

William & Mary Law Review

Volume 40 (1998-1999)
Issue 3 *Institute of Bill of Rights Symposium:
Reconstructing Liberalism*

Article 12

March 1999

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Jeffrie G. Murphy, *Moral Reasons and the Limitation of Liberty*, 40 Wm. & Mary L. Rev. 947 (1999), <https://scholarship.law.wm.edu/wmlr/vol40/iss3/12>

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RESPONSES

MORAL REASONS AND THE LIMITATION OF LIBERTY

JEFFRIE G. MURPHY*

I find myself in substantial agreement with Professor Dworkin, and I find this deeply disturbing—not merely because it will make my role as his commentator more difficult, but also for reasons of a more personal nature. I have long held the belief that developing a sympathy for conservative positions is simply a sign of growing old, and thus I view with considerable alarm my increasing sympathy for Lord Devlin's attack on John Stuart Mill's Harm Principle—a principle long considered central to the liberal theory of law, particularly criminal law.

Indeed, I am in much worse shape in this regard than Professor Dworkin because, a couple of years ago, I published an essay in which I expressed even greater support for Devlin's views than that expressed by Professor Dworkin and was even harsher in my criticisms of Joel Feinberg's liberal attempt to defeat those views.¹ In that essay, I argued not merely that most Mill-inspired arguments against Devlin were less successful than I had once thought, but also that Devlin had made some important points of his own against his opponent's liberal views.² I

* Regents' Professor of Law and Philosophy, Arizona State University. This commentary on Gerald Dworkin's essay *Devlin Was Right: Law and the Enforcement of Morality* was prepared for presentation at the conference "Reconstructing Liberalism" at The College of William and Mary School of Law, April 3-4, 1998. It is a response to the draft of the essay that Professor Dworkin presented at the conference, and I do not know what changes—if any—may be present in the published draft that appears in this volume.

1. See Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 73-88 (1995).

2. See *id.*

argued that Devlin had made a start toward showing that some positions strongly favored by many liberals are not consistent with simply ruling out, as legally irrelevant, non-neutral judgments about personal goodness or the good life.³ In particular, I argued that regarding certain constitutional rights as *fundamental* (e.g., free exercise of religion) presupposes a conception of the human good, as does a substantial amount of the *retributive* component in criminal sentencing.⁴ I do not propose to rehearse here all that I wrote in that essay, but I do strongly recommend that you read it. At the very least, it will alert you to what you might expect of yourself as you grow old.

What, then, shall I do in my role as commentator on Professor Dworkin's essay? Rather than further explore the pros and cons of Lord Devlin's views, I shall instead—after a brief scholarly quibble—focus on the final section of Professor Dworkin's essay and on his suggestion, with which I generally agree, that the liberal position is sometimes best defended, not with some abstract general principle claiming that private immorality is simply not the law's business, but rather with reflection on the particular judgments of immorality themselves—what they mean and whether they can be rationally defended. In pursuing this thought, I will focus on the criminalization of private homosexual sodomy between consenting adults—Lord Devlin's issue⁵—and will explore the concept of morality that was at work in the Supreme Court's decision in the 1986 case *Bowers v. Hardwick*.⁶ In *Bowers*, the Court held that the supposed moral objection that a majority of Georgia citizens had to homosexual sodomy was a rational basis for criminalizing the practice.⁷

First, though, the scholarly quibble. In the cases in which Professor Dworkin does wish to defend certain liberal positions on principle, the principle he favors he characterizes as the "Kantian" principle of "the protection of autonomy and equal respect for persons."⁸ Although it has been years since I have done seri-

3. See *id.* at 80-81.

4. See *id.* at 81-84, 86.

5. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1-2 (1965).

6. 478 U.S. 186 (1986).

