMPARATIVE JURISPRUDENCE: WHAT THE LAW SAYS ABOUT SEX

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### Introduction

A debate that raged in Anglo-American jurisprudential circles more than fifty years ago is, in fact, alive and well today. The arguments made by the duelling legal philosophers Patrick Devlin and H.L.A. Hart are now heard in courtrooms, parliaments, and even the corridors of the United Nations. At issue is the role of morality in defining criminal offences and, specifically, whether public morality may be used to justify restrictions on personal conduct that has no harmful effects. The contours of this argument are seen most vividly in discussions about the regulation of sex and sexuality and the decriminalization of same-sex sexual conduct.<sup>1</sup>

Hart and Devlin were themselves treading over territory mapped out a century earlier by the political theorist John Stuart Mill and his principal critic, the jurist James Fitzjames Stephen, about the proper function of criminal law. Stephen argued that moral constraints produced social benefits and that the law should reflect prevailing moral beliefs because such laws would have more persuasive power.<sup>2</sup> According to Mill, however, “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>3</sup> This limitation on the coercive power of the state is known as the harm principle. Its closest judicial corollary is the notion of privacy.<sup>4</sup>

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<sup>1</sup> The laws at issue, often termed ‘sodomy laws,’ vary considerably. Some criminalise anal and/or oral sex, regardless of the sex of the partners. Some criminalise sexual conduct only if it is committed by same-sex partners. Terminology may be specific but is more often vague, as in ‘crimes against nature’ or ‘indecent practices between males.’ See generally, Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* (2008).

<sup>2</sup> See generally B. Harcourt, ‘The Collapse of the Harm Principle’, *Journal of Criminal Law and Criminology* 1999-90, pp. 109-194; J. Hill, ‘The Constitutional Status of Morals Legislation’, *Kentucky Law Journal* 2009-2010-98, p. 1; A. Ristroph, ‘Third Wave Legal Moralism’, *Arizona State Law Journal* 2010-2011-42, pp. 1151-1172; E. Tennen, ‘Is the Constitution in Harm’s Way? Substantive Due Process and Criminal Law’, *Boalt Journal of Criminal Law* 2004-8, p. 3; B. McDonnell, ‘Is Incest Next?’, *Cardozo Women’s Law Journal* 2004-10, p. 337; A. Fellmeth, ‘State Regulation of Sexuality in International Human Rights Law and Theory’, *William & Mary Law Review* 2008-50, pp. 890-907.

<sup>3</sup> J.S. Mill, *On Liberty* (1859) p. 9.

<sup>4</sup> The modern interpretation of privacy “protects certain kinds of activities because of their significance to the self, to one’s life pattern, or to one’s sense of personal identity. It is this latter interpretation which most closely approximates Mill’s harm principle and which poses a

While the harm principle has never been completely accepted as the sole limitation on the state's power to criminalise in any jurisdiction—and thus many states continue to prohibit conduct that fails Mill's test, such as recreational drug use, sadomasochism, suicide, polygamy, and adult consensual incest—the earliest critiques of sodomy laws were based on some version of Mill. Legislative reforms and legal challenges alike were animated by his ideas.

This article revisits the debate on morality and criminal law through the lens of recent court judgments concerning sexual orientation. In doing so, I examine how morals-based justifications for criminalisation are accepted or rejected by courts. The purpose is to trace the progression of an idea—should criminal law be used to enforce a popular conception of morality— and to analyse the use of privacy and equality arguments. Although early responses to morals-based justifications for criminalization relied heavily on the harm principle, as developed by Mill and Hart, and the corresponding values of privacy and autonomy, more recent judgments have emphasized equality and non-discrimination. This has potentially far-reaching implications for the use of morality outside of the criminalization of sexual conduct.

This article proceeds in four parts. Part One looks at the historical background. Part Two considers those cases in which morality-based justifications immunised laws criminalizing consensual same-sex conduct against constitutional challenges. Parts Three and Four evaluate the use of arguments based on privacy and equality respectively.

### **I. Historical Background**

In 1957 in the United Kingdom, the Departmental Committee on Homosexual Offences and Prostitution released its report, known as the Wolfenden Report after its chairman Sir John Wolfenden. It recommended decriminalizing "homosexual behaviour between consenting adults in private."<sup>5</sup> In Millian terms, the Wolfenden Committee described the function of criminal law as

to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or

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fundamental challenge to morals legislation." J. Hill, 'The Constitutional Status of Morals Legislation', *Kentucky Law Journal* 2009-2010-98 p. 19. Others have argued that there is no need for a right to privacy so long as all morals legislation is constitutionally suspect. See S. Bedi, 'Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete', *Cleveland State Law Review* 2005-2006-53, pp. 452-455.

<sup>5</sup> Report of the Departmental Committee on Homosexual Offences and Prostitution (1957) at para. 48.

mind, inexperienced, or in a state of special physical, official, or economic dependence.<sup>6</sup>

Most famously, the Wolfenden Report contained this line: “Unless a deliberate attempt be made by society through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.”<sup>7</sup> The recommendations of the Wolfenden Report were not adopted by Parliament until 1967, but its publication prompted a forceful critique from Devlin, then a Justice of the High Court, Queens Bench, and later a Lord of Appeal. Hart, a professor at Oxford University, disagreed with Devlin's legal moralism and responded with his own interpretation of Mill's harm principle.<sup>8</sup>

Devlin framed the question as: “What is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?”<sup>9</sup> Devlin argued that society depended on a shared, public morality and that society therefore had a right to make laws in defence of such morality. He dismissed the notion of a sphere of ‘private’ morality.

It is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.<sup>10</sup>

In short, Devlin believed that criminal law existed not only for the protection of individuals but also for the protection of society. Without laws to reflect and enforce morals, society would disintegrate. “Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.”<sup>11</sup> For Devlin, the morals underlying the law were derived from “the sense of right and wrong which resides in the community as a whole.”<sup>12</sup> Society's morals were “those standards of conduct which the

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<sup>6</sup> *Idem*, at para. 23.

<sup>7</sup> *Ibid.*

<sup>8</sup> See Sexual Offences Act 1967. Lord Devlin's response to the Wolfenden Report was contained in the Maccabaeen Lecture that he delivered to the British Academy in 1958. See P. Devlin, *The Enforcement of Morals*, Oxford: University Press 1959; H.L.A. Hart, *Law, Liberty and Morality*, Stanford: University Press 1963; P. Devlin, ‘Law, Democracy and Morality’, *University of Pennsylvania Law Review*, 1962-110, p. 635; Dworkin, ‘Lord Devlin and the Enforcement of Morals’, *Yale Law Journal* 1966-75, p. 986.

<sup>9</sup> Devlin, ‘Morals and the Criminal Law’, *The Enforcement of Morals*, Oxford: University Press 1965, p. 25.

