

**Title:** Moral Offences and Same-Sex Relations: Revisiting the Hart-Devlin Debate

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The long-standing controversy about the law's proper role in enforcing morality has entered a new phase with the U. S. Supreme Court's decision in 2003 invalidating state criminal laws prohibiting same-sex sodomy. On its face, the Court's opinion in *Lawrence v. Texas*<sup>1</sup> might appear to rest on the libertarian principle enunciated more than a century ago by John Stuart Mill: that "the only purpose for which power can be rightfully exercised over any members of a civilized community, against his will, is to prevent harm to others."<sup>2</sup> The Court does not explicitly invoke Mill's principle; and it is highly unlikely that the Court majority is prepared to endorse the implications that Mill drew from this principle, to invalidate laws restricting narcotics usage or commercial sex. But *Lawrence* can be read at least to suggest that state coercion must be aimed at secular harms, at something more than simple moral approval or disapproval of individuals' conduct. In this sense, *Lawrence* might be understood to rest on the spirit of Mill's dictum, even if secular justifications might be identified for specific state restrictions that he would not approve.

A few months after *Lawrence* was decided, the Massachusetts Supreme Court ruled in *Goodridge v. Department of Public Health*<sup>3</sup> that the state could not restrict marriage to heterosexual couples. Several state supreme courts had previously held that same-sex couples must be afforded all of the practical benefits provided by state law for married heterosexuals but the honorific status of "marriage" as such was not

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1. 120 S.Ct. 2472 (2003).

2. John Stuart Mill, *On Liberty*, p. 72, quoted in Patrick Devlin, *The Enforcement of Morals* 103 (Oxford; Oxford Univ. Press, 1965).

3. 440 Mass. 309, 798 N.E.2d 941 (2003)

constitutionally required.<sup>4</sup> *But the Massachusetts court swept this distinction aside; it read the state constitution's guarantees of both "equality" and "liberty" to require identical treatment. This ruling points in a different direction from the spirit of Mill's dictum. The state-sanctioned status of "marriage," as distinct from its practical, secular advantages of this status, conveys nothing but moral approval. In the spirit of Mill's dictum, we should conclude that the state has no business in awarding this moral honorific – this "Good Housekeeping Seal of Approval" – for its own sake.*

*This does not mean that the Massachusetts ruling is incoherent. It is plausible to conclude that the Court was not asked to evaluate the state's authority to honour "marriage" as such, and that so long as the state remains in this business, it must bestow its approval equally on those who are similarly situated. But it is clear that Massachusetts court did not see itself on the way toward invalidating marriage any more than the U.S. Supreme Court viewed Lawrence as leading to the invalidation of overturning state prostitution laws.*

The question thus posed by the juxtaposition of these two judicial rulings is to identify the proper role of state authority in regulating morals as such, where there is no plausible claim for secular harm either to others or to the individual himself. Even if the two rulings are not directly inconsistent, there are different implications and a different justificatory vocabulary that follow from each of them. For shorthand purposes, we might say that *Lawrence* can be read through a "privacy" prism which demands a secular rather than exclusively moral basis for state action while *Goodrich* posits that morals regulation is acceptable so long as it complies with the norm of equality.

I propose to explore this question by returning to a classic debate that took

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4. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993).

place in the early 1960s between H. L. A. Hart and Patrick Lord Devlin about the legitimacy of laws regulating morals. The debate was provoked by the recommendation of an Law Revision Commission proposing the repeal of the English law criminalizing homosexual sodomy. Hart supported this recommendation and Devlin opposed it. In exploring the grounds for their disagreement, I believe we can clarify the contemporary choice presented by the juxtaposition of *Lawrence* and *Goodridge*..

### *I. The Morality of Morals Laws*

There was no judicially enforceable Bill of Rights in England when Hart and Devlin debated one another. Both men aimed their arguments at legislators; they were not required to grapple with the special problems raised, as in the United States, where judges have authority to overrule majority enactments to protect minority interests. In particular, both men were free to support their views on any philosophic or practical grounds that seemed relevant to them; they were not obliged to defer to legislative judgments on matters beyond their special role or expertise, as constitutional law jurisprudence requires for judges. Their wide-ranging freedom will permit us to stand outside constitutional law constraints in evaluating the cogency of their arguments for and against homosexual sodomy laws and morals regulation generally. When we have completed this task, we can then turn to the more narrow inquiry about the suitability for constitutional law enforcement of whatever principles appear to emerge intact from the debate between these two men.

Hart rigorously restricted his argument to the specific issue whether the state may legitimately enforce morals as such. So long as some additional motive could be adduced for state interventions, Hart was prepared to accept it even though moral

conviction played a critical role in the intervention. This was most evident in Hart's acceptance of the criminalization of bigamy. Thus he notes the argument that "in a country where deep religious significance is attached to monogamous marriage and to the act of solemnizing it, the law against bigamy should be accepted as an attempt to protect religious feelings from offence by a public act desecrating the ceremony."

