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OUR MILLIAN CONSTITUTION: THE SUPREME COURT'S REPUDIATION OF IMMORALITY AS A GROUND OF CRIMINAL PUNISHMENT

KEITH BURGESS-JACKSON*

[The function of the criminal law], as we see it, is 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 specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined.

. . . .

. . . Unless a deliberate attempt is to be made by society, acting 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. To say this is not to condone or encourage private immorality.

—The Wolfenden Committee¹

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1. SIR JOHN WOLFENDEN, COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 23–24 (Stein and Day 1963) (1957). The Wolfenden Committee (chaired by Sir John Wolfenden) recommended that “homosexual behaviour between consenting adults in private should no longer be a criminal offence.” *Id.* at 48.

The suppression of vice is as much the law's business as the suppression of subversive activities; 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.

—Patrick Devlin²

A little over a century ago, the state of New York enacted a law that limited the number of hours a baker could work.³ The law was challenged on the ground that it violated the Fourteenth Amendment of the United States Constitution, which forbids states to "deprive any person of life, liberty, or property, without due process of law."⁴ The United States Supreme Court agreed, ruling, in *Lochner v. New York*,⁵ that the law deprived individuals of liberty of contract. In his famous dissent in that case, Justice Oliver Wendell Holmes drew a distinction between the wisdom or desirability of a law (on the one hand) and its constitutionality (on the other):

This case is decided upon an economic theory [viz., *laissez-faire*] which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

2. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 13–14 (4th prtg. 1970).

3. See 1897 N.Y. LAWS c. 412, art. 8, § 110.

4. U.S. CONST. amend. XIV.

5. 198 U.S. 45 (1905).

The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*.⁶

Justice Holmes' deferential attitude toward state economic regulation eventually won out. It is now widely (though not universally) accepted that the Fourteenth Amendment does not prohibit a state from intervening in the economy. State legislatures (and Congress, to which the identically worded Fifth Amendment applies) are free to regulate the economy provided the means chosen are rationally related to a legitimate state interest. But while the Fourteenth Amendment may not enact Herbert Spencer's *Social Statics*,⁷ the recent Supreme Court decision on sodomy, *Lawrence v. Texas*,⁸ shows that it all but enacts John Stuart Mill's *On Liberty*.⁹ Justice Holmes, I suspect, would be aghast.

Mill argued in *On Liberty* for what we might call classical liberalism, which he thought could be summarized in "one very simple principle":

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹⁰

6. *Id.* at 75 (Holmes, J., dissenting).

7. HERBERT SPENCER, *SOCIAL STATICS, OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* (1851).

8. 123 S. Ct. 2472 (2003).

9. JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in 18 *COLLECTED WORKS OF JOHN STUART MILL* 213 (J.M. Robson ed., 1977).

10. *Id.* at 223–24.

Mill was marking off a class of conduct (or a realm of life) that was, morally speaking, beyond the reach of the state. In the quoted passage, Mill identifies three grounds for limiting individual liberty:

1. (Prevention of) harm to others;
2. (Prevention of) harm to self; and
3. (Prevention of) harmless wrongdoing.

Elsewhere in *On Liberty* Mill discusses a fourth ground:

4. (Prevention of) offense to others.¹¹

Mill's claim is that only the first ground is legitimate. That is to say, only the prevention of harm to others constitutes a good reason to legally coerce or socially pressure individuals. The fact that my action will harm *me* is morally irrelevant. The fact that my action is *immoral*, or widely *believed* to be immoral, is irrelevant. The fact that my action may or will *offend* others is irrelevant.

Mill was aware that more than one ground may apply to a given act. Murder, for example, is both a harm to another (the victim) and immoral. If it is done in public, moreover, it will deeply offend (revolt, shock, dismay, frighten) onlookers. What Mill argued is that only the *harmfulness to others* counts as a good reason to prohibit and punish murder. The immorality does not. The offensiveness does not. The harm or risk of harm to the perpetrator (should there be any) does not. This is why I used the expression "harmless wrongdoing" rather than merely "wrongdoing." Mill was not opposed to legislating morality; he was opposed to legislating morality *when there is no victim*. He would have opposed what we now call victimless crimes (provided they really are victimless).¹²

11. *Id.* at 283–85.

12. It is important not to conflate immorality and offensiveness, even if some acts are both immoral and offensive. H.L.A. Hart explains the difference: Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse between consenting adults in private is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public. But the fact that the same act, if done in public, could be regarded both as immoral and as an affront to public decency must not blind us to the difference between these two aspects of conduct and to the different principles on which the justification of their punishment must rest. The recent English law relating to prostitution attends to this difference. It has not made prostitution a crime but punishes its public manifestation in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive.

H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 45 (1963).

