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***BOWERS, LAWRENCE AND SAME-SEX MARRIAGE:
A MEETING OF HARD AND VERY HARD CASES***

VINCENT J. SAMAR*

In this article, I intend to point out how two United States Supreme Court cases and one state supreme court case have impacted our understanding of legal judgments in the area of sexual orientation and the law. The point of my analysis will be to show that the social and cultural contexts in which these cases are situated requires courts to move higher up a ladder of increasing abstraction, ultimately terminating in a broad-based concern for human rights. Taken together, these three cases first illustrate this result by delineating an important crossroads between two important jurisprudential divides. Once this is accomplished, these cases will illustrate the need for bridging the gap between the divides, although they do not directly offer the intellectual apparatus to do this. For purposes of this article, that apparatus can only be suggested.

The two jurisprudential divides are, on one hand, the so-called “hard” cases and, on the other hand, what I shall call the “very hard” cases. The former, the “hard” cases, are cases where no rule of law presents a specific legal answer to a particular case, but the background principles underlying the political morality of the society do. Usually, this is because the principles differ in weight, and courts are directed to follow the more weighty principle. The latter, the “very hard” cases, are cases where the background political morality is itself in dispute and the key is to appeal to some broader, more general political morality to try to resolve the dispute.

An example of a “hard” case is *Bowers v. Hardwick*, decided in 1986.¹ Two examples of “very hard” cases are *Lawrence v. Texas*² and *Goodridge v. Department of Public Health*,³ both decided in 2003. Together these three cases represent an important jurisprudential crossroads between theories of law and political morality generally. *Lawrence* is particularly interesting in this

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1. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
2. *Lawrence v. Texas*, 539 U.S. 558 (2003).
3. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

regard and will be addressed last because it points to a clear place where the road divides. The fact that all three cases concern sexual orientation and the law illustrates that such cases are profoundly interesting not only in the way they search out and challenge long-standing viewpoints about human sexuality and gender, but also in the way they force us to rethink our understandings of what courts should do when faced with difficult cases.

These cases make us confront the fact that long-standing categories in which legal cases fall are as much a product of political philosophy as they are about principles and rules. The fact political philosophy should enter into the picture at all means that the hope remains for rational discourse and debate to ultimately usurp extreme prejudices and narrow viewpoints. Exactly why this happens, however, may not always be clear, especially (and perhaps not always desirably) when courts have to backtrack from what previously seemed to be settled positions, turning the whole judicial decision making process on its side. Understanding the reason courts do this should nevertheless provide this insight. This will require a brief digression into the legal basis of the three decisions mentioned above, which will show not only where the departure is found between what the law is and what it ought to be, but why the latter has a normative connection to the former in making sense of the duty to obey the law. It is also my hope that by pointing out the crossroads of the two jurisprudential divides, I will be able to show the salience gay rights cases have to our more general understanding of the nature of legal judgment.

In effect, the arguments presented here will implicate broader human rights concerns about sexual orientation in general. These arguments will suggest why sexual orientation issues may not be simply reduced to the jurisprudence of a single legal system, especially a system that claims to find its foundation in democratic theory. More specifically, in a legal system such as ours, the duty to obey the law is normally connected to the both the legislature's responsibility to provide for the common good and the court's responsibility to do justice.⁴ However, when this does not happen, or fails to happen for certain groups of people, a closer look at the surface topology of the language is required to determine what principles of morality are really at stake.

The choice of the three cases I mentioned helps to guide us in just this way. The significance of each will point out a failure and a redirection in legal reasoning that can open doors to a greater appreciation of human rights in the American constitutional context. To show this I will demonstrate that when *Bowers* was decided, it should have been no more than a "hard" case with a different outcome because of the then-prevailing political morality of our society. In contrast, its language notwithstanding, *Lawrence* is a much harder case, as the background political morality that was available but not taken

4. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 6 (1955).

advantage of in *Bowers* could no longer provide the same solution. Thus, a new approach is now necessary. *A fortiori*, *Goodridge* is a case that motivates a search for a still more abstract and deeper background political morality in light of the societal debate over the moral and legal legitimacy of same-sex marriage. Before I can be any more explicit about these matters, I need to say something more about what I mean by the appellations “hard” and “very hard” in context to these cases.

The book *Justifying Judgment: Practicing Law and Philosophy* deals with the issue of resolving legal cases where the law is unclear and where there are varying degrees of controversy over what legally should be done. Because I believe that the arguments in that book will be useful in clarifying what was occurring in the above-mentioned cases, permit me to begin by quoting a small portion of that book’s preface as an introduction to the forthcoming discussion of the case law:

Ever since the publication of Ronald Dworkin’s *Taking Rights Seriously* in 1977 lawyers have been discussing ‘hard cases.’ The precedents in hard cases go in both directions, and no clear legal rules apply. One suggestion for deciding these cases has appealed to broader substantive principles of society’s political morality. By ‘political morality’ I mean the application of morality to the operation and justification of political institutions. The problem with this suggestion, however, is that it presupposes that a judge is not faced with having to decide a case in which the society’s political morality is internally inconsistent or under serious attack from some alternative political morality. [This was true, for example, in our own history in the 18th century, when the political morality that supported slavery came under attack by the abolitionist movement.] The alternative political morality [in that case the morality of the abolitionists] may be the position of some substantial portion of society, or it may be some ideal that seems to the judge to be more persuasive [than the dominant moral viewpoint]. Either way, when the alternative occurs, the judge is faced with a very hard case [because now there is no clear principle of law or social morality that gives the judge a correct way to decide which way the case should go].⁵

I. WHY *BOWERS* V. *HARDWICK* WAS, AT MOST, A “HARD” CASE

Bowers v. Hardwick involved the unchallenged legal entry of a Georgia police officer into the home of Michel Hardwick on the evening of August 3, 1982.⁶ There the officer found Michael Hardwick and another adult male engaged in an act of oral sodomy in Michael’s bedroom.⁷ Michael was

5. VINCENT J. SAMAR, *JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY*, at ix (1998).

6. *Bowers*, 478 U.S. at 187-88.