Hart concludes that this argument is not in consistent with his basic thesis opposing state enforcement of morality as such; "the bigamist," he says, "is punished neither as irreligious nor as immoral but as a nuisance. For the law is then concerned with the offensiveness to others of his public conduct, not with the immorality of his private conduct . . . ."<sup>5</sup> *Engaging in a public ceremony of bigamous marriage is, by Hart's reasoning, no different in principle from public display of sexual intercourse. Thus Hart says, "Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency."*<sup>6</sup>

*In these instances, the distinction between "public" and "private" acts is centrally important for Hart. But he was also prepared to accept state coercion in other circumstances where publicly displayed activity was not at all evident, such as criminalizing narcotics usage or consensual euthanasia. This is not enforcement of morality as such, Hart insists, but is a "perfectly coherent policy" of state "paternalism – the protection of people against themselves."<sup>7</sup> Hart acknowledges that Mill rejected this justification as inconsistent with his "no harm to others" principle; but Hart dismisses Mill's position as merely reflective of the "laissez faire" attitudes of the late nineteenth century which are inconsistent with "the facts" about human nature as understood "in the mid-twentieth century." Thus by twentieth*

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5. H. L. A. Hart, *Law, Liberty and Morality* 41 (Stanford: Stanford Univ. Press, 1963).

6. *Id.* at 45.

7. *Id.* at 31-32.

*century lights, criminalizing narcotics usage is not necessarily the enforcement of morals as such, but application of state intention to protect individuals against “choices ... made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion.”*<sup>8</sup>

*Devlin seizes on these two examples and charges Hart with inconsistency, with the acceptance of the enforcement of morality as such.*<sup>9</sup> *As a matter of strict logic, however, Hart has the better of this argument; there is a distinction based on the intent of the legislator in enacting the criminal proscription of bigamy or narcotics usage. The distinction may be gossamer thin in actual practice; and it may not be robust enough or sufficiently self-defining to serve as an instrument for judicial supervision of legislative action. But Hart was not prescribing formulas for use in constitutional adjudication. Hart was speaking to legislators who, he assumed, were struggling in good faith to do the right thing. He was appealing to the legislators’ willingness to engage in self-reflection, to assure themselves that the reason for their*

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8. *Id.* at 32-33. Hart continues, “Underlying Mill’s extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts. Mill, in fact, endows him with too much of the psychology of a middle-aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences; who knows what he wants and what gives him satisfaction or happiness; and who pursues these things when he can.” *Id.* at 33.

9. For Hart’s acceptance of laws criminalizing bigamy, Devlin observes, “Bigamy violates neither good manners nor decency. ... When it is committed without deception it harms no one... . A marriage in a registry office is only in form a public act. ... No one with deep religious feeling is likely to attend in the registry office; and the chance of the happy couple as they leave the office running into a man who happens to combine deep religious feelings with the knowledge that one of the parties has been married before is remote.” Devlin, *op. cit. supra* note 2, at 138. Regarding Hart’s exception for paternalistic state regulation, Devlin says, “[Hart’s] words ... might almost have been written with homosexuals in mind. It is moral weakness rather than physical that leads to predicaments when the judgment is likely to be clouded and is the cause of inner psychological compulsion.” *Id.* at 136.

*coercive intervention was not simply “distress [arising from] the bare knowledge that others are acting in ways you [or your constituents] think wrong.” This justification for state coercion, Hart asserted, “cannot be acknowledged by anyone who recognises individual liberty as a value. ... To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which one seriously objects. Such liberty plainly is quite nugatory. ... No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.”<sup>10</sup>*

*It is clear from this capsule account that acceptance of same-sex marriage can find no justification from Hart’s position. As much as the bigamist who offends “religious feelings from offence by a public act desecrating the ceremony,” the performance of same-sex marriages may be regarded as a “public nuisance” in Hart’s scheme. Even criminalization of private homosexual acts could conceivably find justification in the considerable heavy breathing space in Hart’s scheme for paternalist prohibitions conduct arising from an individual’s “merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion.” But these observations do not in themselves discredit Hart’s scheme. There is a deeper problem with Hart’s premises that become clear in considering Devlin’s rejoinder. The problem is not in Hart’s rejection of homosexual sodomy laws; it is in his failure to understand why rejection of these laws must necessarily lead to validation of same-sex marriages. This, of course, is not position that Devlin espoused. But, though he failed to understand this, the premises of Devlin’s opposition to Hart’s scheme must necessarily lead him to this conclusion.*

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10. Hart, *op. cit.* supra note 5, at 46-47.

*Devlin does not succeed in directly refuting the logic of Hart's scheme.*

*Unlike Hart, Devlin has difficulty restricting himself to the specific question of the enforcement of morals as such. His arguments for criminalizing homosexuality shift back and forth between secular justifications and pure morality justifications without clearly distinguishing the two.<sup>11</sup> Thus he does not precisely join issue with Hart. But though Hart has the advantage throughout most of their debate, Devlin did identify one reason for retaining the criminal statutes which Hart only indirectly addressed and did not clearly join issue with him. "Freedom," Devlin said, "is not a good in itself. ... If a free society is better than a disciplined one, it is because ... it is better for a man himself that he should be free to seek his own good in his own way and better too for the society to which he belongs, since thereby a way may be found to a greater good for all. But no good can come from a man doing what he acknowledges to be evil. The freedom that is worth having is freedom to do what you think to be good notwithstanding that others think it to be bad. Freedom to do what you know to be bad is worthless."<sup>12</sup>*