<sup>10</sup> *Idem*, p. 37.

<sup>11</sup> *Idem*, p. 45.

<sup>12</sup> *Ibid.*

reasonable man approves.”<sup>13</sup> The reasonable man was also variously described as “the man in the street” or “the man in the Clapham omnibus.”<sup>14</sup>

Hart rejected the idea that Devlin’s ‘shared morality’ provided the justification for its own enforcement. In a series of lectures, Hart argued that the coercive force of the criminal law should not be used to enforce morality in the absence of other more tangible harms.<sup>15</sup> Thus for Hart the mere belief that certain kinds of sexual activity were immoral was not enough to justify their prohibition. Hart was especially critical of Devlin’s thesis that private acts of ‘immorality’ threatened social disintegration.

The Hart-Devlin debate was cast as an argument over the philosophical wisdom, rather than the constitutional legitimacy, of using morality as a basis for enacting criminal law. Nevertheless, from the very beginning, it was also a debate about whether the law should regulate private consensual sex between men. Lord Devlin used homosexuality as a hypothetical in his Maccabean Lecture, asking whether “we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.”<sup>16</sup> For Lord Devlin, the lawmaker’s function was to enforce morals and those morals were defined by, and perhaps synonymous with, widely held community standards.<sup>17</sup>

In Europe the Devlin-Hart argument over the criminalization of homosexuality was largely laid to rest by the European Court of Human Rights decision *Dudgeon v. United Kingdom* (1981) and its progeny, *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993). Clearly influenced by the thinking behind the Wolfenden Report, which it quoted, the European Court held in *Dudgeon* that criminalizing “homosexual acts in private” violated the applicant’s right to private life under Article 8 of the Convention. It accepted Northern Ireland’s argument that protection of public morals was a permissible aim of the law, but found that the interference with private life was disproportionate because there was “no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.”<sup>18</sup>

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<sup>13</sup> *Idem*, p. 47.

<sup>14</sup> *Idem*, p. 38.

<sup>15</sup> For a general summary of the Hart-Devlin debate, see B. Miller, ‘Morals Laws in an Age of Rights: Hart and Devlin at the Supreme Court of Canada’, *American Journal of Jurisprudence* 2010-55, p. 79; E. Tennen, ‘Is the Constitution in Harm’s Way? Substantive Due Process and Criminal Law’, *Boalt Journal of Criminal Law* 2004-8, p. 3; A. Fellmeth, ‘State Regulation of Sexuality in International Human Rights Law and Theory,’ *William & Mary Law Review* 2008-50, pp. 890-906.

<sup>16</sup> Devlin, *supra* note 8, p. 41.

<sup>17</sup> Devlin, ‘Law, Democracy, and Morality’, *University of Pennsylvania Law Review* 1962-110, p. 639.

<sup>18</sup> *Dudgeon v. United Kingdom*, ECHR, 22 October 1981, at para. 60.

The UN Human Rights Committee, the treaty-monitoring body for the International Covenant on Civil and Political Rights, followed suit in the case of *Toonen v. Australia*.<sup>19</sup> Interpreting Article 17 of the Covenant, the Human Rights Committee found that Tasmania's sodomy laws constituted an arbitrary and unjustified interference with the right to privacy. It rejected Tasmania's argument that "moral issues" were "exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."<sup>20</sup>

Despite these decisions from the European Court of Human Rights and the Human Rights Committee delineating a zone of privacy—at least for consensual, non-harmful, adult sex and thus appearing to enshrine the harm principle—morals-based legislation is far from dead. Seventy-six countries criminalise same-sex sexual activity and, of those, five countries and parts of Nigeria impose the death penalty.<sup>21</sup> When new laws are introduced to criminalise certain sexual conduct or increase penalties, lawmakers often cite the need to preserve traditional morality.<sup>22</sup> The ghosts of legal philosophers continue to haunt today's judicial decisions concerning the decriminalization of same-sex sexual conduct.<sup>23</sup>

## II. The Triumph of Morality

Public disapproval of private same-sex sexual behaviour—the morality justification—was accepted in US courts until relatively recently and is still accepted in other national courts today. It is also a dominant theme in discourse around sexual orientation. This part of the article studies decriminalization cases from the United States, Zimbabwe, and Botswana, but constitutional challenges have been heard, with varying success, in Nepal, Malaysia, Fiji, Hong Kong, and Singapore, and cases are pending or planned in a number of other countries.

In the United States, prior to the 1986 Supreme Court case *Bowers v. Hardwick*, it appeared as if Hart and Mill might gain the upper hand. The American Law Institute adopted a new model penal code in 1962 that

<sup>19</sup> *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994.

<sup>20</sup> *Toonen v. Australia*, at para 8.6.

<sup>21</sup> D. Ottosson, *State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, Brussels: ILGA 2010.

<sup>22</sup> See, e.g., National Assembly, Democratic Republic of Congo, *Proposed Law Concerning Sexual Practices Against Nature*, (introduced in October 2010): S. Long, 'Anatomy of a Backlash: Sexuality and the 'Cultural' War on Human Rights', *Human Rights Watch World Report 2005*.

<sup>23</sup> And not just courts. For a description of the Hart-Devlin debate replayed at the parliamentary level, see Y. Lee, 'Don't Ever Take a Fence Down Until You Know the Reason it Was Put Up: Singapore Communitarianism and the Case for Conserving 377A', *Singapore Journal of Legal Studies* 2008, p. 347; K. Amirthalingam, "Criminal Law and Private Spaces: Regulating Homosexual Acts in Singapore," in B. McSherry, A. Norrie & S. Bronitt, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, UK: Hart Publishing 2008, pp. 185-214.

conspicuously omitted sodomy from the list of sexual offences. The comments to an early draft explained: "The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behaviour that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences."<sup>24</sup>

Over the next twenty years, American state courts heard challenges to sodomy laws based on state constitutional provisions. In 1980, two state supreme courts reprising the arguments of Mill, the Wolfenden Report and H.L.A. Hart, struck down laws criminalizing "deviate sexual intercourse." In *People v. Bonadio*, the Supreme Court of Pennsylvania declared: "With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others."<sup>25</sup> The court emphasised that the "concepts underlying our view of police power" had been previously summarised by Mill. It quoted *On Liberty* at length and then concluded: "This philosophy, as applied to the regulation of sexual morality presently before the Court...properly circumscribes state power over the individual."<sup>26</sup>

Similarly, in *People v. Onofre*, the Supreme Court of New York reasoned:

There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality . . . So here, the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behaviour out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.<sup>27</sup>

The issue, however, was far from settled. The harm principle was not everywhere ascendant. A significant number of American states continued to criminalise sodomy (defined either in terms of anal or oral sex or in terms of the sex of the partners) and many other state constitutional challenges failed. The issue reached the U.S. Supreme Court in 1986.<sup>28</sup> In *Bowers v. Hardwick*, the petitioner's federal constitutional challenge to Georgia's statute criminalizing sodomy argued in part that the law could not survive rational basis review because the only rationale was the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and

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<sup>24</sup> MPC at para. 207.1, comment at 207 (Tentative Draft No. 4, 1955)

<sup>25</sup> 415 A.2d 47, 50, Supreme Court of Pennsylvania 1980.