7. *Id.* at 187.

subsequently charged with violating section 16-6-2 of the Georgia Code, a statute that made it a crime to engage in sodomy with another, even in the privacy of one's home,⁸ and was punishable by not less than one and up to twenty years in prison.⁹ The Georgia statute stated that "[a] person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."¹⁰ The case went to the U.S. Supreme Court, where the Georgia sodomy statute was challenged on due process and privacy grounds.¹¹

The Supreme Court, in upholding the statute, distinguished the portion of the statute pertaining to homosexual sodomy from the remainder of the act, which also included heterosexual sodomy.¹² Specifically, the Court, referring to the portion of the statute making homosexual sodomy a crime, ruled, per Justice White, that prior case law did not put adult consensual homosexual sodomy in the home beyond state proscription.¹³ The basis of the Court's rationale was that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other [was] . . . demonstrated."¹⁴ Nor did the cases protect any form of private sexual conduct between consenting adults.¹⁵ Thus, *Bowers* was a "hard" case.

While there were no prior privacy cases directly on point, the Court already had within its established constitutional privacy jurisprudence a set of principles that should have guided the Court to decide the case very differently from the way it ultimately did. This suggests a prejudice against homosexuals on the part of some of the justices who participated in the decision. Indeed, this was particularly clear from Justice Burger's concurring opinion where he said: "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 the Judeo-Christian moral and ethical standards."¹⁶ The set of privacy principles that should have decided this case, and no doubt would have had the prejudices suggested by

8. See GA. CODE ANN. § 16-6-2 (1984).

9. *Id.* § 16-6-2(b).

10. *Id.* § 16-6-2(a).

11. See *Bowers*, 478 U.S. at 190, 196 n.8 (in *Bowers* an equal protection challenge was not raised).

12. See *id.* at 190 (clarifying that the Court's ruling dealt only with "whether the Federal Constitution [sic] confers a fundamental right upon homosexuals to engage in sodomy," even though the statute did not distinguish between homosexual and heterosexual sodomy).

13. See *id.* at 190-91.

14. *Id.* at 191.

15. See *id.*

16. *Bowers*, 478 U.S. at 196 (Burger, J., concurring).

the above-quoted passages not existed, have their foundation in three different areas of the law: Fourth Amendment, tort, and constitutional privacy.

A. *The Fourth Amendment*

In the Fourth Amendment area, the right to privacy protects persons, information, and places against unreasonable searches and seizures.¹⁷ What makes a search unreasonable is the presence of a reasonable expectation of privacy coupled with the absence of a warrant based on probable cause that a crime was about to take place.¹⁸ This right to privacy of information and places was specifically directed against the government, limiting its pursuit of a criminal investigation from becoming a mere fishing expedition of possible criminal activity.¹⁹ A perhaps now antiquated example of this rule would be the person in the glass-enclosed telephone booth who had a reasonable expectation of not being overheard, but no such expectation of not being seen.²⁰

B. *Tort*

In contrast to the Fourth Amendment right to privacy was the development of the privacy tort in civil law. Here the issue, as described in a famous law review article at the turn of the last century, was protecting against unreasonable invasions into personal affairs by the press and other persons.²¹ Prosser describes this tort as involving four separate concerns:

- Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
- Public disclosure of embarrassing private facts about the plaintiff.
- Publicity which places the plaintiff in a false light in the public eye.
- Appropriation, for the defendant's advantage, of plaintiff's name or likeness.²²

Similar to the Fourth Amendment area, the civil law privacy tort was to serve as a protection of information and places. However, this tort is directed

17. See U.S. CONST. amend. IV; see also VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 26-28 (1991).

18. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (the zone of privacy extends as far as a court would consider a reasonable person to expect).

19. See generally *id.* at 357.

20. See *id.* at 352 (government-placed wire tap captured petitioner's calls from inside glass-enclosed telephone booth).

21. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-97 (1890).

22. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

against other persons rather than the government.²³ In this way, privacy became more than just a protection against certain governmental intrusions, but also a safeguard of individual personhood and autonomy from the prying eyes of others.²⁴

C. Constitutional Privacy

The Fourth Amendment right to privacy and the privacy tort were not the only sources of privacy protection that had been recognized prior to the Court's decision in *Bowers*. Beginning in the 1960s with *Griswold v. Connecticut*, the Supreme Court began to set out constitutional privacy law jurisprudence based on a liberty right.²⁵ In *Griswold*, the Court upheld the constitutional privacy rights of a married couple to use contraceptives and of physicians to advise their use against a state law that prohibited both.²⁶ In *Eisenstadt v. Baird*, the Court extended that right to include unmarried persons.²⁷ In *Carey v. Population Services International*, the Court extended the right still further, striking down a law which made it a crime to distribute contraceptives to minors.²⁸ In *Roe v. Wade*, the Court extended constitutional privacy protections to a mother's choice to have an abortion, noting that the fetus was not a person under the law.²⁹

The Supreme Court's jurisprudence in this area was not confined to physical activity that was arguably self-regarding.³⁰ The Court had also upheld, in *Stanley v. Georgia*, the right of a person to possess "obscene matter" in the privacy of his home.³¹ In that case, the Court stated:

This right to receive information and ideas, regardless of their social worth is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.³²

D. Application to *Bowers*

23. See Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1894-96 (1981).

24. See *id.* at 1896-97.

25. *Griswold v. Conn.*, 381 U.S. 479 (1965).

26. *Id.* at 503 (White, J., concurring).

27. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

28. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977).

29. *Roe v. Wade*, 410 U.S. 113, 153-54, 158 (1973).

30. See SAMAR, *supra* note 17, at 65-68.

31. *Stanley v. Ga.*, 394 U.S. 557, 559 (1969).

32. *Id.* at 564 (citations omitted).

Despite all the precedent that might have suggested the contrary, the *Bowers* Court refused to find constitutional privacy protection for two consenting adults to engage in same-sex sodomy in the home.³³ Prior to *Bowers*, two cases, one a New York court of appeals case, *People v. Onofre*,³⁴ and the other a Virginia federal district court case, *Doe v. Commonwealth's Attorney*,³⁵ had gone in opposite directions on whether a fundamental right to privacy covers and protects such activities. *Bowers* was not a “very hard” case because the Court had enough of an indication of society’s political morality from its own past privacy decisions to render a decision against such statutes, even though it chose not to do so. Consequently, at the point when the Court heard *Bowers*, constitutional jurisprudence had already been sufficiently developed to afford protection to Michael Hardwick.³⁶ Still, if there was any question about this matter, it could have been reasoned as follows:

A mere description of the action involved in *Bowers* does not impinge the basic interest of any other person in the relevant group of actors. The Court should have first acknowledged this, and then if it so thought, said what the basis was for any derivative interest trumping privacy. The Court did none of this, and that failure more than even its conclusion marks this case as a particularly notorious departure from the traditional protection afforded fundamental human rights.³⁷

The same precursory precedent that was available to the Court in *Bowers* was not unconditionally available to the Court’s more recent decision in *Lawrence v. Texas*,³⁸ which overruled *Bowers*. For reasons to be discussed below, and notwithstanding the Court’s own language, *Lawrence* was a “very hard” case.