*In this observation, Devlin makes a crucial distinction between an individual's application of moral judgment to his own conduct and others' moral judgments of him. Devlin's distinction restricts attention to those matters where an individual comes to the conclusion that he judges conduct X as wrongful, even though he*

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11. Thus Devlin "question[s] ... whether all vice that can be committed in private is of its nature harmless to society" and sees harm to those "who might be led into evil by example or temptation." Id. at 110. At the same time, Devlin maintained that a breach of morality as such is a legitimate subject for social prohibitions. "We should ask ourselves ... whether, looking at it calmly and dispassionately, we regard [some act] as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it." Devlin, op. cit. supra note 2, at 17.

12. Id. at 108.

chooses to engage in that conduct. For this conduct, Devlin argues, the liberty value carries no weight. Such conduct is ineligible for the strong presumption of “protected liberty” that Hart took as his starting point in evaluating morals legislation.

This position gives Devlin a basis for supporting laws criminalizing consensual adult incest and prostitution that eluded Hart. Thus Devlin argues, a man “does not as a rule lie with his daughter or sister because he thinks that an incestuous relationship can be a good one but because he finds in it a way of satisfying his lust in the home. He does not keep a brothel so as to prove the value of promiscuity but so as to make money.”<sup>13</sup> *And Devlin then carries this distinction to same-sex relations. “I do not think,” he said, “there is anyone who asserts vocally that homosexuality is a good way of life.”*<sup>14</sup>

*This is an utterly implausible proposition today. In 1965 it was not implausible. And Hart did not argue to the contrary. Indeed, Hart did not refute this proposition; he was remarkably reticent in speaking directly of homosexuality, and thereby implicitly even appeared to accept its denigration. In the course of evaluating laws criminalizing bigamy, Hart observed, “the question depends on comparative estimates ... of the seriousness of the offence to [the majority’s] feelings and of the sacrifice of feelings and suffering demanded and imposed by the law. Supporters of the law could certainly argue that very little sacrifice or suffering is demanded by the law in this instance. It denies only one, though doubtless the most persuasive, item of the appearance of legal respectability to parties who are allowed to enjoy the substance and parade all the other simulacra of a valid marriage. The case is therefore utterly different from attempts to enforce sexual morality which may demand the repression of powerful instincts with which personal happiness is*

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13. Id. at 107.

14. Id. at 116.

*intimately connected.”<sup>15</sup> Generalizing on this observation about the legitimacy of enforcing “a moral code in sexual matters,” Hart concluded, “The central question is: Can anything or nothing be said to support the claim that ... the maintenance of the moral status quo in a society’s morality are values sufficient to offset the cost in human misery which legal enforcement entails?”<sup>16</sup>*

*In these lightly veiled references to homosexuality, Hart speaks of it not as a positive good, but as a “powerful instinct” whose repression brings “cost in human misery.” In these passages, Hart’s rejection of laws criminalizing homosexuality was not based solely on their interference with freedom; Hart gave some added weight to the misery caused by these laws. And he rested his acceptance of anti-bigamy laws not simply on the distinction between their intention of suppressing a “public nuisance” rather than enforcing “private” morality as such but also because no suppression of “powerful instincts” or personal “misery” was imposed by them. More than freedom as such – more than freedom simply understood as the liberty to do what you want because you want it – is at stake for Hart in these passages. Freedom from the imposition of suffering is different from freedom prized for its own sake.*

*Devlin also acknowledged the suffering imposed by laws criminalizing homosexuality; but while Hart referred only to private suffering – that is, the suffering incurred by repressing one’s inclinations or hiding them from public view – Devlin spoke of the ways in which private suffering might become publicly visible. For Devlin, this transposition of private to publicly expressed suffering was critical in prescribing the process by which the boundaries between legitimate and illegitimate regulation of morality should be drawn. Thus Devlin stated, “In any society in which*

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15. Op. cit. supra, note 5, at 43.

16. Id. at 69.

*the members have a deeply-rooted desire for individual freedom ... there is also a natural respect for opinions that are sincerely held. When such opinions accumulate enough weight, the law must either yield or it is broken. In a democratic society ... there will be a strong tendency for it to yield ... to give ground to those who are prepared to fight for something that they prize. To fight may be to suffer. A willingness to suffer is the most convincing proof of sincerity. Without the [restrictive] law there would be no proof. The law is the anvil on which the hammer strikes.”<sup>17</sup>*

*In this passage, Devlin envisions that lay juries would play the crucial role in judging the “sincerity” of those subject to laws against homosexual conduct or any other moral offences. The test for him in this judgmental process is not, as noted, whether the legal restrictions interfere with an individual’s freedom as such but whether the claim for freedom is based on an individual’s sincere belief that his conduct is morally justified. If, as he said, “when such opinions accumulate enough weight,” then the law will (and should) yield.*

*On this issue, Hart and Devlin momentarily incline toward convergence. Hart, that is, gives weight to some degree of subjective suffering, not simply a claim of interference with freedom as such, to distinguish between anti-bigamy laws and criminalization of homosexual relations. Devlin places considerable weight on this suffering and demands public expression of this suffering to measure its “sincerity.” But Hart’s formal framework – that society cannot legitimately enact morals as such – gives no apparent room for evaluating the “suffering” of the individual affected by such laws; his reference to suffering seems rhetorical rather than clearly rooted in his evaluative framework. For Devlin, by contrast, “suffering” is a central element in*

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17. Op. cit. supra, note 5, at 116.