7. See *id.* at 196.

8. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40

ous Kant scholarship—and my memory may be defective here—it strikes me that Professor Dworkin’s own understanding of the concepts of autonomy and respect for persons is not obviously Kantian in nature. Professor Dworkin is inclined to defend in principle, for example, a doctrine of free speech that includes the right to hurl “racial insults” as a part of a legitimate “sphere of autonomy for individuals to engage in.”⁹

I am not at all sure, however, that Kant would protect the hurling of racial insults as an exercise of autonomy in his sense. In Kant’s sense, autonomy is—I think—best understood not simply as doing whatever comes into one’s mind for whatever motive, but rather as the exercise of one’s capacity for practical reason—the use, in John Rawls’s language, of one’s “moral powers.”¹⁰ It is not obvious that a racial insult is an expression of autonomy in this sense; it is, indeed, far more likely to be expressive of heteronomy. One might still be able to make a case for the protection of racial insults by appealing to other aspects of Kant’s philosophy—e.g., his notion in the *Rechtslehre* that coercion is justified only to prevent one citizen from using “external freedom” in such a way as to interfere with the external freedom of another citizen.¹¹ I think, however, that one distorts this notion of external freedom if one tries to interpret it in light of Kant’s much more restrictive concept of autonomy—a concept that seeks to capture our status as rational and moral beings. This status is typically revealed when we seek to reason together, not when we let ourselves get carried away by base emotions and shout insults at each other.

With this scholarly quibble out of the way, let me now move to a discussion of *Bowers v. Hardwick*. I will discuss this case not as an expert in constitutional law—I am not one—but rather as a philosopher interested in finding out whether the Court’s reasoning in this and other cases can inform and enrich our

WM. & MARY L. REV. 927, 931.

9. *Id.* at 945.

10. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 236 (1989).

11. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35-37 (John Ladd trans., Bobbs-Merrill 1965) (1797).

moral and political thinking about democratic government, a form of government that should be understood, as Ronald Dworkin has argued, not simply as winner-take-all majoritarianism but rather as incorporating the value of equal concern and respect for all citizens.¹² One way in which such concern and respect are shown is by placing limits on the kinds of reasons that may legitimately be used to justify the curtailment of liberty, and here I shall be asking this question: Should our philosophical theories about the reasons that we owe our fellow citizens when we propose to limit their liberty be guided by what the Court says about those reasons? Is there wisdom in the Court from which we all can learn? If *Bowers* is representative of the Court's general thinking about reasons, I am inclined to answer this question in the negative, and my discussion of *Bowers* will reveal the basis for my negative answer.

Most of you will recall that (for our present purposes) there were two important parts to Justice White's majority opinion in *Bowers*. In the first part, White considered the question of whether strict scrutiny should be applied in the case.¹³ Obviously reluctant to expand the scope of the previous privacy cases, White refused to apply strict scrutiny on the grounds that private homosexual sodomy is not properly conceptualized as a fundamental right (one of the triggers for strict scrutiny).¹⁴ He interpreted the previous privacy cases as concerned essentially with marriage, family life, and reproductive autonomy and argued that, because homosexual sodomy engages none of these values, it should not be conceptualized as a fundamental privacy right and thus that strict scrutiny was not required.¹⁵

Some dissenting Justices (Justice Blackmun in particular) challenged this view—arguing that White had selected the wrong level of generality to describe the issue before him.¹⁶ The issue, Blackmun argued, was not about sodomy as a fundamen-

12. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (1996).

13. See *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

14. See *id.* at 191.

15. See *id.*

16. See *id.* at 199-200 (Blackmun, J., dissenting).

tal right but about personal intimacy as a fundamental right, and that even if the Framers and the previous privacy cases were not concerned with the former as such, they were concerned with the latter, which may plausibly be conceptualized as including the former.¹⁷ Because I explored these issues in the essay I have already mentioned,¹⁸ I will now move on to the second important part of the *Bowers* opinion.