<sup>26</sup> 415 A.2d 47, 50, Supreme Court of Pennsylvania 1980, p. 96-98.

<sup>27</sup> 415 N.E.2d 936, 952, Court of Appeals of New York 1980.

<sup>28</sup> *Bowers v. Hardwick*, 478 U.S. 186, U.S. Supreme Court 1986.

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unacceptable.”<sup>29</sup> This, the petitioner argued, was inadequate. Both the majority opinion, per Justice White, and Justice Burger’s concurrence firmly disagreed. The law, wrote Justice White, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”

In order to determine whether ‘consensual sodomy’ was within the fundamental liberties protected by the Constitution, Justice White asked whether it was “deeply rooted in this Nation’s history and tradition.”<sup>30</sup> He noted that “proscriptions against that conduct have ancient roots.”<sup>31</sup> Reviewing the sodomy laws of the original thirteen States when the Bill of Rights was adopted, as well as the thirty-seven States in existence when the Fourteenth Amendment was adopted, he concluded: “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>32</sup> For the *Bowers* majority, tradition not only determined whether ‘consensual sodomy’ was a fundamental liberty. It also served as evidence of longstanding moral condemnation and thus as confirmation that prohibition through criminal sanction was a necessary or at least a constitutional function of the law. This use of tradition is made even clearer by Chief Justice Burger in his concurrence.

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.<sup>33</sup>

Justice Blackmun’s dissent is well noted for its stirring defence of privacy in both its physical and decisional dimensions. But he also attacked the assertion of morals as a sufficient rationale. He observed that nothing in the evidentiary record supported the Court’s linkage of private sexual activity with the possession of ‘drugs, firearms, or stolen goods,’ activities that presented well-known harms. By contrast, there was no harm asserted by the State to justify the criminal law at issue. Rather, “petitioner argues, and the Court agrees, that the fact that the acts described in § 16-6-2 ‘for hundreds of years, if not thousands, have been uniformly condemned as immoral’ is a sufficient reason to permit a State to ban them today.”<sup>34</sup> To have no better reason for a law was, in Justice Blackmun’s words, revolting. The fact that the law had religious

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<sup>29</sup> *Bowers v. Hardwick*, p.196. Note that, despite the Court’s wilful myopia, the sodomy statute at issue criminalised both same and opposite-sex sexual acts.

<sup>30</sup> *Bowers v. Hardwick*, p. 192.

<sup>31</sup> *Bowers v. Hardwick*, p. 192.

<sup>32</sup> *Bowers v. Hardwick*, p. 194.

<sup>33</sup> *Bowers v. Hardwick*, p. 197-198.

<sup>34</sup> *Bowers v. Hardwick*, p. 210.

origins made it even more suspect. “A State can no more punish private behaviour because of religious intolerance than it can punish such behaviour because of racial animus. ‘The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’”<sup>35</sup> Finally, noted Blackmun, there was no real argument that private sexual acts harmed others. “The mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.”<sup>36</sup>

It is easy to see *Bowers v. Hardwick* as Hart-Devlin redux.<sup>37</sup> On the one side there is the notion that law is an extension of morality and that it may be used to criminalise what is morally condemned. On the other is the notion of the autonomous self, protected from interference by the State, so long as both the activity and the location are essentially private. As Justice Blackmun wrote, “The concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’”<sup>38</sup> Blackmun quoted Hart to the effect that the failure to punish ‘some private sexual practice’ would not cause society’s downfall.<sup>39</sup> By contrast, Justice White did not argue that homosexuality was harmful and could be banned on that basis. Rather, he argued that a society could choose to criminalise conduct solely on the basis of morality. Thus the majority and dissenting opinions disagreed not just about American constitutional doctrine and the content of the Due Process Clause of the Fourteenth Amendment, they also articulated fundamentally different philosophies about the purpose of criminal law.

Halfway around the world, the Supreme Court of Zimbabwe and the Court of Appeals of Botswana reached similar conclusions in their analyses of constitutional challenges to the sodomy laws in those countries. Like *Bowers*, both opinions relied heavily on legal moralism. Although appellants asserted claims based on constitutional non-discrimination and equality provisions, rather than privacy, the issue of traditional morality as a sufficient justification was squarely confronted.

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<sup>35</sup> *Bowers v. Hardwick*, pp. 211-212 (quoting *Palmore v. Sidoti* 466 U.S. 429 (1984) –rejecting rationale of social racism and prejudice to justify denial of custody to a mother who had married a man of a different race.)

<sup>36</sup> *Bowers v. Hardwick*, p. 213.

<sup>37</sup> See A. Goldstein, ‘History, Homosexuality and Political Values, Searching for the Hidden Determinants of *Bowers v. Hardwick*’, *Yale Law Journal* 1988-97, p. 1073. Justice Blackmun’s former law clerk noted that his dissent “borrowed much of its perspective from H.L.A. Hart’s position in the famous debate about the Wolfenden Commission’s recommendation that Great Britain decriminalise sodomy.” See P. Karlan, ‘A Tribute to Justice Harry A. Blackmun’, *Harvard Law Review* 1994-108, p. 16.

<sup>38</sup> *Bowers v. Hardwick*, p. 204.

<sup>39</sup> *Bowers v. Hardwick*, p. 212.

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In *Banana v. State*, a 4-2 majority of the court held that the common law crime of sodomy did not violate the constitutional prohibition on discrimination on the ground of gender.<sup>40</sup> As in *Bowers*, Justice McNally, writing for the majority, began with the history lesson. He observed that “consensual sodomy, along with a number of other sexual activities which were regarded as immoral, were dealt with by the ecclesiastical courts.”<sup>41</sup> Not until 1533 were they brought under the jurisdiction of the secular courts. In other words, they were originally sins, not crimes. Since then, he noted, there had been a tendency in the western world to reverse that process, such that activities once deemed criminal were now considered only sinful. “Criminal sodomy has, in many but not all parts of the western world, joined that drift from crime to sin to acceptable conduct.”<sup>42</sup>

Justice McNally framed the question as one that could be answered by majority public opinion. “From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete. . . . From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe’s sexual conservatism in sexual matters.”<sup>43</sup> According to Justice McNally, the “social norms and values of Zimbabwe” did not require the court to decriminalise consensual sodomy. With this in mind, he then turned to the constitutional argument of non-discrimination.<sup>44</sup> Section 23 of the Constitution provided in part that laws that discriminated on the basis of gender were only in contravention of the Constitution if they were not shown to be reasonably justifiable in a democratic society.