*his evaluation of the legitimacy of morals regulation – not just any suffering, but suffering regarded by the individual target of state restriction as unjustified because he “sincerely” believes that his conduct is not immoral.*

*I believe that Lord Devlin’s framework is not simply coherent in its own terms, but that it is preferable to Hart’s in its approach to morals regulations. The advantages of Devlin’s perspective become apparent when we shift attention from criminalization of homosexuality to claims for same-sex marriage. Hart’s position must lead him to reject these claims; his acceptance of laws criminalizing bigamy dictates this result. As noted, Hart accepts these laws on the ground that the bigamist’s dual invocation of the legally recognized marriage ceremony is “a public act desecrating the ceremony” which offends “religious feelings” and is therefore a punishable “public nuisance.” In his own terms, this is an exceedingly strained justification. If the bigamist posted his co-existing marriage certificates on a Times Square billboard this might constitute a “public nuisance” in the same sense that sexual intercourse performed on a public sidewalk intrudes on unwilling observers’ sensibilities. But the simple act of obtaining a marriage license from a town clerk is hardly comparable. Unless the fervent believers in monogamy regularly pore through town hall records, it is difficult to understand how they are offended – except by the generalized knowledge that profane certificates might be issued somewhere for someone at this very moment.<sup>18</sup> This hypersensitivity to moral outrage seems barely distinguishable from the offence generated by the knowledge that somewhere someone may be engaged in same-sex intercourse; but Hart rejects legal recognition of this kind of offence on the ground that it is enforcement of morality as such.*

*Hart’s gyrations in order to distinguish restrictions on marriage from other*

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18. See Devlin’s observation to this effect, quoted at note supra 9.

*restrictions on sexual conduct arise because he focuses on the intention of the regulators, of the majority imposing their will on a deviant minority. For much of his argument, Devlin takes this same perspective and is quite prepared for the majority to enforce its moral norms as such; and for this reason, as noted, Devlin's overall argument is much less rigorously laid out. But in the passage which I have stressed, Devlin shifts perspective to consider the intention of the regulated minority. Thus Devlin lays the groundwork for distinguishing between the bigamist and the homosexual in a more coherent way than Hart. The distinction is that insofar as the bigamist seeks the law's certified approval without claiming that his preference for multiple concurrent partners is morally correct, this claim need not be honoured. Devlin did not understand – indeed, he made clear that it was inconceivable to him – that a homosexual could sincerely advance any claim for the moral correctness of his sexual practices. Devlin was wrong in this application of his perspective – or more precisely he was proven wrong by the progressively unfolding advocacy for same-sex relations after 1965. But this error does not prove that his perspective is the wrong way to approach the question of the regulation of morality.*

*Put succinctly, if we view Hart's position from the perspective of the regulated deviant, this person's claim against the majority regulators is, "How dare you make any moral judgment about my sexual conduct. In a democratic society, whatever moral judgment I make about my own conduct – whether I consider myself good or evil – is none of your business." By contrast, Devlin's deviant claims, "I believe my conduct is morally acceptable. How dare you condemn me based on your variant morality. In a democratic society, you are obliged to respect my moral convictions."*

*Hart's claimant is disabled from claiming legal recognition of his marital status. Consistent with his starting premise, the most he can ask for is the "right to be*

let alone.” This was Louis Brandeis’s famously generative formulation of the right to privacy, which he characterized as “the most comprehensive of rights and the right most valued by civilized men.”<sup>19</sup> This formulation is intensely isolated in its social signification. It is antithetical to the pursuit of, or claim for, others’ moral approbation. Devlin’s claimant, by contrast, does not turn away from this pursuit. But his claim walks a fine line between social engagement and separateness. Devlin’s claimant demands others’ acknowledgment of his moral stature as a self-evaluating individual; he demands respect for his moral equality. His conception of morality equality is substantive; he sets out the terms of his moral self-evaluation and demands respect for those terms. He does not claim the “right to be let alone” in the sense of offering no justification to anyone of himself or his conduct. From this premise, the demand for recognized marital status clearly follows; and it follows for the same reason that criminalization is illegitimate if it overrides the individual’s own moral evaluation of his sexual conduct, if it punishes him for actions he regards as morally worthy. The core value in both cases is the democratic obligation of mutual respect among equals.

Hart’s version of the democratic value is more limited – for “negative liberty” in the sense that Isaiah Berlin invoked, for tolerance marked by disengagement rather than respect actively offered.<sup>20</sup> In a society driven by religious warfare – even in the overheated partisanship of “the culture war”<sup>21</sup> as waged in American society today – it may seem that this kind of barricaded tolerance is the best we can hope for, that the values of democratic pluralism can only be preserved by constructing demilitarized zones along uneasy truce lines. If the only alternative were Berlin’s version of

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19. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

20. Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Oxford Univ. Press, 1961).