II. SAME-SEX MARRIAGE—A CLEARLY “VERY HARD” CASE

33. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

34. *See* *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980) (holding unconstitutional statute declaring consensual sodomy or deviate sexual intercourse between persons not married to each other criminal), *cert. denied*, 451 U.S. 987 (1981).

35. *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199, 1200 (E.D. Va. 1975) (holding constitutional statute making private consensual sodomy between adult males a crime), *aff'd mem.*, 425 U.S. 901 (1976).

36. *Bowers*, 478 U.S. at 190-91 (arguing that the Court’s prior cases have not “construed the Constitution to confer a right of privacy that extends to homosexual sodomy,” and that those cases “were described as dealing with child rearing and education; with family relationships; with procreation; with marriage; with contraception; and with abortion” (citations omitted)).

37. Vincent J. Samar, *Gay-Rights as a Particular Instantiation of Human Rights*, 64 ALB. L. REV. 983, 1016 (2001) (footnote omitted).

38. Compare *Bowers*, 478 U.S. at 190-91, with *Lawrence v. Texas*, 539 U.S. 558 (2003).

The claim that *Bowers v. Hardwick* was wrongly decided is based on the view that the prior privacy cases cannot be interpreted merely as a concern about marriage and procreation, as was suggested in Justice White's majority opinion in *Bowers*.³⁹ This is because neither *Eisenstadt v. Baird*,⁴⁰ *Carey v. Population Services International*,⁴¹ nor *Roe v. Wade*⁴² specifically dealt with marriage, and moreover, while *Roe* is contrary to the protection of procreation, it does protect the right to make procreative choices. Although one might say that these earlier cases were distinguishable because they did not deal directly with the question of state regulation of adult consensual sexual activities such as fornication, they nevertheless did lay out the predicate for protection of non-procreative sex among unmarried persons, which is what state regulation of adult consensual sexual activity concerns.

On the other hand, the majority's opinion in *Bowers* was correct in that these earlier privacy cases did concern the *choice* to bear children and whether that choice could be compelled by the state. *Bowers* only concerns that choice indirectly because same-sex relationships are not biologically reproductive. Still, the distinction here appears to be without a difference if the net effect of the earlier cases is to protect behavior that may not be procreative in nature. For this reason too, it appears that *Bowers* is nothing more than a "hard" case, where a new variation of an old issue had to be decided under the then-prevailing law.

A "very hard" case is one where the correctness of society's political morality is itself in doubt. Take, for example, the situation of same-sex marriage. At stake in the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*⁴³ was the question of the moral legitimacy of same-sex marriage, over which our society is very divided. The issue in that case was not whether marriage is a fundamental right; that was decided in *Meyer v. Nebraska* in 1923,⁴⁴ and repeated again in *Skinner v. Oklahoma* in 1942.⁴⁵ Nor was it undecided whether miscegenation statutes were unconstitutional; that was decided in *Loving v. Virginia* in 1967.⁴⁶ What our society is divided over is whether the right to marry includes the right to marry someone of the same sex. This is evident from recent legislative

39. *Bowers*, 478 U.S. at 190-91.

40. 405 U.S. 438 (1972).

41. 431 U.S. 678 (1977).

42. 410 U.S. 113 (1973).

43. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

44. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923).

45. *Skinner v. Ok.*, 316 U.S. 535, 541 (1942).

46. *Loving v. Va.*, 388 U.S. 1, 12 (1967).

reactions to the possibility of same-sex marriage⁴⁷ and from various public opinion polls.⁴⁸ Indeed, every argument, from the analytical argument that the institution of marriage is defined to be between opposite-sex partners⁴⁹ to the normative argument that state support of marriage exists primarily to encourage the procreation of children,⁵⁰ has been used to try to justify the prohibition of same-sex marriage. *Singer v. Hara*, a 1974 case from the State of Washington, provides a good example of these two arguments being used in tandem against an attempt to argue that prohibitions against same-sex marriage violate the U.S. Constitution.⁵¹

However, if the state's normative argument is merely that marriage is defined to include only opposite-sex couples, then the state has begged the question by simply constructing into the definition of marriage, without argument, the very thing it has sought to prohibit; namely, gay and lesbian marriage. This is an analytical move that is completely blind to why the state might afford a right to marry at all. Marriage is, after all, not a "natural kind" containing a unique set of natural constitutives.⁵² Rather, it is a social construction designed to further certain social goals of society.⁵³ Following this line of thought, if it is the state's position that marriage exists for the sole purpose of supporting procreation, then the state's position is weak by being focused exclusively on procreation, as opposed to other normative values like stability and self-fulfillment that the state may also value. This is made clear by the fact that state marriage laws allow heterosexuals to marry who do not intend (and in some cases could not) have children and do not want to adopt children.⁵⁴

On the other hand, if the right to marry is of value only to take advantage of certain benefits that accrue through marriage (such as the ability to file a joint income tax return, having automatic rights of inheritance, or rights to make health and property decisions for a spouse), that too is a weak argument

47. Bill Walsh, *Demos Fear Fallout of Gay Nuptials Question; Some Say Wedge Issue on Ballot Helps Republican Candidates*, TIMES-PICAYUNE, May 23, 2004, at 20; Fred Barnes, *How Many Gays Do You Know?*, WALL ST. J., Nov. 1, 2004, at A14.

48. Fred Bayles, *Same-Sex Marriage Begins in Mass.: Gay Couples Line Up to Apply for Licenses*, USA TODAY, May 17, 2004, at 1A (showing 55% of Americans opposed to same-sex marriage, down from 65% last December).

49. *Dean v. D.C.*, 653 A. 2d 307, 315-16 (D.C. 1995).

50. *Standhardt v. Superior Court*, 77 P.3d 451, 461-63 (Ariz. Ct. App. 2003).

51. *Singer v. Hara*, 522 P.2d 1187, 1192, 1197 (Wash. Ct. App. 1974).