Assuming for the sake of argument that the criminalization of consensual sodomy was in fact disparate treatment on the basis of gender, Justice McNally next asked whether it was reasonably justifiable in a democratic society.

I do not believe it is the function or right of this court, undemocratically appointed as it is, to seek to modernise the social mores of the state or of society at large... Zimbabwe is a conservative society on questions of sexual morality and the court should not strain to interpret provisions in the Constitution which were not designed to put Zimbabwe among the front-runners of liberal democracy in sexual matters.<sup>45</sup>

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<sup>40</sup> The common law definition of sodomy in Zimbabwe is “unlawful intentional sexual relations per anum between two human males.” Consensual sexual acts between women were not a criminal offence nor was anal sex between a man and a woman. See *Banana v. State* (2000) 4 LRC 621, p. 641.

<sup>41</sup> *Banana v. State*, p. 670.

<sup>42</sup> *Banana v. State*, p. 670.

<sup>43</sup> *Banana v. State*, p. 673.

<sup>44</sup> Because the privacy argument had not been fully developed by petitioner and because the Court considered it only as protection from search and seizure, it did not receive detailed examination.

<sup>45</sup> *Banana v. State*, p. 644.

In other words, the only justification for the law and the only justification needed was the public morality of Zimbabweans.

The dissent, authored by Chief Justice Gubbay, argued that the common law offence discriminated on the basis of gender, because sexual acts between females were not criminalised, and that the discrimination was not reasonably justified in a democratic society. Was the legislative objective sufficiently important to override the fundamental right to be free from discrimination? The objective of the criminal law was “to discourage conduct regarded as ... immoral, shameful and reprehensible and against the order of nature.” Chief Justice Gubbay accepted the need to criminalise some acts that would amount to a perversion of the natural order and cited bestiality as an example. But he found that here the legislative objective was not so important as to justify outweighing the protection against discrimination.

It may well be that the majority of people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask, ‘By whose moral values is the state guided?’<sup>46</sup>

The dissent then quoted Ronald Dworkin’s dissection of homophobia as compound of prejudice, rationalization, and personal aversion. “If so, the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another’s freedom, itself occupies a critical and fundamental position in our popular morality.”<sup>47</sup>

Like Dworkin, Justice Gubbay was “not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be acceptable.”<sup>48</sup> He recalled the anti-majoritarian function of the court, which included protecting the rights of “marginalized members of society.” Justice Gubbay’s dissent thus squarely rejected the use of the law for the “enforcement of private moral opinions.”<sup>49</sup>

In *Kanane v. State* (2003), a unanimous Court of Appeal upheld Botswana’s laws criminalizing same-sex sexual conduct.<sup>50</sup> As in *Banana*, this was treated essentially as a manner of public opinion. Rather than asking whether the laws at issue were discriminatory, the court asked “whether in Botswana at the present time the circumstances demand decriminalisation?” The Court

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<sup>46</sup> *Banana v. State*, p. 645.

<sup>47</sup> *Banana v. State*, p. 645 (quoting Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press 1978).

<sup>48</sup> *Banana v. State*, p. 646.

<sup>49</sup> *Banana v. State*, p. 648.

<sup>50</sup> *Kanane v. State*, 2003 (2) BLR 64.

answered this question in the negative. There was no evidence that “public opinion in Botswana has so changed and developed that society in this country demands such decriminalization.” Judge Tebbutt wrote: “I am of the view that while the courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature... The public interest must therefore always be a factor in the court’s consideration of legislation, particularly where such legislation reflects a public concern.” It was for the legislature, not the Court, to decide what conduct to criminalise. “In making such a decision parliament must inevitably take a moral position in tune with what it perceives to be the public mood.”

In these three courts, the majority opinions hew fairly closely to the Devlin line of reasoning. Criminal law may prohibit that which the majority—the reasonable man—disapproves. Objective harm is not required as a justification for the exercise of the state police power. The dissenting views of Justices Blackmun and Gubbay rely on the concepts of privacy and autonomy and reject the role of public morality in determining what conduct may be criminalised by the state. In these cases, however, the privacy argument fails and morality, the contours of which are determined by tradition and public opinion, prevails.<sup>51</sup>

### III. Privacy and the Rejection of Morals-Based Arguments

Over a little more than a decade, in three very different contexts, courts rejected the public morality rationale for sodomy laws. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), *Lawrence v. Texas* (2003), and *Naz Foundation v. Union of India* (2009) were constitutional challenges to laws that criminalised same-sex sexual conduct. Equality and privacy were significant in all three cases. This part looks at the privacy response to the public morality justification.<sup>52</sup> A close reading of these courts’ use of privacy shows that it is informed by a sense of the limit on the state power to criminalise that is derived from Hart.

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<sup>51</sup> Justice Gubbay’s dissent, however, was influential in the case of *Secretary for Justice v. Yau Yuk Lung Zigo and Another*, Hong Kong Court of Appeal, 20 September 2006. In rejecting the justification of public morality for a law that criminalised only ‘homosexual buggery’ not in private, the court noted that it preferred Justice Gubbay’s explanation of “why conservatism may in fact be unacceptable entrenched prejudice.” See *Kanane v. State*, at para. 17.

<sup>52</sup> This dichotomy is of course artificial. As Justice Sachs wrote, “[F]rom the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws.” *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Constitutional Court of South Africa, 9 October 1998 (*NCGLE*) at para. 112. Similarly Justice Kennedy recognised that the due process (privacy) and equal protection analyses were inextricably linked. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.” *Lawrence v. Texas*, 539 U.S. 558, U.S. Supreme Court, 26 June 2003, p.575. I am however treating them separately here to focus on two different responses to legal moralism: the privacy argument and the equality argument.