21. *Lawrence v. Texas*, 120 S.Ct. at 2497 (Scalia, J., dissenting).

*“positive liberty” – that is, the enforcement of some single-minded totalizing vision of the “good life” on unwilling subjects – then the democratic choice is clear, as he argued. But there is another alternative which is at least conceivable, if difficult to accomplish in practice. The alternative is democratic pluralism grounded in actively expressed mutual respect for variant personal values.*

*This alternative depends on the willingness and capacity of the citizenry to actively engage one another in moral dispute. Sustained disputation – or, put another way, sustained efforts to convert – involves reciprocal criticism, which can be intrusive and even offensive to “true believers” in all sides. But a refusal to engage in disputation – a claim that I am not obliged to justify myself to you – can be offensive in a different sense; offensive, that is, in the underlying implication that you are not worth arguing with or about, that you are so far removed from any moral worthiness as to be not simply beyond redemption but beneath notice, permanently excluded from any social connection. Criminal sanctions against same-sex relations marked homosexuals as outside any social relationship, as no different from beasts or monsters. Understood in this full context, simply overturning the criminal sanctions is not enough to undo the social disrespect, the indignity inflicted by their enactment. As Justice Kennedy observed in *Lawrence*, the very existence of these criminal laws, even if never enforced, “demeans the lives of homosexual persons.”<sup>22</sup> State exclusion from the honorific status of marriage is equally demeaning. The disrespect thus imposed is no less because the marriage act is somehow “public” while the homosexual acts themselves can be carried out in “private,” in secrecy without any implication of social approbation. Because the basic wrong inflicted by the criminal statutes was in their expressions of social disrespect, in their denial of equal*

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22. 120 S.Ct. at 2482.

*humanity, the reasons for invalidating those statutes and for recognizing same-sex marriage are identical.*

*This conclusion is strengthened by clear-sighted acknowledgment of the quality of social disrespect expressed by these laws denigrating same-sex relations. This is not simply the disdain aimed at someone who has transgressed some social propriety, like wearing a sport shirt to a black-tie event or dribbling soup down one's chin during dinner. The disrespect for same-sex relations has not been disdain but revulsion. Though this distinction might be characterized as different points along the a spectrum of disrespect, this characterization misses the significance of the intensity of disrespect conveyed by revulsion at "sexual deviance." Using Mary Douglas's classic depiction of the social function of separate categories of "purity and danger," we might say that both the soup dribble and acts of homosexual sodomy are instances of "dirt" – that is, as she puts it, of "matter out of place."<sup>23</sup> But the soup implies only "impurity" while the sodomy carries the full force of the "danger" which Douglas insists is the true opposition to the social "purity" that important ritualized distinctions mean to convey.*

*Hart directly addresses this revulsion at the very end of his analysis. After discounting the justification that the enforcement of morals is simply society's function, properly understood, and the justification that this enforcement leads to good results – that is, both the intrinsic and instrumental justifications advanced by Devlin – Hart takes on a more emotionally freighted justification. He briefly shifts his attention from the enforcement of sexual morality to the justification offered on behalf of the death penalty, beyond any consideration of its instrumental effects. Hart quotes another prominent member of the House of Lords, Alfred Lord Denning, speaking*

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23. Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* 41 (London: Routledge, 1966).

*before a Royal Commission on Capital Punishment:*

*The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely the death penalty.<sup>24</sup>*

*Whatever its justification for punishing murder, Hart rejects this justification for punishing “offenders against a moral code ... simply as a means of venting or emphatically expressing moral condemnation [because it is] uncomfortably close to human sacrifice as an expression of religious worship.”<sup>25</sup>*

*The links that Hart sees between violation of sexual mores, “revulsion,” and “human sacrifice” bring us into the heart of the issue. The core impulse in the legal condemnation of sexual deviance is denunciatory and expulsive. In some deep sense, this impulse may have an instrumental basis. This impulse may, that is, arise to countermand strong temptations to engage in the forbidden transgressions – regarding the wish to commit incest, for example, whose inhibition requires a countervailing proscription of extraordinary emotional intensity. Even if the goal of moral revulsion is instrumental in this sense, as a kind of psychological reaction formation, the revulsion is all the more effective because it denies the temptation itself. One might say that laws against theft are necessary because most people are tempted to steal others’ property; but revulsion does not commonly accompany violations of norms against theft. Whatever its temptations, they are less febrile than violations of sexual mores. Revulsion serves to bury temptations toward sexual transgressions even deeper from consciousness than the more readily confined urges*

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24. Quoted in Hart, *op. cit.* supra note 5, at 65.

25. *Id.* at 65-66.