In the second part of the opinion, Justice White, having rejected strict scrutiny, moved to the framework imposed by minimal scrutiny: the so-called "rational basis test."¹⁹ Unlike strict scrutiny, which requires a showing by the government that it is pursuing a compelling state interest by means that are necessary for the attainment of that interest, minimal scrutiny imposes a much weaker burden on the government: the burden of showing that the liberty restriction it imposes serves, if not a compelling state interest, at least a state interest that is reasonable or rational.²⁰ (The actual language typically used is that the state interest must be legitimate and the liberty restriction employed must be rationally related to that interest.²¹) Let me turn now to how Justice White interpreted and applied this test in *Bowers*. He wrote as follows:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, 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. Even respondent makes no such claim, but insists that majority sentiment about the morality of homo-

17. See *id.* at 206 (Blackmun, J., dissenting).

18. See Murphy, *supra* note 1, at 85-87.

19. See *Bowers*, 478 U.S. at 196.

20. See *id.*

21. See, e.g., *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988) (holding that a rent control ordinance was "rationally related to a legitimate state interest" (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976))).

sexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.²²

The reasoning revealed here does not, in my judgment, show Justice White at his best. Even if we grant that, in a democratic society, the majority has a legitimate interest in building some of its moral beliefs into criminal law, we surely cannot interpret this to mean that the majority should be allowed to build just *any* of its beliefs and desires into the criminal law. This would deprive the rational basis test of any meaning at all, interpreting the mere fact that the majority wants to do something as equivalent to their having a rational basis for doing it. The Due Process Clause and its rational basis test may not place very onerous burdens on the government; on this interpretation, however, they place no burdens at all. The majority simply gets to do whatever it jolly well feels like—so long, at any rate, as it remembers to use the word “morality” somewhere in its supposed justification.

Justice White’s basic mistake, I think, was his failure to see that any serious consideration of the role that moral conviction might legitimately play in justifying criminal law must regard as separate and discuss separately the following three questions:

- (1) Is it in fact true that a majority of citizens have strong disapproval of the practice in question?
- (2) If it is true that they do have strong disapproval, is there good reason to think that this disapproval is *moral* in nature—that the attitudes, beliefs, and judgments involved are *moral* attitudes, beliefs, and judgments?
- (3) If the relevant attitudes, beliefs, and judgments are moral in nature, are these attitudes, beliefs, and judgments *reasonable* or *rational*? (The contrast here is with beliefs that may simply be silly superstitions or with beliefs that, to use Justice Kennedy’s language from the 1996 case *Romer v. Evans*, reflect mere prejudice or animus.²³)

The fact that we can distinguish these three questions at the very least shows that the slogan “citizens in a democratic society

22. *Id.* at 196.

23. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

have a legitimate interest in enforcing morality²⁴ is open to a variety of interpretations, and that on some interpretations the slogan will be more plausible than on others. I will now briefly explore each of these three questions.

(1) THE FACT OF DEEP DISAPPROVAL. This is not itself a moral issue, but an examination of the factual assumptions being made by those claiming to enforce moral judgments will sometimes assist us in determining if those judgments are genuinely moral and reasonable. As Justice Stevens pointed out in his dissent in *Bowers*, the actual facts about the beliefs of a majority of citizens are a bit harder to determine than Justice White thought.²⁵ Justice White was convinced that a majority of Georgia's citizens had strong moral disapproval of homosexual sodomy. What, though, was his evidence for this? Apparently the mere fact that the Georgia legislature (in company with the legislatures in many other states) voted for the statute criminalizing homosexual sodomy and the fact that the Georgia Attorney General claimed that this vote was expressive of strong moral conviction on the part of Georgia's citizens were enough.²⁶ Of course, we do not really know why the Georgia legislature voted for this statute. Perhaps it was indeed because they believed that there was a deep level of moral repugnance against homosexuals among the citizens of Georgia. Perhaps, though, it was simply because they were under great pressure from the Christian Coalition and feared getting recalled if they did not toe the line on this issue. I really do not know; and neither, I suspect, did Justice White. Also, as Justice Stevens pointed out, the actual language of the statute is gender neutral, covering heterosexual sodomy as well as the practices of homosexuals.²⁷ Indeed, the statute replaced an earlier statute that explicitly targeted only homosexuals.²⁸ Thus, if the statute itself provides any evidence of what truly disturbs the citizens of Georgia, it would seem to provide evidence that they do not much like sodomy in