The foremost contemporary defender of Millian liberalism with respect to the moral limits of the criminal law is Joel Feinberg, who wrote a book on each of the four principles.¹³ Feinberg called the principles “liberty-limiting principles,” for each states a distinct moral ground for limiting liberty. (According to Feinberg, “Liberty should be the norm; coercion always needs some special justification.”¹⁴) There are other possible liberty-limiting principles, as he acknowledged, but these four are the main ones. For ease of reference, he gave them names. The principle that there always exists a good reason for prohibiting and punishing conduct that harms or risks harm to others is called the “harm principle.”¹⁵ The principle that there is always a good reason for prohibiting and punishing conduct that seriously offends others is called the “offense principle.”¹⁶ The principle that a good reason always exists for prohibiting and punishing conduct that harms or risks harm to oneself is called “legal paternalism.”¹⁷ Finally, the principle that there is always a good reason for prohibiting and punishing immoral conduct is called “legal moralism.”¹⁸

The term “good reason” is important. Feinberg did not say that preventing harm to others is a *sufficient* reason to limit liberty, for it may be that certain harms are trivial (*de minimis*) in comparison to the costs of enforcement (where intrusion on privacy is one significant cost).¹⁹ He was building an analytical framework, inspired by Mill, for use in evaluating criminal laws. He left the application of the various principles, as well as judgments concerning enforcement and other costs, to legislators, executives, and judges.²⁰ Feinberg wrote as a philosopher, not a policymaker.

13. JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984–88). Specifically, see 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988). For a bibliography of Feinberg’s work, see Keith Burgess-Jackson, *An Almost Complete Joel Feinberg Bibliography*, at <http://www.uta.edu/philosophy/faculty/burgess-jackson/Feinberg.htm> (June 12, 2003) (on file with the *Note Dame Journal of Law, Ethics & Public Policy*).

14. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 9 (1984).

15. *Id.* at 10, 26–27.

16. *Id.* at 12–13, 26.

17. *Id.* at 12–13, 26–27.

18. *Id.* at 12–13, 27.

19. *Id.* at 189.

20. *Id.* at 190–92.

Having identified and named the main liberty-limiting principles, Feinberg went on to define "liberalism" in terms of them. Liberalism, he said, is the view that only the harm and offense principles, duly qualified, are valid.²¹ Extreme liberalism is the view that only the harm principle is valid.²² This means that, to a liberal (either kind), it is *never* a good reason (although it is always a *reason*) to prohibit and punish conduct in order to prevent harm to self or to prevent immoral conduct. Liberals are not necessarily moral skeptics, subjectivists, or relativists (as is so often charged). The reason a liberal rejects legal moralism is not (necessarily) that morality is a myth (skepticism), a personal stance (subjectivism), or an artifact (relativism), but that, even if there *are* objective, universal moral values (truths), such values (truths) are not a legitimate basis on which to limit individual liberty. Law is one thing, the liberal insists, morality another. Law must accommodate, on grounds of fairness, a diversity of firmly held moral opinions, even if only one set of opinions is objectively and universally "true."

When we superimpose Feinberg's analytical framework on the passage from Mill, we see that Mill, too, rejects legal paternalism and legal moralism. It's not as clear whether Mill would have gone along with Feinberg in accepting a duly qualified offense principle. In other words, it's not clear whether Mill was a liberal (like Feinberg) or an extreme liberal; but he was some kind of liberal. Another difference between Mill and Feinberg is that Feinberg was concerned only with criminal punishment. (The title of his tetralogy is *The Moral Limits of the Criminal Law*.) Mill was concerned with all forms of social pressure, not just legal coercion. For example, Mill borrowed the expression "tyranny of the majority" from Alexis de Tocqueville.²³

On June 26, 2003, in a case that will be discussed a hundred years from now (*Lawrence v. Texas*²⁴), the United States Supreme Court overruled its seventeen-year old decision in *Bowers v. Hardwick*.²⁵ The overruling represents a movement to Millian liberalism, albeit without mentioning Mill or *On Liberty*. In *Bowers*, the Court had applied traditional fundamental-rights analysis to a Georgia statute that prohibited and punished sodomy (defined as oral or anal intercourse).²⁶ It first identified the interest at

21. *Id.* at 14.

22. *Id.*

23. MILL, *supra* note 9, at 219 (citing ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 142 (2d ed. 1840)).

24. 123 S. Ct. 2472 (2003).

25. 478 U.S. 186 (1986).

26. *Id.* at 190.

stake. If state action (a statute, for example) implicates a “fundamental right,” then the Court applies “strict scrutiny” to it. More often than not, this results in a striking down of the statute. If no fundamental right is implicated, then the Court applies “rational-basis” analysis to it. This is an easy test to pass.