In 1994 South Africa became “the first country in the world to grant explicit constitutional-level protections to gays and lesbians.”<sup>53</sup> Both the interim and final constitutions of the newly democratic South Africa provided explicit protection against discrimination on the basis of sexual orientation. But the landmark case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* relied as well on the constitutional values of dignity and privacy. Justice Ackermann’s majority opinion and Justice Sachs’ concurrence found unpersuasive the legislative rationale for South Africa’s common law and statutory prohibitions on anal sex between men. Their reasoning relies in part on the harm theory of criminal lawmaking. Justice Ackermann wrote that criminalizing the “private conduct of consenting adults which causes no harm to anyone else” had no purpose other than to criminalise conduct that “fails to conform with the moral or religious views of society.”<sup>54</sup> Such “private moral views” did not qualify as a “legitimate purpose.”<sup>55</sup>

Concurring, Justice Sachs observed that criminal laws typically punished conduct “when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury.” But male homosexuality was punished “for its perceived symbolism rather than because of its proven harm.”<sup>56</sup> While Justice Sachs noted that the Constitution protected the right of individuals to hold views condemning homosexuality, it “does not allow the state to turn these beliefs into dogma imposed on the whole of society.”<sup>57</sup>

In 2003 the U.S. Supreme Court heard its second challenge to a state sodomy law.<sup>58</sup> In overturning *Bowers* on substantive due process (i.e., liberty) grounds, Justice Kennedy’s majority opinion in *Lawrence* proceeded on several tacks. He critiqued *Bowers* for misapprehending the right at issue. Rather than a fundamental right “to engage in homosexual sodomy”<sup>59</sup> it was the right to liberty, protected by the Due Process Clause of the Fourteenth Amendment, which included the liberty of adults to enter into intimate personal relationships “in the privacy of their own homes and their own private lives.”<sup>60</sup> Liberty “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>61</sup>

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<sup>53</sup> E. Christiansen, ‘Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process’, *New York University Journal of International Law and Politics* 2000-21, pp. 997-999.

<sup>54</sup> *NCGLE*, at para. 26.

<sup>55</sup> *NCGLE*, at para. 37.

<sup>56</sup> *NCGLE*, at para. 108.

<sup>57</sup> *NCGLE*, at para. 137.

<sup>58</sup> *Lawrence v. Texas*, pp. 576-577.

<sup>59</sup> *Bowers v. Hardwick*, p. 191.

<sup>60</sup> *Lawrence v. Texas*, p. 567.

<sup>61</sup> *Lawrence v. Texas*, p. 572.

As for the *Bowers* Court contention that tradition could determine the content of the liberty protected by the Constitution, Justice Kennedy first questioned the factual accuracy of its description of tradition. He pointed out numerous counter-examples undermining the 'evidence' put forward by the majority and concurrence in *Bowers*. In the end, however, he conceded that the historical record would always be contested and he argued that it was not ultimately determinative.

It must be acknowledged, of course, that 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 behaviour, 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. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'<sup>62</sup>

Not surprisingly, this assertion was vigorously denied by Justice Scalia in dissent.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behaviour are "immoral and unacceptable," *Bowers, supra*, at 196, 106 S.Ct. 2841-the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante*, at 2484 (emphasis added). The Court embraces instead Justice STEVENS' declaration in his *Bowers* dissent, that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,' " *ante*, at 2483. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.<sup>63</sup>

In 2009, the Delhi High Court decided a constitutional challenge to Section 377 of the Indian Penal Code. Finding it unconstitutional on multiple grounds, the court read down the portion of Section 377 that applied to consensual adult

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<sup>62</sup> *Lawrence v. Texas*, p. 571 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

<sup>63</sup> *Lawrence v. Texas*, p. 599.

same-sex sexual conduct. Defending the statute, the Home Affairs Ministry argued that it was a valid interference with rights in the interest of, among other things, protection of public morals. In short, Indian society's disapproval of homosexuality was strong enough to justify it being treated as a criminal offence even when practiced in private between consenting adults.

The Delhi High Court based the right to privacy on earlier jurisprudence concerning Article 21, which protected the right to life and personal liberty. It framed the issue as whether the enforcement of morality was a State interest sufficient to justify infringement of the right to privacy. When a fundamental right is infringed, the law infringing it must pass the compelling state interest test. Citing *Lawrence v. Texas*, *Dudgeon v. United Kingdom*, and *Norris v. Ireland*, the Court held that "enforcement of public morality does not amount to a compelling state interest to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others."<sup>64</sup>

The Court quoted at some length the Wolfenden Report's description of the function of criminal law. It then addressed directly the government's morality rationale:

Insofar as the basis of this argument is concerned, as pointed out by the Wolfenden Committee, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy.<sup>65</sup>

Despite the sweeping language about privacy and the application of the harm principle found in all three decisions, it is doubtful that we have really seen the end of morality legislation. In India, following *Naz Foundation*, one commentator pointed out that the Indian Penal Code "is replete with offences that are fundamentally grounded in the protection of public morality" and listed both gambling and bigamy prohibitions as examples.<sup>66</sup> The task for courts was not to reject public morality but to determine those points where it diverged from constitutional morality.<sup>67</sup>

Cases in South Africa post *National Coalition* and in the United States post *Lawrence* make clear that the courts do not protect all adult, consensual, private sexual conduct from state interference and that morals based justifications are not dead. In *Jordan v. State*, the Constitutional Court of South Africa upheld the *Sexual Offences Act* (criminalizing commercial sex work)

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<sup>64</sup> *Naz Foundation v. Government of NCT of Delhi*, High Court of Delhi at New Delhi, 2 July 2009, at para. 75.

<sup>65</sup> *Naz Foundation*, at para. 86.

<sup>66</sup> R. Sharma, 'The Public and Constitutional Morality Conundrum: A Case-Note on the *Naz Foundation* Judgment,' *NUJS Law Review* 2009, pp. 448-449, 453.

<sup>67</sup> *Idem*, p.451.

against challenges based on human dignity and privacy. In distinguishing the case from *National Coalition*, Justice Ngcobo emphasised that the heart of the violation there was “the right of gay people not to be discriminated against unfairly.”<sup>68</sup>

In the United States courts have, for example, found constitutional laws prohibiting the sale of sexual devices, adult consensual incest, and bigamy.<sup>69</sup> Thus in *Williams v. Morgan*, the Court of Appeals for the Eleventh Circuit rejected the contention that the *Lawrence* Court had recognised a fundamental right of adults to engage in private consensual sexual conduct. “Because we find that public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*, we affirm.”<sup>70</sup> In *State v. Lowe*, the court stated: “*Lawrence* did not announce a ‘fundamental’ right to all consensual adult sexual activity, let alone consensual sex with one’s adult children or stepchildren.”<sup>71</sup> In upholding a prosecution for bigamy, the Supreme Court of Utah observed that the defendant had “misconstrue[d] the breadth of the *Lawrence* opinion.”<sup>72</sup>

#### IV. Equality and the Unmasking of Morals-Based Arguments

In *Lawrence*, *National Coalition*, and *Naz Foundation*, the twin constitutional norms of equality and non-discrimination were also used to find the laws unconstitutional.<sup>73</sup> The use of equality to strike down laws criminalizing same-sex sexual conduct is fundamentally different from the use of privacy. The use of equality shifts the terms of the debate from being one about the right to have sex (“express one’s sexuality”) to one about the right to “equal respect for difference.”<sup>74</sup>

South Africa and India have self-consciously transformative constitutions.<sup>75</sup> Constitutional lawmaking in both countries is writ against a backdrop of painful

<sup>68</sup> *Jordan v. The State*, Case CCT 31/01, 9 October 2002, at para. 27.