24. See, e.g., *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 569 (1991).

25. See *Bowers*, 478 U.S. at 219 (Stevens, J., dissenting).

26. See *id.* at 196.

27. See *id.* at 215-16 (Stevens, J., dissenting).

28. See *id.* at 200-01, 200 n.1 (Blackmun, J., dissenting).

any form, whether heterosexual or homosexual. One might ask, then, how could Justice White, if he wished to defer to majority sentiment, so easily support—as he did—the limitation of the enforcement of this statute to homosexuals?

There is, of course, one possible answer to this question, namely, that Justice White believed that the privacy cases would force him (logically) to apply strict scrutiny in the area of heterosexual activity and that such scrutiny would demand an interest more compelling than the mere enforcement of morality. Although he might have preferred enforcing the moral judgment across the board, he perhaps had to content himself with allowing its enforcement in the one area where (he had already argued) strict scrutiny was not available: homosexual relations. This position, of course, had considerable logic. If the citizens of Georgia morally deplore it all, they must surely deplore the part of it that the privacy cases permit the government to target. So let us at least, White may have been thinking, allow them to enforce their moral convictions in the one area where the privacy cases permit them to do so.

(2) MORAL AND NON-MORAL DISAPPROVAL. Let us grant then, at least for the moment, the truth of the empirical claim that the majority of Georgia's citizens have strong disapproval of—perhaps even disgust and repugnance at—homosexual sodomy. It does not follow from this alone, however, that their disapproval is moral disapproval; for some disapproval, even strong disapproval that rises to the level of disgust and revulsion, is not plausibly regarded as moral in nature. It could, for example, be religious or aesthetic. I am confident that I find revolting the idea of someone eating “road kill” (the barbecued corpses of animals killed on the highway), but is my revulsion moral? I do not think so—any more than my revulsion at the so-called “art” of Jeff Koons is moral revulsion. Why not? Because of the nature of the *reasons* that are, in my view, intrinsic to morality. If I am actually disapproving of something on moral grounds, it seems that I ought to be prepared to make a case that the object of my disapproval involves at least one of the following: harm, injustice, or certain failures of human flourishing. If I am not prepared to make such a case but can only say something like “This is ugly” or “Yuck! This makes me sick to my stomach!” or “God

forbids this" (a constitutional nonstarter), there is no reason to regard my judgment as moral in nature. In short: The status of my judgment as a moral judgment is a function, not of its intensity, but of the reasons I am prepared to give in support of that judgment.

In summary: Suppose we grant the principle that the majority has a right to enforce its moral convictions. Further suppose that we grant that the majority finds homosexual practices revolting. If I am correct in my claim that not all revulsion is moral revulsion, it does not follow from these two claims alone that the majority has the right to use the criminal law to target homosexual sodomy.

(3) MORALITY AND REASONS. If I am correct that a judgment is typically identified as moral through the kinds of reasons given in support of that judgment, it would seem that it would be important to distinguish good (rational) reasons from bad (irrational) reasons. In *Bowers*, however, this distinction was lost on Justice White; for in *Bowers*, once he had decided that citizen disapproval of homosexual sodomy was moral disapproval, he concluded that the rational basis test had been satisfied, with no inquiry at all into the question of whether the moral judgment involved is a rational or reasonable moral judgment or perhaps simply a judgment of unexampled stupidity, ignorance, prejudice, and animus.

The indifference that White showed to this question in *Bowers* was in marked contrast, as it happens, to his use of the rational basis test in his concurring opinion in the 1965 case *Griswold v. Connecticut*.²⁹ In that case, he actually ridiculed the claim made by the State of Connecticut that a ban on contraceptives for married couples is a rational means to the legitimate government objective of discouraging extra-marital sex.³⁰

It is possible, I suppose, that Justice White embraced non-cognitivist metaethical views, that he viewed the reasons given by Connecticut as open to rational evaluation because they concerned matters of fact but viewed moral reasons as irretrievably subjective or relative and thus beyond the scope of rational eval-

29. 381 U.S. 479, 502-07 (1965) (White, J., concurring in judgment).