52. See generally W.V. QUINE, *Natural Kinds*, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 114 (1969) (discussing the philosophical doctrine of "natural kinds").

53. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1434, 1485 (1993).

54. See Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 369 (2002).

for same-sex marriage.⁵⁵ That is to say, there may be alternative ways to provide these benefits, such as the civil unions that exist in the State of Vermont.⁵⁶ In that case, the most one might hope to say—adopting for the moment a utilitarian approach—is that it is for the greatest good of the greatest number to allow lesbians and gays to unionize and heterosexuals to marry. But then the resolution of the marriage question is strictly dependent on a cost/benefit analysis of how much of a benefit to how many different people is served by allowing gays and lesbians to unionize but not marry. In this situation, the benefit is going to be the upholding of certain social biases/prejudices regarding who can marry; it is no better than the biased-based white supremacy justification implicit in the Virginia miscegenation statute struck down in *Loving v. Virginia*.⁵⁷ As an aside, there may be many economic benefits resulting from allowing same-sex marriage in the form of renting spaces for wedding receptions, buying flowers and presents, renting apparel, hiring bands, and going on honeymoons.

Nevertheless, because utility may not protect against bias and prejudice in the short run, whether gays and lesbians should be allowed to legally marry must depend on whether denying such a right is a violation of fundamental fairness, just as separate but equal education was found to be fundamentally unfair to African-Americans attending public schools.⁵⁸ Therefore, same-sex marriage seems to provide a good example of a “very hard” case, especially when it is recognized that appealing to society’s existing political morality will not likely resolve the problem. But, then, to what should a court appeal to decide such a case, and how would a court be able to justify whatever choice of source it settled upon?

It might be questioned why same-sex marriage is not simply a “hard” case where judges and others may simply not like the result that equal protection clauses force upon them. The answer is that equal protection clauses are not all that clear. For example, take the federal Equal Protection Clause, which is part of the Fourteenth Amendment to the U.S. Constitution.⁵⁹ When the amendment was passed, it was designed to remove a certain form of racial discrimination that was likely to keep former African-American slaves as an underclass in the former succeeding southern states.⁶⁰ However, broader

55. *See id.* at 364-72.

56. *See id.* at 372-79 (also including possible limitations on such unions). In this regard, Professor Strasser also explains and critiques domestic partnerships as another alternative route to marriage. *See id.* at 380-81.

57. *Loving v. Va.*, 388 U.S. 1, 2, 7, (1967).

58. *See Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493-95 (1954).

59. U.S. CONST. amend. XIV, § 1.

60. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 162 (1998).

interpretations of the amendment have led to its use as a means for removing discrimination against politically powerless classes of persons who are identified by some immutable trait through no fault of their own.⁶¹ Would such an immutable trait include finding happiness by having a recognized legal relationship with another person of the same sex? That is a question for which the courts have been uncertain.⁶²

Put another way, what justifies the courts in deciding “easy” cases on a positivistic interpretation of laws,⁶³ such as laws enacted by the Congress and signed by the President?⁶⁴ In “hard” cases, what justifies the courts in following a more Dworkian-like approach that seeks to protect the integrity of law by making sure that it conforms to society’s political morality?⁶⁵ Finally, what justifies the courts in deciding “very hard” cases following a *de novo* natural law/natural rights approach when the society’s political morality is itself in doubt?⁶⁶ This is the central question that *Justifying Judgment* seeks to unravel, and it is especially poignant in areas concerning sexual orientation and the law.

III. WHEN RESORTING TO POLITICAL THEORY IS NECESSARY TO DO JUSTICE

Part of the difficulty we have in resolving this problem discussed *supra* in Section II is that too often we tend to compartmentalize our thinking of how courts should operate with such popular expressions as “activist” or “conservative” court.⁶⁷ We tend to look at law as either an open or a closed system, and think that the political responsibility of judges is to either preserve institutional or background rights.⁶⁸ What I attempt to show in *Justifying Judgment* (and hope to illustrate in this article) is that this compartmentalization of the law is too static in that it blocks us from seeing

61. See Thomas R. McCoy, *Recent Equal Protection Decisions – Fundamental Right to Travel or “Newcomers” as a Suspect Class?* 28 VAND. L. REV. 987, 1017-20 (1975).

62. See *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

63. A positivistic interpretation is an interpretation that decides what the law is based on its having the correct pedigree. See BLACK’S LAW DICTIONARY 859 (7th ed. 1999).

64. H.L.A. HART, *THE CONCEPT OF LAW* 92-98, 100-09 (2d ed. 1994) (showing that under a modern positivistic conception, laws affecting behavior, called “primary rules,” take their validity from conformance to some recognized secondary rule of procedure, the same also being true for determining the validity of most secondary rules, except for the ultimate secondary rule of recognition, which exists by mere acceptance).

65. RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986).

66. See Ronald Dworkin, *Justice for Clarence Thomas*, N.Y. REV. OF BOOKS, Nov. 7, 1991, at 41, 44.

67. See, e.g., Patti Waldmeir, *Big Eye on the Little Guy*, FIN. TIMES (London), Jan. 10, 2004, at 16; Mimi Hall & Andrea Stone, *Activists May Use Ruling to Stir up Voters About Values*, USA TODAY, June 27, 2003, at 6A.

68. See SAMAR, *supra* note 5, at 68-72.

why we have legal institutions at all. Such institutions serve to allow for a deeper level of moral reflection that goes beyond the consideration of individual preferences and allows movement between institutional and background rights. The former represent the specific rights individuals have before the law.⁶⁹ The latter represent a more abstract set of political rights people are thought to possess in a free society, which, when not guaranteed by the legislature, ought to be guaranteed by the courts.⁷⁰

The point is that if courts are to do justice and legislatures are to promote the common good, more flexibility is needed. This is true whether we take the judges to be activist or conservative, because any action they take is going to be shrouded in language concerning their duty to obey law. But from where would this duty arise? The answer lies in what we take to be the responsibilities associated with the various practices of governmental institutions and the particular duties of the governmental actors involved in those practices to insure that such responsibilities are met.

