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INSUFFICIENT DISSENT:
REVISITING *BOWERS V. HARDWICK* AND
THE SEARCH FOR A LEGAL JUSTIFICATION
OF HOMOSEXUAL EQUALITY

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In February of this year, the Supreme Court of Massachusetts unanimously overturned the state's anti-sodomy laws, reducing the present number of states with similar regulations to fourteen. Without question, this move warrants the praise of all those who support the removal of these antiquated and often discriminatory legal provisions. Yet, as is often the case, the exercise of justice at one juncture makes its absence only more conspicuous at another, and despite the progress recently made in Massachusetts, inequities remain. Because of the 1986 Supreme Court ruling in *Bowers v. Hardwick*, citizens of more than a dozen states remain exposed to prosecution for engaging in private, consensual expressions of intimacy. This article not only critiques the *Hardwick* Court's majority opinion—and the flagrant prejudices espoused therein—but addresses more specifically the inadequacies of the Court's dissenting opinions and the subsequent failure of the American judiciary to endorse a legal justification of homosexual equality.

Introduction

On June 30, 1986, the United States Supreme Court affirmed the conviction of Michael Hardwick, an openly gay adult male who had been found guilty of violating a Georgia statute that criminalized sodomy.¹ A majority of the Court upheld the Georgia statute, declaring that the Constitution makes no guarantee for the rights of individuals "to engage in homosexual sodomy."²

In his dissenting opinion, Justice Blackmun begins by claiming that the case of *Bowers v. Hardwick* "is no more about a fundamental right to engage in homosexual sodomy... than *Stanley v. Georgia* ...was about a fundamental right to watch obscene movies..."³ Instead, Blackmun claims that the point at issue is an individual's constitutional right to privacy, citing Justice

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Brandeis's concept of a citizen's basic "right to be let alone."⁴

However, this objection dilutes what is truly at issue in the case; the source of the controversy in *Bowers v. Hardwick* stems not from an intolerance of privacy, but of homosexuality. It remains true that even on its face, the opinion of the Court's majority demands further explanation, if not solely for its questionable appeal to history, morality, and public sentiment, then for its strained compatibility with previous Court decisions invoking a constitutional right to privacy, including *Griswold v. Connecticut*, "*Roe v. Wade*," "*Stanley v. Georgia*," "*Katz v. U.S.*" and others. Privacy, however, is at most an issue of secondary importance to this case. The real question is whether openly homosexual members of American society are entitled to the same constitutional liberties and protections as their heterosexual peers. The dissenting justices ought to have defended an individuals right to live as a "practicing" homosexual without reservation. But rather than directly confronting the homophobic premises relied upon by the Court's majority—premises that were primarily shaped by both personal and public prejudice against homosexuals—the dissenting justices formulated the heart of their argument around the "safer" issue of constitutional privacy rights. By permitting the Court's majority to go largely unchallenged as it formalized traditional disapproval of homosexuality with the authority of law, the dissenting justices only further compromised the integrity of the Constitution and ultimately failed to take an imperative step toward establishing a more egalitarian society.

Beyond the Right to Privacy

The dissenting justices' primary objection to the Georgia statute—that it violated an individual's constitutional right to privacy established by earlier court precedents—was, from a purely legal standpoint, sufficient. But while this argument should have soundly refuted the constitutionality of the Georgia statute itself, it nevertheless left the Court majority's vocal reproach of homosexuals largely unanswered.

The specific words of the statute made no distinction between homosexual sodomy and heterosexual sodomy. Consequently, any form of sodomy—committed by persons of any sexual orientation—was prohibited. But the justices who ruled against Michael Hardwick made no attempt to defend the statute's all-encompassing prohibition of sodomy. Rather, they limited their review to the issue of homosexual sodomy. Justice White, who delivered the Court's majority opinion, demonstrated this when he wrote the following: "...we granted the States' petition for certiorari questioning the holding that its sodomy statute violates the fundamental rights of homosexuals."⁹ Clearly, then, the right to privacy was not the source of the Court's objec-

tions; rather, it was the *homosexual content* seeking protection within that right that the Court's majority considered objectionable. Thus, while issues of privacy rights may have been relevant, it was the legal equality of homosexuals that was at the essence of this case.

Confronting the Homophobia of the Court

The homophobic disposition of the Court is immediately evident, emerging as early as the fourth sentence in the majority opinion. In Justice White's summary of the facts of the case, he refers to Hardwick as a "practicing" homosexual. This term, however, raises several objections; it is somewhat slanted in that it acts as a persuasive definition.¹⁰ Although it may be slight, there is a difference between referring to a person as a homosexual, and referring to him or her as one who practices homosexuality. The implication is that homosexuality is primarily a matter of choice—that it is less about who a person is and more about what he or she does. This view (which is often popular among those who denounce homosexuality) provides ammunition for the legal moralists' typically homophobic argument—that homosexuality, like other immoral forms of behavior, or "lifestyles," may be tempting to some, but can and should be resisted by everyone.

But is it fair to suggest that people "practice" who they are? Would most heterosexuals refer to themselves as "practicing heterosexuals?" Granted, an individual may refer to him or her self as a "practicing Catholic," or as a "practicing Muslim," but how comparable are these two aspects of a person's life—one's religious convictions versus one's sexuality? Despite the fact that some individuals may consider their religious beliefs to be an inherent part of who they are, one's spiritual convictions remain indefinitely susceptible to change or conversion; there is always the potential to be "lead astray," or to be convinced of other religious doctrines. This is the weakness of the analogy: adherence to a belief, even a religious belief, is a form of action—it has more to do with what one does than who he or she is. The same cannot be said of an individual's sexuality. Thus, for the Court to use the term "practicing homosexual" suggests that it views a person's sexual orientation as a distinction of conduct, rather than individuality. The fact that this subtle bias is detectable prior to the actual arguments of the case—even in the summary, where one expects to be presented with objective information, rather than opinions—acts as a revealing indication of the Court's anti-homosexual partiality.