30. See *id.* at 506 (White, J., concurring in judgment).

uation. If this was his metaethical view, it is worth noting that it is a view rejected—at least in this simple form—by most contemporary moral philosophers. These philosophers generally see the place of reason in ethics to be an issue of central importance.³¹

What would it be like to give reasons of a moral nature to support the criminalization of homosexual sodomy? Consider the argument developed by Michael Levin in his essay *Why Homosexuality is Abnormal*.³² According to Levin, scientific studies reveal that male homosexuals tend to be much more unhappy than heterosexual males, and he attributes this unhappiness both to their promiscuous lifestyles and to their use of their sexual organs in an exclusively unnatural way.³³ He then suggests that society has a moral duty to discourage lifestyle choices that have a tendency to produce great unhappiness and advocates using the law as one instrument in a comprehensive strategy for the social discouragement of homosexuality.³⁴

Now suppose some legislature develops a set of laws targeting homosexual conduct—some criminal, some not—and cites Levin's account in defense of those laws. This defense would, on my view, count as moral because it involves reasons based on both harm and human flourishing. Is the defense reasonable, though? Should it pass a rational basis test? I suspect that Justice White, if he remained on the Court, would give it a pass because in *Bowers* he gave a pass to a morals statute supported by no reasons at all. Is such a posture defensible, though? Should it be adopted by anyone wishing the rational basis test to have some bite, some meaning? Before simply signing off on the acceptability of the statute, one should first at least ask questions like the following (questions expressing the spirit of skepticism that Justice White himself displayed in *Griswold*): Is there any reason to believe that any of Levin's claims are true? Are homosexuals

31. See, e.g., STEPHEN EDELSTON TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS (1950).

32. See Michael Levin, *Why Homosexuality is Abnormal*, in ETHICS IN PRACTICE 233 (Hugh LaFollette ed., 1997). This essay originally appeared in 1984, but the 1997 printing is preferable because of the Postscript added in 1995.

33. See *id.* at 236-39.

34. See *id.* at 240.

generally far more unhappy than heterosexuals? If they are, is this because of their homosexuality or because of society's treatment of them? Is homosexuality an elective lifestyle choice or is it genetically determined—something we discover about ourselves rather than choose? (If it is largely genetically determined, of course, we clearly will not have to worry much about people being lured into making harmful lifestyle choices here.³⁵) My own belief is that Levin is largely wrong. As the one advocating interference with liberty, he bears the burden of proof and has failed rather dramatically to bear that burden. Any legislation based on his writings on homosexuality, in my view, therefore, would not be rationally based. If, in spite of this, the Court would still uphold the legislation as satisfying the rational basis test, all this shows is that the Court is probably confusing rationality with majoritarianism. It is thus operating with a concept of rationality that, whatever its constitutional merits, is un instructive to those of us interested in the question about democratic theory that I posed at the outset: What sorts of reasons do we owe our fellow citizens when we propose to encumber their liberty?

This brings to a close my commentary on Professor Dworkin's essay. I have in my remarks attempted to build on the few brief suggestions made by Professor Dworkin in the closing section of his paper. By arguing that disapproval of homosexuality may not be moral disapproval and that moral disapproval of homosexuality may not be rational, I have tried to fill out in some detail my reading of two of Professor Dworkin's claims—the claim that our thinking about issues such as homosexuality requires a plausible account of what is involved in the making of moral judgments, and the claim (made in the final sentence of his essay) that the reason that homosexual conduct ought not to be criminalized is that there is nothing immoral in such activity. I hope that I have construed him correctly here and that he sees my efforts as involving the "honest toil" he advocates on issues of this nature.

35. Levin considers the possible genetic basis for homosexuality and generally concedes this point in his 1995 Postscript. *See id.* at 240-41.