What is perhaps surprising to learn from a study of legal decisions is not that there are differences in judicial viewpoints over what the laws entail, as would be the case, for example, if some judges believe in following original intent⁷¹ while others believe in adopting the law to the changing needs of society.⁷² What is both surprising and interesting is that the very concept of why even a very clearly written law should be followed is not at all obvious from delineating the legal philosophy of any judge.⁷³ This is because the question of why the law should be followed is not itself a question of legal philosophy, but rather of political philosophy.⁷⁴ By “legal philosophy” I mean both what is to count as law and when a so-called law should validly be given effect. The reason why traditional natural law theories appear to answer this question (as opposed to positivism, legal realism, or even Dworkian legal idealism where society’s political morality is in doubt) is that such theories conflate the question of what the law is and why we should obey it. The question of why one should obey the law is not to be found in the practice of law itself but in the concern over whether courts should follow unjust laws. That is to say, it is not a question for judges alone, but for legal academics,

69. *See id.*

70. The relationship between background and institutional rights is theoretical and is meant to convey two different ideas about what duties courts have. *See id.*

71. *See generally* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (arguing for a framers’ interpretation of the law).

72. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 559 (1999) (discussing different theories of constitutional interpretation).

73. *See* Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1981-1982, 96 F.R.D. 437, 444 (1983).

74. *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 13-14, 31-36 (2001).

political philosophers, and the citizenry at large who seek broader justificatory grounds before accepting any such dogma-affecting behavior. Judges operating from within the internal point of view accept a responsibility to follow the law because they view their society as nearly just, and they obey the laws until changed by the legislature or through the various methods of constitutional or legislative interpretation.⁷⁵ “Very hard” cases, however, disrupt this neat avoidance of the issue by forcing judges to confront the question of the justice of the legal system from outside their own point of view. Marriage, for example, can no longer be assumed to be between a man and a woman because that issue is exactly what is in question. “Very hard” cases arise when judges confront either internally inconsistent principles or principles subject to some greater outside challenge as to their justice. Whenever this happens, judges should be prepared to engage a more open, reflective process in which the institutional grounds of their own duty to follow the law can no longer be assumed, but must, at least to some extent, be justified.

In the broader sense, this means that even in a society that considers itself to be nearly just, if it does not engage in this reflective process, the laws it follows will at most be virtual (at least until “very hard” cases are confronted) in the sense that the courts will assume a duty to obey them without such duty ever being shown to exist.⁷⁶ Here, I use the word “law” in the broad sense that natural law theorists do in order to encompass the outcrop of society’s serious reflection of how to decide difficult cases. The distinction between internal and external points of view brings us to the relationship of legal and political philosophy by making this issue obvious, as it does when courts confront the question of same-sex marriage. By the same token, the problem with “very hard” cases is that having made the issue evident, it now needs to be solved if justice is to be done.

Still, that some cases should be “very hard,” such as *Goodridge v. Department of Public Health*,⁷⁷ while others are merely “hard” cases, such as *Bowers v. Hardwick*,⁷⁸ does not say much about what the topography looks like at the border. For this reason, the last of the three cases I consider is *Lawrence v. Texas*,⁷⁹ which in many respects is similar to *Bowers*, but in one important respect is more comparable to *Goodridge*.

IV. LAWRENCE V. TEXAS: THE TOPOGRAPHY OF THE BORDER

75. See SAMAR, *supra* note 5, at 76-78.

76. *Id.* at 96.

77. 798 N.E.2d 941 (Mass. 2003).

78. 478 U.S. 186 (1986).

79. 539 U.S. 558 (2003).

In *Lawrence v. Texas*, the Court made up for its prior—now admitted—mistake in *Bowers v. Hardwick* by allowing a challenge to the constitutionality of a Texas sodomy statute that made adult consensual same-sex behavior a crime, even when performed in private.⁸⁰ The facts were almost identical to those in *Bowers*, except the sodomy concerned anal sex, not oral sex, and there was a different legal—though still unrelated—reason for the police entry into the home.⁸¹ One very interesting aspect of the case is the fact that it came down just seventeen years after a similar Georgia statute⁸² was upheld as constitutional in *Bowers*. Another important difference between the two cases was that the *Lawrence* Court seemed willing to pay more attention to extralegal and nonlegal sources.⁸³

In *Lawrence*, the Court overruled *Bowers*.⁸⁴ Writing for the majority, Justice Kennedy grounded his opinion in several earlier cases, including *Griswold v. Connecticut*⁸⁵ and *Roe v. Wade*,⁸⁶ because both recognized a fundamental privacy interest protected by the Due Process Clause.⁸⁷ Kennedy's majority opinion in effect displaced what dissenting Justice Scalia noted was the previous view of the Court (and, no doubt, was still the view of himself, Chief Justice Rehnquist, and probably Justice Thomas), that a particular practice traditionally viewed as immoral could be "a sufficient reason for upholding a law prohibiting the practice."⁸⁸

Kennedy's broader due process interpretation in *Lawrence* may have been out-of-step with current law, however, if *Bowers* were still good law. As *Lawrence* and *Bowers* are not logically reconcilable, *Bowers*'s status as controlling law had to be overcome. Kennedy dealt with this issue by showing that *Bowers* was wrong when decided and remains wrong today.⁸⁹ It was necessary for the Court to find that *Bowers* was wrongly decided because, under a certain version of positivism, once *Bowers* was decided, it became part of the very law that Kennedy had to interpret.⁹⁰ Indeed, even from the position

80. *Lawrence*, 539 U.S. at 562-64. The Texas statute at issue in *Lawrence* was TEX. PENAL CODE ANN. § 21.06(a) (2003).

81. *Lawrence*, 539 U.S. at 562-63 (the police entered the home as a result of a reported weapons disturbance).

82. The statute in question in *Bowers* was GA. CODE ANN. § 16-6-2 (1984).

83. See *Lawrence*, 539 U.S. at 576-77.

84. *Id.* at 578.

85. 381 U.S. 479 (1965).

86. 410 U.S. 113 (1973).

87. *Lawrence*, 539 U.S. at 564-65.

88. *Id.* at 599 (Scalia, J., dissenting).

89. *Id.* at 566-68.