Obviously, a great deal hinges on whether a fundamental right is implicated. The *Bowers* Court, via Justice Byron White, held that there is no fundamental right to engage in homosexual sodomy.²⁷ (Yes, that is how the Court framed the issue. It is one of many grounds on which *Bowers* has been criticized.) The only remaining question was whether the state of Georgia had a rational basis for its anti-sodomy law. The Court ruled that it did. As Justice White put it, “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause [of the Fifth or Fourteenth Amendments], the courts will be very busy indeed.”²⁸

This was a ringing endorsement of the legal enforcement of morality, otherwise known as legal moralism.²⁹ Justice White was saying that the immorality of homosexual sodomy, or the presumed *belief* of a majority of the citizens of Georgia that homosexual sodomy is immoral, is a good—indeed, a sufficient—reason, constitutionally speaking, to prohibit and punish it. This should not be read as a reflection of Justice White’s personal views. For all we know, he, like Justice Clarence Thomas in *Lawrence*, found anti-sodomy laws “uncommonly silly.”³⁰ Indeed, Justice White went out of his way to say, like Justice Holmes before him, that the issue before the Court was not whether the Georgia statute was “wise or desirable.”³¹ That was for legislators to decide. The issue was whether the United States Constitution forbids states to enforce morality (or what they take to be morality).³² His answer

27. *Id.* at 191.

28. *Id.* at 196.

29. For a beautifully written and carefully reasoned defense of legal moralism against several prominent liberal critics, see ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993). George’s “central thesis” is that “there is nothing in principle unjust about the legal enforcement of morals or the punishment of those who commit morals offenses.” *Id.* at 1.

30. *Lawrence v. Texas*, 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (Stewart, J., dissenting)).

31. *Bowers*, 478 U.S. at 190.

32. Much has been written about the distinction between an act’s *being* immoral and its being widely or universally *believed* to be immoral. Ronald Dworkin, for example, distinguishes between an “anthropological sense” of morality and a “discriminatory sense” of morality, the former being purely descriptive in nature (reflecting actual consensus, however uncritical, unrea-

was that it did not.³³ The Georgia statute was accordingly upheld.³⁴

Fast forward to June 2003. The question before the *Lawrence* Court was whether a state, such as Texas, may pass a law that prohibits *homosexual* sodomy but not heterosexual sodomy. The Court could have upheld *Bowers* by striking down the Texas statute on Equal Protection grounds. The Court could have said, in effect, that while no state may single out homosexual sodomy for punishment, a state is free to prohibit and punish *all* sodomy. Justice Sandra Day O'Connor, who had voted with the majority in *Bowers*, took precisely this position in her concurring opinion.³⁵ Five other justices, however, decided to overrule *Bowers*.³⁶

Justice Anthony Kennedy wrote for the five-member *Lawrence* majority. His opinion is remarkable for what it didn't do as much as for what it did do. He did not use the traditional "fundamental-rights" analysis or the "privacy" rubric. He did not ask, as Justice White had in 1986, whether there is a fundamental right to engage in homosexual sodomy (indeed, Justice Kennedy comes close to ridiculing that way of framing the issue). He did not even ask whether there is a fundamental right to *privacy* that includes or encompasses sodomy. He did not mention privacy at all! Instead, he invoked a right to "liberty."³⁷ Recall that the Fourteenth Amendment forbids states to "deprive any person of life, liberty, or property, without due process of law."³⁸ The

soned, and unreflective) and the latter being critical, reasoned, and reflective. He then criticizes Patrick Devlin for conflating the two senses. Dworkin's strategy is interesting. He assumes legal moralism for the sake of argument (Dworkin, like Mill and Feinberg, is a liberal) and shows that it does not support a prohibition on homosexual conduct. "What is shocking and wrong," he writes, "is not [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality." Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986, 1001 (1965-66) reprinted in RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 248, 255 (1977).

33. *Bowers*, 478 U.S. at 195.

34. In Justice Thomas's two-paragraph dissent in *Lawrence*, he wrote that if he were a member of the Texas Legislature, he would "vote to repeal" the anti-sodomy statute. *Lawrence*, 123 S. Ct. at 2498 (Thomas, J., dissenting).

35. *Id.* at 2488 (O'Connor, J., concurring).

36. It is a nice jurisprudential question whether the Court *should* have overruled *Bowers*, or indeed whether its ruling *really does* overrule *Bowers*. There is a longstanding principle, mentioned by Justice O'Connor in her concurring opinion, that appellate cases should be decided on the narrowest possible ground. The Court could (and arguably should) have struck down the Texas statute without touching laws against sodomy generally. That it did not do so raises the charge of judicial activism, of legislating rather than judging.

37. *Lawrence*, 123 S. Ct. at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

38. U.S. CONST. amend. XIV.

Texas statute at issue in *Lawrence* does precisely that, Justice Kennedy said. Hence, it violates the Constitution.