<sup>69</sup> See M.J. Hooi, ‘Substantive Due Process: Sex Toys After *Lawrence*’, *Florida Law Review* 2008-60, pp. 507-518.

<sup>70</sup> *Williams v. Morgan*, 478 F.3d 1316, 1318, U.S. Court of Appeals for the 11th Circuit, 14 February 2007.

<sup>71</sup> *State v. Lowe*, 861 N.E. 2d 512, 517, Supreme Court of Ohio, 28 February 2007.

<sup>72</sup> *State v. Holm*, 137 P.3d 726, 742-743, Supreme Court of Utah, 16 May 2006.

<sup>73</sup> In *Lawrence*, this was primarily in Justice O’Connor’s concurrence, based on the Equal Protection Clause, but Justice Kennedy’s majority opinion also is heavily grounded in notions of equality. “*Lawrence*’s words sound in due process, but much of its music involves equal protection.” C. Sunstein, ‘What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage,’ *Supreme Court Review* 2003-55, p. 27.

<sup>74</sup> *NCGLE*, at para. 112 (J. Sachs Concurrence).

<sup>75</sup> See, e.g., *Naz Foundation*, at para. 80 (describing Indian constitution as document intended to foster ‘social revolution’ by creating an egalitarian society). For more on transformative constitutions, see V. Sripathi, ‘Constitutionalism in Indian and South Africa: A Comparative Study from a Human Rights Perspective’, *Tulane Journal of International and Comparative Law* 2007-16, pp. 49-116; E. Christiansen, ‘Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice’, *Journal of*

historical memory. In both *National Coalition* and *Naz Foundation*, the courts made explicit reference to national experiences of subjugation and exclusion. Justice Ackermann compared the sodomy offence to apartheid legislation that rendered lives “perpetually at risk.”<sup>76</sup> Justice Sachs was even more emphatic:

It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled, an issue central to the present matter.<sup>77</sup>

The acknowledgement of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.<sup>78</sup>

The Delhi High Court made similar use of the past when it referred to the criminalization of certain castes under the Criminal Tribes Act, 1871 during the colonial period. Although this was used specifically as an example of stigmatization of the *hijra* (eunuch) community, the larger point was also made: “These communities and tribes were deemed criminal by their identity, and mere belonging to one of these communities rendered the individual criminal.”<sup>79</sup> The Court recalled the injunction of Nehru: “No tribe can be classed as criminal as such.”<sup>80</sup> Later the Court stated, “A provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed” under the Constitution.<sup>81</sup> As with equality clauses in other constitutions, Article 14 of the Indian Constitution permits differential treatment if it is rationally related to the objective sought. The Court concluded that the law here was arbitrary because its distinction between same-sex sexual conduct and opposite-sex sexual conduct was not based on any rational criteria.

The two courts also appealed to a broader vision of the public good, defined as a ‘morality’ grounded in constitutional values. After rejecting public morals as a basis for limiting rights, the Constitutional Court of South Africa affirmed instead ‘political morality.’

[T]he Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it

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*Gender, Race and Justice* 2010-13, pp. 575-614; C. Sunstein, *Designing Democracy: What Constitutions Do*, USA: Oxford University Press 2001.

<sup>76</sup> *NCGLE*, at para. 28

<sup>77</sup> *NCGLE*, at para. 131.

<sup>78</sup> *NCGLE*, at para. 134.

<sup>79</sup> *Naz Foundation*, at para. 50.

<sup>80</sup> *Naz Foundation*, at para. 50.

<sup>81</sup> *Naz Foundation*, at para 113.

enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.<sup>82</sup>

The Delhi High Court made an analogous pronouncement: “If there is any type of ‘morality’ that can pass the test of compelling state interest, it must be constitutional morality and not public morality . . . In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.”<sup>83</sup>

In both South Africa and India the courts recognised that the claimed public morality might be nothing more than a mask for a particularly insidious form of prejudice, cloaked in the guise of tradition. It is not just that the criminalization of sex constitutes discrimination. It is also that the justification itself is “based to a large extent on nothing more than prejudice.”<sup>84</sup> The Delhi High Court, rejecting the public morality rationale, stated:

Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people.<sup>85</sup>

The United States, of course, does not share a history of colonialism with India or apartheid with South Africa. But its experience with slavery and systemic racial inequality influenced the development of its equal protection jurisprudence.<sup>86</sup> In *Lawrence*, the majority opinion authored by Justice Kennedy, struck down Texas’ sodomy statute because it infringed petitioners’ right to liberty under the Due Process Clause. In doing so, the Court overruled *Bowers*. But Justice Kennedy acknowledged the connection between equality of treatment and “conduct protected by the substantive guarantee of liberty.”<sup>87</sup>

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma night

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<sup>82</sup> *NCGLE*, at para. 136.

<sup>83</sup> *NCGLE*, at paras. 79, 86.

<sup>84</sup> *NCGLE*, at para. 37.

<sup>85</sup> *Naz Foundation*, at para. 91.

<sup>86</sup> At least two of *Lawrence*’s many antecedents are cases that dealt with racial classifications. One is *Loving v. Virginia*, which was quoted by Justice Stevens in his dissent in *Bowers*. In *Loving*, the Supreme Court struck down a state law prohibiting interracial marriages. Justice Stevens recalled: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice: neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” *Bowers v. Hardwick*, p. 216 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The other is *Plessy v. Ferguson*, in which Justice Harlan, dissenting, stated that the Constitution “neither knows nor tolerates classes among citizens.” 163 U.S. 537, 559. This line was quoted by Justice O’Connor in her *Lawrence* concurrence and is also the first sentence of Justice Kennedy’s opinion in *Romer v. Evans*, the case that directly paved the way for *Lawrence*.

<sup>87</sup> *Lawrence v. Texas*, p. 575.

remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.<sup>88</sup>

Justice O'Connor's concurrence was based on the Equal Protection Clause of the Fourteenth Amendment. The statute at issue in *Lawrence* only criminalised 'deviate sexual intercourse' between partners of the same sex. Sodomy between opposite-sex partners was not a crime. Thus Texas treated the same sexual conduct differently based solely on the sexual orientation of the participants. Moral disapproval, wrote Justice O'Connor, was not a legitimate state interest to justify "by itself a statute that bans homosexual sodomy, but not heterosexual sodomy."<sup>89</sup>

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behaviour. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>90</sup>

For O'Connor, the morality asserted by Texas in its defence was nothing more than animosity towards the group "closely correlated" with the conduct at issue.

*Lawrence* did not occur in a vacuum. Several years earlier – in a case quoted by both the Indian and South African courts – the US Supreme Court signalled that the justifications accepted in *Bowers* might be crumbling. In *Romer v. Evans*, the Court considered the validity of an amendment to the constitution of the state of Colorado which prohibited all legislative, executive or judicial action intended to protect people on the basis of their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."<sup>91</sup> The amendment was sweeping in effect.

Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and

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<sup>88</sup> *Lawrence v. Texas*, p. 575.

<sup>89</sup> *Lawrence v. Texas*, p. 582.

<sup>90</sup> *Lawrence v. Texas*, p. 583 (citations omitted).

<sup>91</sup> *Romer v. Evans*, 517 U.S. 620, 624, U.S. Supreme Court, 20 May 1996.

governmental spheres. The 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.<sup>92</sup>

A legislative classification must of course bear a rational relationship to an independent and legitimate legislative end. This requirement ensures that “classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>93</sup> The Supreme Court quickly concluded that the amendment at issue failed to pass constitutional muster. “[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a legitimate relationship to legitimate state interests.”<sup>94</sup>

If 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.<sup>95</sup>

The majority opinion does not mention morality. In dissent, Justice Scalia took the ‘bare desire to harm’ identified by the majority and named it ‘morality.’ At first he described the legislative purpose as “a modest attempt by ... Coloradans to preserve traditional sexual mores.”<sup>96</sup> He argued that if conduct could be criminalised— which *Bowers*, still good law in 1996, had confirmed— then surely classifications could be drawn on the basis of sexual orientation, which bore a reasonable if not imperfect relationship to criminal sexual conduct.<sup>97</sup> But, after conflating status and conduct, he asserted that the law at issue was only ‘animus’ directed at conduct and not at persons.

Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*... Coloradans are, as I say, entitled to be hostile toward homosexual conduct ...<sup>98</sup>

Similar ‘animus’ could be directed at “murder, for example, or polygamy, or cruelty to animals.”<sup>99</sup> For Justice Scalia, the majority wrongly equated moral disapproval of homosexual conduct with racial and religious bigotry. Instead, “homosexuals” should be considered akin to any other group that engages in

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<sup>92</sup> *Idem*.

<sup>93</sup> *Romer v. Evans*, p. 633.

<sup>94</sup> *Romer v. Evans*, 517 U.S., p. 633

<sup>95</sup> *Romer v. Evans*, 517 U.S., p. 633

<sup>96</sup> *Romer v. Evans*, 517 U.S., p. 636.

<sup>97</sup> *Romer v. Evans*, 517 U.S., p. 642 (“If it is rational to criminalize conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”).

<sup>98</sup> *Romer v. Evans*, 517 U.S., p. 644.

<sup>99</sup> *Romer v. Evans*, 517 U.S., p. 644.

some activity disfavoured by the majority, such as “drug addicts, or smokers, or gun owners, or motorcyclists.”<sup>100</sup> Thus, where the majority saw class-based discrimination, the dissent saw only legitimate moral condemnation of conduct.

In her concurrence in *Lawrence*, Justice O’Connor wrote: “After all there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”<sup>101</sup> Her language – “the conduct that defines the class” – is taken from a 1987 Court of Appeals decision holding that a law enforcement agency’s decision to refuse to hire an applicant because of her homosexuality was not a violation of equal protection.<sup>102</sup> The *Padula* Court relied on *Bowers* to reach its conclusion: “If the Court was unwilling to object to state laws that criminalise the behaviour that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.”<sup>103</sup> Two years later, a different Court of Appeals found that the U.S. Army was stopped from prohibiting a soldier’s reenlistment because of his “acknowledged homosexuality.”<sup>104</sup> The concurrence distinguished *Bowers* as a case about sexual conduct and not identity. “[W]hile *Hardwick* does indeed hold that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy, nothing in *Hardwick* suggests that the state may penalise gays merely for their sexual orientation... In other words, the class of persons involved in *Hardwick* – those who engage in homosexual sodomy – is not congruous with the class of persons targeted by the Army’s regulations.”<sup>105</sup>

In *Watkins*, the court was compelled by the reasoning of *Bowers* to separate the privacy and non-discrimination strands of analysis. What *Lawrence* did, in part, was to reunite these two strands. Status and conduct cannot be separated, and so laws criminalizing conduct violate not only privacy but also constitutional guarantees of equal protection. The same dynamic is at work in both *Naz* with its discussion of the Criminal Tribes Act and *National Coalition*, where Justice Ackermann wrote that the prohibition on sodomy, by punishing a “form of sexual conduct which is identified by our broader society with homosexuals,” has the “symbolic effect” of stating that “all gay men are criminals.”<sup>106</sup> It is this insight that helps to unmask public morals justifications as prejudice.

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<sup>100</sup> *Romer v. Evans*, 517 U.S., p. 647.

<sup>101</sup> *Romer v. Evans*, 517 U.S., p. 583.

<sup>102</sup> *Padula v. Webster*, 822 F.2d 97, U.S. Court of Appeals for the D.C. Circuit, 26 June 1987.

<sup>103</sup> *Padula v. Webster*, p. 103.

<sup>104</sup> *Watkins v. U.S. Army*, 875 F.2d 699, U.S. Court of Appeals for the Ninth Circuit, 3 May 1989.

<sup>105</sup> *Watkins v. U.S. Army*, p. 716. Sonia Katyal writes that *Watkins* “signified the end of treating gays and lesbians as potential criminals, and marked instead the beginning of recognizing them as a clear and definable class of minorities.” S. Katyal, ‘Exporting Identity,’ *Yale Journal of Law and Feminism* 2002-14, p. 112.

<sup>106</sup> *NCGLE*, at para. 28.

Although there is no broad privacy right for private adult sexual conduct, as can be seen from the discussion above, within US jurisprudence *Lawrence* has clearly had the effect of removing ‘morality’ from the debate about laws that differentiate on the basis of sexual orientation. Thus in a recent case concerning the constitutionality (under the state constitution) of a law that prohibited adoptions by homosexuals, the government argued not morality but harm to the child. The government lost.<sup>107</sup> In a challenge to the constitutionality of an amendment to the state constitution prohibiting same-sex marriage, the proponents of the amendment “abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples.”<sup>108</sup> In a case concerning the constitutionality of the federal Defence of Marriage Act, the government forsook morality arguments that were clearly reflected in the statute’s legislative history when it was enacted in 1996. “For purposes of this litigation, the government has disavowed Congress’s stated justifications for the statute.”<sup>109</sup>

## Conclusion

Much has been written about the formation of an ‘LGBT’ class-consciousness, including critiques about the exporting of a Western paradigm based on an ethnic model of fixed identity.<sup>110</sup> But the use of equality arguments to expose morality-based laws as pretexts for prejudice has implications beyond the regulation of sex and sexuality. For example, the rights to freedom of expression, peaceful assembly and association under the International Covenant on Civil and Political Rights may all be limited for the protection of public morals<sup>111</sup> (the European Convention on Human Rights and Fundamental Freedoms contains the same limitations on the same rights and has as well public morals as a permissible limitation on private life under Article 8). Public morals limitations are often used to restrict the freedom of LGBT individuals to register nongovernmental organizations, speak publicly about issues related to sexual orientation, or hold pride events.<sup>112</sup>

<sup>107</sup> *Florida Department of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G.* 45 So.3d 79, 22 September 2010.