90. The point here is that if positivism (or legal realism, which holds the view that the "law" is what the courts say the law is) claims that what the highest court decides is now the law, then the Supreme Court's prior determination in *Bowers* would make that the law of the land.

of a natural law theorist, Kennedy's decision would be problematic if *Bowers* were deemed morally correct.⁹¹

As a ground for overturning *Bowers*, Kennedy showed that the suppositions determining that decision—views of Western Civilization towards homosexuality—were incorrect and inadequate ways of explaining both the law that preceded it and the law ensuing from it.⁹² First, Kennedy examined the history and weak enforcement of sodomy statutes that preceded *Bowers*.⁹³ Second, he noted that the prior development of the Model Penal Code disavowed making private, consensual, adult sexual activity criminal.⁹⁴ Third, the post-*Bowers* case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* re-affirmed *Roe*, and recognized that due process protected the deep-seated value in personal autonomy and human dignity.⁹⁵ Finally, Justice Kennedy focused on various recent international human rights documents and decisions affirming privacy and equality rights for gays and lesbians.⁹⁶

What is striking is that Kennedy's opinion in *Lawrence* is difficult to fit into a standard positivist model of law, like that of H.L.A. Hart's. This difficulty exists because Hart treats positivism as not only separating law from morality and providing an analytical analysis of concepts, but also treats it as establishing formal criteria for determining what the law is.⁹⁷ In other words, if a statute or case decision has the correct pedigree, it is the law regardless of whether we like its content. Kennedy's view is arguably more consistent with Dworkin's model, because Kennedy attempts to balance previously established principles against those raised in *Bowers*. However, the Dworkin model cannot easily explain why the weight of relevant principles may now have shifted.⁹⁸ Internal principles, including those directing courts to take account of society's changing views, are themselves relative to such change. What Kennedy did not do was articulate a clear way of answering these questions within the American constitutional framework. This author believes that Kennedy's decision was correct; however, the task of formulating such an articulation of how to answer these questions within the American constitutional framework is still incomplete.

91. The issue here is different, as it begs the question of whether or not morality is relative to changing beliefs.

92. *Lawrence*, 539 U.S. at 567.

93. *Id.* at 558-71.

94. *Id.* at 572 (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1980)).

95. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 846, 851 (1992).

96. *Lawrence*, 539 U.S. at 576-77.

97. See Brian Leiter, *Beyond The Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 22 (2003).

98. See *id.* at 27-28.

V. TOWARDS A MORE COMPLETE UNDERSTANDING OF LEGAL DECISION- MAKING

At this point, I would like to offer an interpretative suggestion about what courts should do to decide “very hard” cases. This suggestion may explain Justice Kennedy’s decision as well as provide a predicate for what courts should do to decide all such cases. My suggestion is to adopt a metatheory⁹⁹ that tells courts how to pick and choose among competing legal theories. The justification for adopting such a metatheory, from the judge’s point of view, is that it will provide a basis for making decisions in “very hard” cases by answering requisite questions that would otherwise be unanswerable. The metatheory should also tell judges that in “very hard” cases it is both necessary and appropriate to go beyond traditional legal theory in pursuit of what I call the best theory of politics. This is necessary to bring out the duty to obey law formulated as I have shown as a normative, and not strictly analytical, idea. With this picture in mind, I want to suggest five criteria that a court could rely on when deciding “easy,” “hard,” and “very hard” cases:

1. When the traditional sources of law are clear and on point, a judge should rely on these sources if the society views itself as nearly just, despite her own views as to the most just result
2. If the traditional sources of law include past case precedents, then, if the society is nearly just, a judge should analogize the case and reason by analogy to bring it under the particular precedent that would provide the most just result.
3. If the traditional sources of law are not clear or on point and the case involves a question of economic or social policy as opposed to right or justice, then, if the society is nearly just, the court should follow an economic analysis or appropriate policy approach to deciding what would best serve the common good.
4. When the traditional sources of law are not clear or on point and the case involves a fundamental question of justice, then if the society is nearly just, a judge should interpret the traditional legal sources, considering the society’s prevailing political morality to produce the most just result.
5. In cases where the society is not nearly just or where the particular issue is so controversial as not to be resolvable within the society’s

99. A metatheory is “a theory concerned with the investigation, analysis, or description of theory itself.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE: UNABRIDGED 1421 (Philip Babcock Gove, Ph.D. et al. eds., 1993).

political morality, because the society's political morality is itself in question, then, despite whether the law is clear and on point, a judge has no political responsibility to follow the law. In such a case, the judge's responsibility is to act upon the best political theory the court can find to do justice and, if possible, to create along the way democratic procedures that will be constitutionally liberal and concerned for the equal opportunity of all individuals.¹⁰⁰

At this point it might be noted that the criteria do not require judges to seek validation for the legal system in every case, provided that society considers itself nearly just and the case is no more than a "hard" case.¹⁰¹ This is to avoid adding unnecessary complexity both to a legal system that is already overburdened and to the duties of judges who may not be properly trained. It is also to ensure that some level of justice is done for all who come before the system. In those few cases that really are "very hard," the criteria do demand just this sort of "philosopher-king" effort, and there the added requirement does seem appropriate. Some examples will help illustrate the theory's utility.

Utilizing the metatheory and its five criteria of decision making, I am now in a position to fit the three cases I presented at the beginning of this article into a broader framework of how the law should operate to resolve each of them. Bearing in mind that there will be differences depending on whether the cases are "easy," "hard," or "very hard," here is how each case-type might be resolved.

I will start with a case-type I have not discussed because it may be thought to be an "easy" case, namely, the case of a homosexual-bashing. This example seems to fit the first criterion because the statute in this case, most likely a battery statute, is clear and there is no serious question of justice at stake in punishing direct uses of force and violence against a non-threatening person. I am putting aside here any free speech issue that might arise from the augmentation of a penalty by simply assuming, for the purposes of the example, that no such augmentation occurs. The difficult question in this area is whether augmenting a punishment to target thoughts is a violation of the First Amendment. There, the question approaches a "hard" case where the society's political morality would seem to recognize higher penalties for premeditation in the criminal law or willful and wanton conduct in the torts area. In that instance my fourth criterion for decision making, requiring the

100. SAMAR, *supra* note 5, at 76-77.

101. Here I differ from an earlier aspect of Ronald Dworkin's work where he would have his judge fit each decision with every other possible decision he or she subsequently plans to make. See RONALD DWORIN, A MATTER OF PRINCIPLE 161-62 (1985). Dworkin later relaxed the requirement a bit to require only putting together a coherent scheme of law within the area in which the decision is rendered. See DWORIN, *supra* note 65, at 252-53.

society's political morality to rank the value of thought in the context of hate-supported violence, seems appropriate. Further, that decision will no doubt rekindle an important discussion balancing First Amendment liberty interests against Fourteenth Amendment equality concerns.