*to steal others' property.*<sup>26</sup>

*The basic issue for social regulation is not whether this revulsion should be part of the psychological armamentarium deployed against sexual deviancy or any other forms of deviancy. The basic issue is to identify the legitimate targets of this weaponry and, even where its targets are appropriate, to confine its expansive implications within legitimate bounds. Some would argue that these implications are so expansive, so uncontrollable once unleashed, that the state should radically dissociate itself from this justification for punishment. This seems to be the context in which Hart draws the parallel between the death penalty and the enforcement of sexual mores; his goal generally appears to try to cool the fevered character of all state enforcement activities so as to make them amenable to calmly reasoned evaluation.*

*Devlin, by contrast, often seems to fan the flames. "Not everything is to be tolerated. No society can do without intolerance, indignation and disgust."<sup>27</sup> But if we give credence to the limit that he himself prescribed for this moral revulsion – that it cannot legitimately be imposed on an individual who sincerely believes in the rightness of his conduct – we find a much more powerful protection for minority rights than Hart's all-purpose prohibition of morals regulation. Hart's proscription is not only riddled with exceptions based on paternalism and "public" offence to majority sensibilities; these shortcomings might be remedied by more rigorous application of his own starting premise. More fundamentally, Hart's framework does not encompass any protection for deviant individuals from the pervasive social*

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26. See William Ian Miller, *The Anatomy of Disgust* 201 (Cambridge, Harvard Univ. Press, 1997) (noting "the paradoxes of disgust in which the disgusting is also the fascinating, the interest-generating, and even the object of desire. . . . [N]othing quite pays homage to the grip of a norm than literally getting sick at the thought of violating it.")

27. Devlin, *op. cit. supra*, note 2 at 17.

*revulsion, the impetus toward “human sacrifice” as he depicts it, which is the underlying impulse for state morals laws. The only proffer of protection made by Hart’s framework to the targets of these laws is for them to retreat behind the walls of their homes, to remove themselves entirely from public view. The remedy he prescribes for the social act of expulsion against deviants is to embrace their expulsion through self-effacement, self-expungement.*<sup>28</sup>

*Thus Hart’s framework would, for example, invalidate a categorical ban excluding all gays and lesbians as such from military service on the ground that this was an illegitimate regulation of morals as such. But his framework would provide no resistance to – indeed, it would appear to endorse – the policy of “don’t ask, don’t tell,” enacted by the U. S. Congress in 1992 to replace this categorical ban.<sup>29</sup> In practice this new policy has led to more expulsions from the military than under the previous policy;<sup>30</sup> but this is not its principal failing. The true error in the new policy is its endorsement of the majority’s “intolerance, indignation and disgust” toward any publicly visible indicia of homosexual orientation. Limiting protection to privately hidden conduct is analogous to the imposition of “separate but equal” social arrangements required by race segregation – the imposition, that is, of parallel social lives to avoid direct polluting contact between people of different races or different sexual persuasions. The closet requirement for “deviant” sexual expression is, like racial separation, unavoidably demeaning in its social implications and therefore inherently unequal. In distinguishing between “private” and “public” deviancy, Hart’s framework does nothing to respond to the claim of gays, lesbians and bisexuals that it is morally wrong to see them as “disgusting deviants.” From*

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28. See Kenji Yoshino, *Covering*, 111 Yale L. J. 769 (2002).

29. 10 U.S. Code section 654.

30. See [http://www.lambda.org/dont\\_ask.htm](http://www.lambda.org/dont_ask.htm)

*his perspective, this substantive moral claim is irrelevant to the reasons why homosexuality should not be criminally punished.*

*Devlin's framework, by contrast, identifies precisely this claim as the crucial issue. Once his criterion for abolishing criminal punishment is satisfied – once the targeted individual demonstrates, in some forum by some means, that he sincerely believes that his conduct is morally good – then public recognition of that good faith belief must follow. Whatever difficulties of proof that Devlin's framework might involve, there is one issue regarding the social status of homosexual conduct where his criterion is self-evidently proven. That issue is the claims for same-sex marriage on terms identical to heterosexual marriage. The public proclamation of love and loyalty joined with mutually enforceable obligations of financial support are paradigmatic indications of "sincere belief in the moral stature" of same-sex relations. The contemporary public advocacy for same-sex marriage visibly and conclusively contradicts Devlin's observation – however accurate it may have been when he made it in 1965 – that he did "not believe that there is anyone who asserts vocally that homosexuality is a good way of life."<sup>31</sup>*

## *II. The Constitutionality of Morals Laws*

*Having identified the comparative substantive virtues of Hart's and Devlin's limiting principles for moral regulations, we must now consider the comparative virtues of the application of those principles, their process merits, in a regime of judicially enforceable constitutional rights. I believe that the process implications of Devlin's principle are preferable.*

*Hart's principle focuses on legislative intent to regulate morals as such. Like*

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31. Op. cit. supra, note 2 at 116.