Although, as I said, Justice Kennedy made no mention of Mill's *On Liberty*, its spirit pervades his opinion. For example, Justice Kennedy wrote that "[t]he [anti-sodomy] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law [via marriage, for instance], is within the liberty of persons to choose without being punished as criminals."³⁹ He then describes a "general rule" to the effect that a state should not attempt "to define the meaning of the relationship or to set its boundaries *absent injury to a person or abuse of an institution the law protects*."⁴⁰ This sounds suspiciously like the Millian harm principle.

But we saw that the harm principle is compatible with legal moralism. As formulated, more than one of the four liberty-limiting principles can be valid. This means that there can be more than one ground for prohibiting and punishing a given act. If Justice Kennedy's opinion is to be read as a Millian tract, therefore, he must foreswear legal moralism. In a remarkable paragraph, he does just that, acknowledging that many people, past and present, have condemned sodomy as immoral. "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."⁴¹ But that, he says, is not the issue. "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."⁴² The clearly implied answer is "No."

Thus ends legal moralism as a constitutional principle. In effect, Justice Kennedy and his colleagues in the majority read the United States Constitution as rejecting legal moralism and embracing, or at least moving toward, Millian liberalism. Henceforth, a criminal statute may not be justified as an enforcement of morality (or of the widely held moral views of citizens). To survive scrutiny under the Fourteenth Amendment, a statute that limits individual liberty must be grounded in some other principle, such as the harm principle. It is not clear whether legal paternalism remains a valid ground of criminal prohibition, since that was not at issue in the case. But the clear movement is toward Millian liberalism.

39. *Lawrence*, 123 S. Ct. at 2478.

40. *Id.* (emphasis added).

41. *Id.* at 2480.

42. *Id.*

It would be a mistake to dismiss this result as academic—i.e., as being interesting but unimportant. As Justice Antonin Scalia points out in his long, impassioned dissent in *Lawrence*, “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”⁴³ If, as the *Lawrence* majority says, the real or presumed immorality of conduct is no longer reason to prohibit it, then laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are called into question.⁴⁴ Justice Scalia attempts to demonstrate the normative *costs* of the Court’s nascent Millianism. The problem with his demonstration is that costworthiness is relative. To Justice Scalia and others, the cost may be unbearable (i.e., not worth bearing). When he says that *Lawrence* “effectively decrees the end of all morals legislation,”⁴⁵ he does so ruefully. But to liberals, some or all of the laws Justice Scalia mentioned *should* be struck down as unconstitutional. They are crimes (it is said) without a victim. Here we have a stark difference in values. Justice Scalia’s values lost.

It is interesting that Justice Kennedy took pains to isolate the issue under consideration by the Court.⁴⁶ He said that the real or presumed immorality of the conduct is *irrelevant* to the constitutionality of the Texas statute. Constitutionally speaking, in other words, the immorality of the conduct is not a good reason to prohibit and punish it. But if it is not a *good* reason, then *a fortiori* it is not a *sufficient* reason. Harm prevention and offense prevention, however, *are* constitutionally relevant, so, to complete his liberal analysis, Justice Kennedy needs to show that the Texas statute (and others like it) cannot be justified by either the harm principle or the offense principle. He does so as follows:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution [which many people find seriously offensive and unavoidable]. It does not involve whether the government must give formal recognition to any relationship [such as marriage] that homosexual persons seek to enter. The case does involve two adults who, with full and mutual con-

43. *Id.* at 2490 (Scalia, J., dissenting).

44. *Id.*

45. *Id.* at 2495 (Scalia, J., dissenting).

46. *Id.* at 2484.

sent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause [of the Fourteenth Amendment] gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.⁴⁷

Neither Mill nor his champion, Feinberg, could have said it better. The only question is whether Antonin Scalia will turn out to be the twenty-first century's Oliver Wendell Holmes. Justice Holmes's deferential attitude toward state economic regulation, expressed in his *Lochner* dissent, took thirty-two years to emerge victorious. Will Justice Scalia's deferential attitude toward state *social* regulation, expressed in his *Lawrence* dissent, take thirty-two years to emerge victorious? Will it *ever* emerge victorious? As is so often the case in the law, only time will tell.⁴⁸

47. *Id.*

48. Readers interested in the topic of legal moralism should consult THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* (1983) and *MORALITY, HARM, AND THE LAW* (Gerald Dworkin ed., 1994). Interestingly, Grey remarked twenty years ago that "[t]he Supreme Court itself has been less ready than have academic commentators to read philosophical theories in general—or Mill's principle in particular—into constitutional doctrine." GREY, *supra*, at 9. The Court, it would appear, is now ready. Ours is quickly becoming, if it has not already become, a Millian Constitution.