*Bowers v. Hardwick*¹⁰² seemed like it should have been a good fit to the fourth criterion because the prevailing political morality of society was already present to resolve a conflict in case precedent. Two important constituents of that morality (as reflected in the case law) are the separate notions of negative freedom¹⁰³ and self-regardingness,¹⁰⁴ which seemed evident in the prior privacy cases.¹⁰⁵ These two notions, when put together, should have presented the Court with the idea of a private act. This idea could have been found to be present in the *Bowers* case, but for some unexplained reason the Court declined to find such a private act.¹⁰⁶

Kennedy's decision in *Lawrence v. Texas*¹⁰⁷ fits my fifth criterion of being a "very hard" case in which extralegal aspects concerning the duty to obey law were taken into account but not articulated. Similarly, the decision to legalize same-sex marriage also fits the fifth criterion because a court must go beyond society's political morality by interpreting the Equal Protection Clause to unravel the institution of marriage itself. Here the issue is not to make the institution (as it is traditionally construed) available to all people equally, but to question whether the institution is fairly constituted. Let me elaborate just a bit.

To deny one class of adult citizens the right to choose *whom* to marry (rather than just affording them the right to marry), without a compelling reason, may undermine the political responsibility courts have to do justice by affording every human being a right to dignity. At least, this would be an important broad-based duty-prescribing question for the courts to consider. In our system, the Equal Protection Clause was designed to avoid past practices

102. 478 U.S. 186 (1986).

103. Negative freedom is the absence of obstacles, barriers or constraints. ONLINE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at <http://plato.stanford.edu/> (last visited Nov. 1, 2004).

104. Self-regardingness is where one's actions do not, in the first instance, affect other than oneself. See JOHN STUART MILL, ON LIBERTY 71 (1988).

105. SAMAR, *supra* note 17, at 65.

106. See *id.* at 68, where I offer the definition that "[a]n action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors." By "in the first instance" I mean that a mere description of the action, "without the inclusion of any additional facts or causal theories" does not suggest of a conflict. *Id.* at 67. By "basic interest" I mean an "interest independent of conceptions about facts and social conventions." *Id.*

107. 539 U.S. 558 (2003).

that may, upon reflection, turn out to be unjust.¹⁰⁸ As Cass Sunstein has noted, the clause is forward-looking in just the opposite way that the Due Process Clause is backward-looking.¹⁰⁹ This means that courts are obligated to make use of the Equal Protection Clause “to invalidate practices that were widespread at the time of its ratification and were expected to endure.”¹¹⁰ Put another way, the Clause recognizes that a system of legal rules may not always be adequate to resolve every case that comes along because the rules themselves embody certain background prejudices. This suggests that occasionally it may be necessary for courts to look beyond the political morality of the society if justice is to be done.

VI. POLITICAL MORALITY

Here it may be appropriate to recognize the likelihood that many people may feel uneasy with this fifth principle, even with this somewhat narrow application, because it allows courts to step outside a conventional legal interpretation of law in search of justice. Undoubtedly, some may wonder whether this opens the door to judicial anarchy by producing results that represent the idiosyncratic moral views of the judges, which may be considered good only when the public shares these virtues but not otherwise. Obviously this issue is serious. However, the fact that in a few “very hard” cases judges may need to step outside the prevailing political morality does not mean, as the other principles attest, that in every case there are good reflective grounds for doing so. Nor does it mean that law is unprincipled because any argument outside of what may be thought as traditional legal argument opens the door to a “nowheresville” of idiosyncratic moral theory.¹¹¹

The contrary to seeing law as unprincipled is seeing law as following a doctrine of political responsibility from which we can derive a duty to obey law. The duty to obey law is based on the state’s political obligation to respect and advance human dignity.¹¹² Even if there are disagreements over what that outside doctrine is, it will be a worthwhile effort to determine what it might be.

108. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

109. *Id.*

110. *Id.*

111. Here I distinguish myself from Richard Posner, who discounts the use of moral theory in law. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

112. My point here is that, at least in a Western-styled democracy, for a legal system to be morally justified such that a normative duty to obey law can be derived, the legal system must require respect for individual human autonomy in the sense of upholding individual self-rule. Failure to respect such autonomy is to undermine at least one important argument for law. See SAMAR, *supra* note 17, at 90-103.

While others may differ on just how to set out this area of political responsibility—whether to follow, for example, Immanuel Kant, John Rawls, or some more utilitarian theory—I prefer to look to the writings of Alan Gewirth who believes that voluntariness and purposiveness are necessary starting elements for any moral theory¹¹³ and, consequently, that these elements are necessary for any morally justified basis for following law. I chose to look to Gewirth here because his system provides the best starting point for grounding rights to freedom and well-being, which our legal system and society generally seem most concerned to support.¹¹⁴

Here, freedom means that one acts by one's own unforced choice with knowledge of relevant circumstances and well-being means that one can act for purposes of one's own good.¹¹⁵ Together, these two rights arise out of a dignity-based notion of individual agency in which everyone affirms their rights, from their own point of view, of maximizing their own individual self-fulfillment.¹¹⁶ Consistent with not conflicting with the equal rights of others, the government aids the development of human dignity by assisting persons both individually and collectively in achieving self-fulfillment. Government serves this purpose by providing protections for basic rights—including the rights to life and physical and mental integrity—and the right to protect and secure various means to ensure that one's purposes are not frustrated—including the rights to property and to contract. Government further protects the right to provide opportunities to enhance one's purpose fulfillment, such as the rights to a decent standard of living, health care, and education.¹¹⁷ In short,

113. Samar, *supra* note 37, at 1000 (citing ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 53 (1982)).

114. In their book, authors Beyleveld and Brownsword make the following argument: "(1) The *Legal Enterprise* and knowledge of it involves action (2) The concept of action commits an agent, logically, to the acceptance of a supreme moral principle, the 'PGC' [Gewirth's supreme principle of morality that holds one should act in accord with the rights to freedom and well being of one's recipients as well as oneself] (3) Phenomena of the *Legal Enterprise* can only be properly characterized by judging their moral statuses in relation to the PGC." DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT 33 (1986).