*strict scrutiny for racial distinctions with some leeway for affirmative action practices,<sup>32</sup> Hart’s test hovers uncertainly between an absolute ban and a “balancing test” permitting some morals regulation (as in his treatment of bigamy) so long as the consequences are not adverse for the regulated parties. Judicial purists who insist on clear-cut formulas with clearly predictable applications would not be satisfied; but they are not satisfied with large swaths of judicial behaviour in enforcing constitutional norms.<sup>33</sup>*

*Devlin’s test focuses on the intent of the regulated subject rather than the legislator’s. Though this is less common in constitutional adjudication, there are nonetheless parallels to be found. Judicial construction of a “sincerity” test to provide conscientious objector protection for unconventional religious beliefs is an especially close analogy. The U.S. Supreme Court did not hold that the existence of religiously-based conscience exemption in the military draft law was per se invalid, as a state establishment of religion or a morals regulation as such. It held instead that the state regulation was permissible so long as the protection was extended to beliefs that were “sincere and meaningful,” no matter how deviant from conventional norms of religiosity.<sup>34</sup>*

*From a conventional perspective, moreover, Devlin’s principle has distinct advantage over Hart’s principles in clearly limiting the scope of judicial invalidation of morals regulation. Justice Scalia was correct in his Lawrence dissent that the underlying “principle and logic” of the majority opinion must lead to judicial*

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32. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

33. See, e.g., 539 U.S. at 346 (Scalia, J., concurring in part and dissenting in part).

34. *United States v. Seeger*, 300 U.S. 163, 166 (1965) (“[T]he test ... is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God ... .”)

validation of same-sex marriage.<sup>35</sup> *He was incorrect, however, in his assertion that its logic also necessarily led to invalidation of “criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”*<sup>36</sup> *If the Court had endorsed the proposition, as Scalia put it, that “the promotion of majoritarian sexual morality is not even a legitimate state interest”* – the claim, that is, that Hart did put forward in claiming that state enforcement of morality for its own sake was illegitimate – Scalia’s charge would have had weight. But Devlin’s framework arrests Scalia’s parade of horrors.

Applying Devlin’s formulation, it is implausible (at least by any glimmering of today’s lights) that a practitioner of bestiality would “sincerely” maintain that his act was morally praiseworthy; he might say it was pleasurable or the product of some unavoidable compulsion. But the assertion that he himself viewed sexual relations with animals as deserving equal moral respect as other expressions of loving conduct would simply have no recognizable traction in any moral vocabulary currently recognizable as such.

On the other hand, the argument for invalidating bigamy restrictions is much more plausible from Devlin’s perspective – the claim, that is, advanced for multiple marriages based on sincerely held religious beliefs. This claim for recognized polygamy has the same characteristics as the claim for same-sex marriage, which distinguishes it from the other items in Scalia’s scarifying list. The petitioners for recognized polygamy or same-sex marriage are not a dissenting Justice’s hypothetical imaginings of claimants publicly demanding the right to engage in bestiality or adult incest. They are real people, significant numbers of real people, who (to recur to

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35. 120 S.Ct. at 2498.

36. *Id.* at 2494.

Devlin's account) are "prepared to fight for something that they prize."<sup>37</sup>

*Devlin's test is less conventional than Hart's in one important sense. Hart's focus on legislative intent easily translates to the kind of generalized oversight of legislative conduct that is the ordinary staple of judicial review whereas Devlin's focus appears intensely individualized, more suitable for formulating individual exemptions from regulation than judging the legitimacy of legislative acts generally. Constitutional adjudication generally aims at wholesale justice while application of Devlin's criterion appears more like retail transactions. Indeed, Devlin himself envisioned his dispensation as the province of juries acting in individual criminal prosecutions.*

*Nonetheless there is a socially aggregative implication in Devlin's own formulation of his criterion. By his lights, the sincere belief in righteousness would be proven by the regulated actor's willingness to take a public stance, fighting "for something that they prize"—that is, offering public justifications for their sexual practices rather than keeping their "deviancy" concealed in "private." This openly avowed fight could of course take place before criminal juries, but that is not the only plausible locus for it. Devlin spoke, though without specific elaboration, of a process by which "such opinions accumulate enough weight"; at that point, he says, "the law must either yield or it is broken. In a democratic society ... there will be a strong tendency for it to yield."<sup>38</sup> Devlin may have envisioned that responsible legislators would observe the progression of jury nullification conduct over time, and when this*

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37. Op. cit. supra note 2 at 116. For a sympathetic account of contemporary Mormons living in polygamous families, see Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: Cambridge Univ. Press, 1996).

38. Ibid.

*conduct had “accumulate[d] enough weight,” they would repeal the legislation under assault. This is familiar judicial behaviour in constitutional adjudication.*<sup>39</sup>

*We can see this judicial behaviour most clearly in the progression from Bowers to Lawrence to Goodrich. The Bowers Court’s refusal in 1986 to overturn Georgia’s homosexual sodomy law clearly rested on the same underlying assumptions about the unquestionable moral wrongfulness of same-sex relations that Devlin assumed in his statement that literally no one “asserts vocally that homosexuality is a good way of life.” Thus Justice White stated for the Court, “No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated. ... [T]o claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”*<sup>40</sup> *Seventeen years later, Justice Kennedy’s opinion for the Court in Lawrence is suffused with an appreciation for the moral equivalence of homosexual and heterosexual love relations. Thus Kennedy observes, “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice. ... When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. ... [The] continuance [of Bowers] as precedent*

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39. Judicial attention to the “accumulated weight of opinion” is explicitly mandated by the Eighth Amendment prohibition of “cruel and unusual punishment” as a basis for overturning majoritarian enactments. Thus the Court has considered actions in a majority of states as a basis for overturning the application of the death penalty to minors or mentally retarded people mandated enacted by a legislative majority in some states. See *In re Stanford*, 537 U.S. 968 (2002); *Atkins v. Virginia*, 536 U.S. 304 (2002).

40. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

demeans the lives of homosexual persons.”<sup>41</sup>

*In the interim between Bowers and Lawrence, public attention to the status of homosexuality had been commanded by a persistent campaign on many fronts by gays, lesbian and bisexual people.<sup>42</sup> Though there were many variations on this campaign, its persistently reiterated theme, explicit and implicit, was that same-sex love relations were not weirdly deviant but were normal – that is, were acceptable deviations within the normal range of sexual attraction and expression. This perspective was opposed by many people; and the mounting passion and outrage among various politically salient groups dictated that this perspective would not readily prevail in majoritarian institutions. Indeed, the explicit congressional exclusion of openly avowed gays and lesbians from the armed forces is powerful testimony to the persistence of hostile, stigmatic popular attitudes.<sup>43</sup> But, in Devlin’s terms, evidence for the “sincerity” of the advocates of this perspective – their passionate, public insistence that their variant sexual orientations were not “evil” – was overwhelming by 2003. Indeed, this evidence was already palpable in 1986, if Justice White had only opened his eyes to it. The uncomprehending hostility toward homosexuals that pervades the Court’s opinion was, as I see it, a central reason for unusually forceful statement in Lawrence that “Bowers was not correct when it was decided, and it is not correct today.”<sup>44</sup>*

*The history of the public advocacy to the status of gay, lesbian, bisexual and*

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41. 120 S.Ct. at 2482.

42. Until 1973, for example, homosexuality as such was listed as a “mental disorder” in the American Psychiatric Association’s Diagnostic and Statistical Manual. See [http://www.psych.org/public\\_homose~1.cfm](http://www.psych.org/public_homose~1.cfm).

43. See note 29, supra.

44. 120 S.Ct. at 2484.

*transsexual people, in the thirty years on either side of Bowers was a paradigmatic expression of Lord Devlin’s observation about such advocacy: “To fight may be to suffer. A willingness to suffer is the most convincing proof of sincerity. Without the [restrictive] law there would be no proof. The law is the anvil on which the hammer strikes.” Lawrence itself is transformative of this struggle. The struggle for the recognition of the moral status of homosexual relations has not been ended by Lawrence, any more than the socially subordinated status of blacks was ended in a single stroke by the Court’s ruling in Brown v. Board of Education.<sup>45</sup> But the context of this struggle has been dramatically altered by the Court’s endorsement and command of public attention. The Court’s conclusion that homosexuals cannot be entirely excluded from social relations, that this exclusion demeans their very lives as “persons,” in itself was a radical reversal of prior social assumptions; and it was a performative conclusion, an action that in itself brought homosexuals into the ambit of social recognition.*

*The next chapter in this struggle is now unfolding in the state court proceedings and other state officials grappling with claims for same-sex marriage, and in the newly launched campaigns for state and federal constitutional amendments banning such marriages. This iterative process – the interplay among constitutional adjudication which enhances the status of the previously defeated parties in this adjudication, and the acceptance of or resistance to this new status in other public forums – is the validating heart of judicial review, the way in which the democratic principle of self-governance comes into harmony with the judicial role in protecting*

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45. 347 U.S. 483 (1954).

minorities against majority oppression.<sup>46</sup> But though courts cannot assure the outcome of this interaction, it can shape the vocabulary in which the debate about the status of the previously disfavoured groups takes place.

Regarding the status of homosexuals, the courts can frame the issue as a claim to be left alone, a “privacy” claim, or as a claim for social recognition, as an “equality” claim. In this exploration of these two vocabularies, through the lens provided by the debate between Hart and Devlin, we can see how the “equality” claim encourages and even demands public display of suffering by the disfavoured groups while the “privacy” claim points away from this display, and even insists that it is irrelevant. If the democratic ethos rests on nothing more than a mutual pledge of disengagement, of bare tolerance, then the privacy claim is sufficient. But if the necessary, or even the preferred, foundation for democracy is a stronger sense of engagement, a commitment not simply to tolerance but to mutual respect for equal moral status, then the privacy claim is not adequate to the task. Moreover, the public display of suffering toward establishing the equality claim, as Devlin implicitly understood, has clear instrumental value toward a regime of mutual respect in its open appeal for empathic identification. This appeal may of course be spurned by a hostile audience. In that event, the best we might hope for is a regime of disengaged tolerance, a kind of wary distance from across battlefield truce lines.

We may have come to that pass today in race relations, notwithstanding the more ambitious aspirations that the Court endorsed in *Brown*. But courts betray their proper role toward fostering a strong democratic ethos if they ever clearly disavow this ambition. This was the betrayal at the heart of the Supreme Court’s decision in

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46. See Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard Univ. Press, 1992).

*Plessy v. Ferguson*,<sup>47</sup> approving the disengaged, implicitly hostile regime of “separate but equal” social relations between blacks and whites. *Brown* demanded more than this; whatever practical success may have followed from that demand, the Court played its proper role in formulating this demand. For relations between heterosexuals and homosexuals, courts should do no less. *Lawrence* is a promising start.

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47. 163 U.S. 537 (1896).