<sup>108</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

<sup>109</sup> *Gill v. Office of Personnel Management*, 699 F.Supp. 2d 374, 388 (D. Mass. 2010).

<sup>110</sup> See, e.g., S. Katyal, ‘Exporting Identity’, *Yale Journal of Law and Feminism* 2002-14, pp. 103-113 (describing transition from conduct to identity and from privacy rights to antidiscrimination); S. Katyal, ‘Sexuality and Sovereignty: The Global Limits and Possibilities of *Lawrence*’, *William & Mary Bill of Rights Journal* April 2006-14, pp. 1434-1436; A. Fellmeth, ‘State Regulation of Sexuality in International Human Rights Law and Theory’, *William and Mary Law Review* December 2008-50, pp. 880-882 (noting that “if conduct is considered a legitimate basis for classifying a person, we find ourselves engaged in an elusive search for a distinction between identity-typing conduct and non-identity-typing conduct”).

<sup>111</sup> Articles 19, 21, 22 of the International Covenant on Civil and Political Rights.

<sup>112</sup> Bans on pride marches in Eastern Europe have been well documented by ILGA-Europe. Recent examples from other parts of the world include the refusal to register LGBT organizations in countries such as Botswana, Turkey, and Mongolia. There have been repeated legislative efforts in Lithuania to prohibit public speech about homosexuality. The only time this issue has been directly considered by the UN Human Rights Committee it upheld criminal charges against radio and television journalists for programs about homosexuality that violated

A recognition that public morality may simply be another name for prejudice, albeit prejudice strongly supported by popular opinion and tradition, will produce a more searching examination of these claimed justifications. There is some evidence that this is happening already, in both domestic and regional courts. Recently in *Alekseyev v. Russia*, the European Court of Human Rights considered a ban imposed by Moscow authorities on gay pride events on the grounds of public order and public morality. The Court found that the applicant's right to peaceful assembly had been violated by the refusal of permission for these events. It also found that the applicant had been discriminated against on the basis of his sexual orientation, meaning that the justifications of public order and public morality were insufficient reasons for the difference in treatment.<sup>113</sup>

Similarly, in 2010 the Supreme Court of the Philippines heard a petition against the decision of the electoral commission refusing to accredit an LGBT organisation called Ang Ladlad as a political party. The commission had based its decision on moral grounds. According to the commission, Ang Ladlad advocated "immoral doctrines" and if the commission accredited it as a political party, it would be failing in its constitutional duty "to protect our youth from moral and spiritual degradation."<sup>114</sup> The Supreme Court reversed the decision on equal protection and freedom of expression grounds.

The COMELEC posits that the majority of the Philippine population considers homosexual conduct as immoral and unacceptable, and this constitutes sufficient reason to disqualify petitioner...Indeed, even if we were to assume that public opinion is as the COMELEC describes it, the asserted state interest here— that is, moral disapproval of an unpopular minority—is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause.<sup>115</sup>

Privacy—the right to be left alone— is the traditional libertarian response to morals-based lawmaking. The right to privacy trumps the community right not to be offended by the idea of what people might be doing behind closed doors.

As Part I showed, the recommendations of the UK Wolfenden Committee and the decisions of both the European Court of Human Rights and the UN Human Rights Committee all share the assumption that interferences with private (and consensual and adult) sexual behaviour could not be justified with

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"sexual morality" and accepted the Finnish Government's invocation of public morals as justification. *Hertzberg v. Finland*, UN Human Rights Committee, 2 April 1982, at para. 10.2. There is now an opportunity to revisit this issue. A case against the Russian Federation for a local law criminalizing public expression about sexual orientation is currently pending before the Human Rights Committee.

<sup>113</sup> *Alekseyev v. Russia*, European Court of Human Rights, 21 October 2010, at para. 109.

<sup>114</sup> *And Ladlad LGBT Party v. Commission on Elections*, Republic of the Philippines Supreme Court, 8 April 2010, pp.4-5.

<sup>115</sup> *And Ladlad LGBT Party v. Commission on Elections*, p. 13.

reference to public morals. Parts II and III examined the development of this idea in national courts. Although privacy has been expansively articulated and re-imagined, it has limitations and these are not just the limitations of the closet, as is frequently asserted.<sup>116</sup> First, assertions of a broad right to privacy inevitably open the door to a ‘parade of horrors’ involving various types of conduct (adult incest, pornography, obscenity, S&M, commercial sex) that some or many in a community wish to continue to prohibit.<sup>117</sup> Although most and perhaps all of these examples may be refuted based on the harm principle, communities and by extension courts are reluctant to completely surrender morals as a legitimate basis for criminal sanction.<sup>118</sup>

Second, and perhaps more significantly, privacy says nothing about whether we can look behind the assertion of public morals. The harm principle does not prevent stigma. These decriminalization cases from South Africa, the United States and India may represent not so much the triumph of Hart over Devlin in that old debate but rather the rise of a critical judicial inquiry into whether the assertion of morality is in fact a pretext for impermissible class-based hostility. What courts are on the lookout for is in fact societal disapproval masquerading as moral condemnation. In this reading, *National Coalition*, *Lawrence*, and *Naz Foundation* are sounding the death knell not for morals-based offences generally but for the use of morals to mask animus. It is not that morals are no longer available as a rationale for lawmaking, but that morals cannot be used for the purpose of disadvantaging a group.

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<sup>116</sup> See, e.g., Justice Sachs’ description of the applicants’ treatment of privacy as “inadequate” and a “poor second prize to be offered and received only” if the Court failed to invalidate the laws based on equality. *NCGL*, at para. 110.

<sup>117</sup> In *Bowers*, Justice White wrote, “And if respondent’s submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.” *Bowers v. Hardwick*, pp. 195-196. Justice Scalia’s dissent in *Lawrence* argued that “Countless judicial decisions and legislative enactments have relied on the ancient proposition that certain sexual behaviour is ‘immoral and unacceptable’ constitutes a rational basis for regulation. . . State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.” *Lawrence v. Texas*, pp. 589-590.

<sup>118</sup> But see S. Goldberg, ‘Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*’, *Minnesota Law Review* 2004-88, pp. 1233-1311 (arguing that the American Supreme Court had long avoided relying on explicitly morals-based justifications, a “jurisprudential discomfort” based on the Court’s frequent exposure to a wide variety of moral viewpoints).