115. Alan Gewirth explains how a reduction in certain "nonsubtractive goods," such as when contract rights and rights to property are not enforced to protect against cheating and illicit takings, leads to a reduction in individual purpose fulfillment, while an increase in certain other "additive goods" – like rights to education, healthcare, and a decent standard of living – enhances one's level of purpose fulfillment. See ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATION 55-56 (1982) [hereinafter GERWITH, HUMAN RIGHTS]; see also ALAN GEWIRTH, REASON AND MORALITY 54-63 (1978).

116. See GEWIRTH, HUMAN RIGHTS, *supra* note 115, at 55-56; see also GEWIRTH, REASON AND MORALITY, *supra* note 115, at 54-63.

117. See GEWIRTH, HUMAN RIGHTS, *supra* note 115, at 55-56; see also GEWIRTH, REASON AND MORALITY, *supra* note 115, at 54-63.

the view protects many of those rights recognized under the *Universal Declaration of Human Rights*, adopted by the United States in 1948.¹¹⁸

Consequently, the idea of human agency (in the moral sense of being a voluntary purposive actor) is not only at the foundation of moral rights, it is also at the foundation of our duty to obey law and the courts' duty to follow the law. It also can be seen as part and parcel to the protection of human rights generally and the promotion of fundamental justice.¹¹⁹ Beyond that, it is no doubt a basis for human dignity that supervenes on human agency by recognizing that what makes our actions so appealing to us is that they are our actions.¹²⁰

In the case of same-sex marriage, the underlying practice that needs to be unraveled is marriage itself. What is it? Why do we as a society value it to the point of attaching legal protections to support it? The application of the broader theory of political morality that I have suggested might be able to answer these questions. If so, it would be most useful in resolving the issue of whether same-sex marriage should be legally recognized in the same way as opposite-sex marriage is recognized. Without going into too much detail on this narrow issue I would like simply to offer a brief outline for how such an approach might operate.

The right to marry (especially if it is based on love and commitment) can easily be seen as grounded in the purposive-fulfillment and dignity that will result not only for the couple seeking to get married but to all people generally affected by the marriage, including family members and, in some cases, as with adoption, the broader society. However, this will only be true if the freedom to marry and participate in the rights that accompany marriage in our society are not circumscribed by phony state arguments that either beg the

118. In the Declaration are promoted rights to life, liberty, security; not to be held in slavery or subject to torture or inhumane treatment; not to be subject to arbitrary arrest or exile; rights to a fair and public trial, privacy, a presumption of innocence, travel and asylum, to change nationality, to own property, and to have freedom of thought and worship. The declaration also affirms certain economic rights including rights to social security, rest and leisure, a decent standard of living, compulsory primary education, and to participate in the cultural life of the community. See THE PRESIDENT'S COMM'N FOR THE OBSERVANCE OF HUMAN RIGHTS YEAR 1968, HUMAN RIGHTS: UNFOLDING THE AMERICAN TRADITION 100-05 (1968).

119. Here the notion of justice comes in when, in protecting rights to freedom and well-being, one also allows for considerations of due process and equal protection to ensure equality of rights and that no one's rights are taken away or limited—as in the case of imprisonment—without adequate justification.

120. "Properties of type *A* are supervenient on properties of type *B* if and only if two objects cannot differ with respect to their *A*-properties without also differing with respect to their *B*-properties." THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 778 (Robert Audi ed., 1995).

question or have little to do with respecting human dignity.¹²¹ When a society affords the right to marry to members of the same sex, it recognizes the fundamental dignity of those who choose same-sex marriage by recognizing that they have the ability to achieve self-fulfillment through the marital relationship. Society also establishes a precedent for fairness in the distribution of all such rights. In this sense, broadening the definition of marriage promotes the ideals of justice in the application as well as in the protection of substantive rights. Indeed, it is this provision of human dignity reflected in individual autonomy and fundamental fairness that renders the outcome in such a case both morally responsible and legally obligatory.

Applying the same moral rights of freedom and well-being to *Lawrence v. Texas*,¹²² a case I earlier described as being on the borderline between a “hard” and a “very hard” case, Kennedy’s opinion now can be fully understood. Not only does it undo the mistake previously made in *Bowers v. Hardrick*¹²³ where the Court appealed to a kind of particularist morality on an issue that perhaps society was too indifferent to give much attention to, but it does so on the basis of recognized human rights principles. These principles have arguably been part of the law all the time, even if they had not been previously recognized. Kennedy’s own statement about these principles hints at this connection:

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention of Human Rights Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 now), the decision is at odds with the premise in *Bowers* that the claim put forth was insubstantial in our Western civilization.¹²⁴

Moreover, upon reflection brought about by the implications that *Bowers* had on the actual lives of gays and lesbians—implications relating to discrimination in employment, child rearing, and marriage—Justice O’Connor, in her concurring opinion, was motivated to, if not overrule *Bowers*, at least correct its progeny by appealing to equal protection values that give

121. Here I have in mind arguments that beg the question like defining marriage as relationship between a man and a woman where that is the issue in question, and arguments that fail to substantiate normative claims like legal marriage exists solely to promote a place for rearing offspring.

122. 539 U.S. 558 (2003).

123. 478 U.S. 186 (1986).

124. *Lawrence*, 539 U.S. at 573 (citation omitted).

substantive meaning (in terms of bringing in freedom and well-being) to constitutional interpretation.¹²⁵ Thus, using traditional constitutional language, but arguably providing it a broader human rights interpretation, the Court (both Kennedy's majority opinion and O'Connor's concurring opinion) alluded to a higher-ordered grounding in which one can find a rational basis for its decision.

VII. CONCLUSION

Looking beyond any specific case outcome, and even beyond the possible interpretive approaches one might take to arrive at their meaning, *Bowers*, *Goodridge*, and *Lawrence* illustrate the need to search out higher-ordered moral theories to find a duty to obey law. It is no longer enough to simply follow what the traditional positivist model of legal analysis affords us. What we gain from appreciating these cases in all their jurisprudential significance is that our society is on the verge of a real commitment to the pursuit of justice and fundamental rights. Where that pursuit takes us is going to be somewhat uncomfortable for those who do not like to venture into new and uncharted intellectual territories, for it will mean not always being as certain of what result one should find based on a simple formula or rule. Still, the pursuit of that commitment, which was a goal of *Justifying Judgment* and an inevitable outcome of recent developments in constitutional law, is something that we should be prepared to do. Certainly the developing field of sexual orientation and the law has pointed us in this direction. The only question is: Will we be prepared and ready to explore?

125. *Id.* at 582-83 (O'Connor, J., concurring).