The Historical/Traditional Argument Against Homosexuality

Although the Court concedes that the evidence for many constitutional

rights exists outside of the actual text of the Constitution—such as those extrapolated from Due Process Clauses of the Fifth and Fourteenth Amendments—they insist that such rights must involve "much more than the imposition of the Justices' own choice of values." As Justice Black paraphrases Justice Goldberg in *Griswold*, "...the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks...is contrary to the 'traditions and [collective] conscience of our people.'"¹² Thus, the majority of the *Hardwick* Court makes an appeal to both history and tradition to legitimize their denial of fundamental homosexual rights beyond the express language of the Constitution. In essence, the justices claim that since their own "choice[s] of values"—or more appropriately, their own prejudices—conveniently mirror those grounded in the history and tradition of the United States, they are justified in refusing to grant homosexuals constitutional equality. Justice White asserts that "proscriptions against [homosexual] conduct have ancient roots," noting that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights." Against these and other such historical references, White insists that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition'...is, at best, facetious."¹⁴

As he writes on behalf of the Court's majority, the logic of White's argument has a certain amount of appeal. It is common for individuals to attempt to legitimate present laws, policies, or social norms by invoking a standard set by precedents and other habitual actions of the past. As Lon L. Fuller of Harvard mentions in his essay "Eight Ways to Fail to Make Law," consistency over time is an essential element of a just and operational legal system.¹⁵

While it is true that a relative degree of consistency is a necessary component of any legitimate body of law, this assertion is by no means absolute; it is limited by an equally necessary element of openness towards legal growth. Oxford professor Ronald Dworkin explains that while the desire to follow legal precedents inclines the Court toward maintaining the status quo, it does not command it to do so; it does not prohibit decisions that conflict with previous rulings of the court if they are enacted in the name of justice.¹⁶ The framers of the Constitution did not view their words as immortal, nor did they intend the future of American society to be bound by them indefinitely. Article V, which provides for the ability to make amendments to the Constitution, serves as the best evidence for this foresight. Here, the delegates in Philadelphia explicitly acknowledged the limitations of their wisdom, and purposefully empowered future generations with the ability to adapt the law to an ever-changing—and ideally, ever-progressing—America.

They recognized that a truly just society cannot be forced to remain stagnant, that it must be free to evolve—that the Constitution must be a living document. They understood that the social norms of the past must be kept from inhibiting the progress of the present.

Justice White is correct in his historical analysis: early America was not an accepting place for homosexuals, and tolerance of homosexuality has never been prevalent enough to be considered an American tradition. But on the same note, the history of the United States is disgraced by countless forms of injustice that were at the time excused as social norms. Can one for a moment forget our nation's appalling legacy of racial persecution, which, among other atrocities, legally sanctioned the enslavement of African-Americans? Or how traditionally, women were considered incapable of receiving an education, of owning property, of becoming professionals, and of being entrusted with the right to vote? Despite the greatness of their democratic vision, the drafters of the Constitution refused to consider African-Americans to be any more than three-fifths a person and failed to recognize women as equally capable to men.

But at certain points in history there came moments of enlightenment in which American leaders saw the virtue of challenging the status-quo—of acting untraditionally. They eventually found justice by learning from the past, rather than merely repeating it for the sake of consistency. Consistent injustice is no less unjust. One year before *Hardwick*, in 1985, Justice Brennan wrote the following on this notion of judicial freedom when deviating from the norms of history and tradition:

We current justices read the Constitution in the only way we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.¹⁷

Brennan's Dworkinian view of the role of the Court should serve as a guideline for original-intent justices, who may unknowingly blind themselves to the interests of modern social progress in their over-reliance on the precedents of the past. As Dworkin likened legal interpretation to the writing of a chain novel, he maintained the following: "Law...begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it."¹⁸ Rather, writes Dworkin, an interpretation of law should both fit and *justify* current legal practice; it

should maintain the integrity of the future with the direction—but not by the dictation—of the past.

If American law is to maintain the integrity to which Dworkin refers, then the *Hardwick* case ought to have been utilized as an opportunity to reestablish and redefine a tradition of equality. A tradition of injustice is not made just by the mere fact that it can be considered 'tradition,' and inequality cannot be reconciled simply because there is an historical precedent for it; legal policies that perpetuate injustice remain unjust indefinitely—no appeal to history can change that fact. As Justice Holmes wrote in *Lochner v. New York*, "it is revolting to have no better reason for a rule of law than that" it was "laid down in the time of Henry IV."¹⁹ And, although it was not the main focus of his dissenting opinion in the *Hardwick* case, Justice Blackmun wrote the following: "I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny..."²⁰

The Majoritarian Argument Against Homosexuality

Justice Blackmun raises another argument that is frequently employed to validate the second-class citizenship of homosexuals: the will of the majority. It is often the view of Americans that the opinion of the majority holds the power of legal legitimacy—that it should essentially act as the ultimate source of legal authority. To this, Chief Justice Rehnquist wrote the following in *Texas v. Johnson*, 1989: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people..."²¹ While Justice Rehnquist cited "murder, embezzlement, pollution, or flag burning" as his examples of "evil" or "profoundly offensive conduct," the list would inevitably include much more. For many individuals—especially those who hold similar views to Justices White, Burger, and the rest of the *Hardwick* majority—homosexuality would undoubtedly be considered an appropriate addition to Justice Rehnquist's list of so-called "evils."

But how accurate is Justice Rehnquist's assessment of the proper role of a majority in a democratic legal body? Why is there this insistence that the will of the majority must be the destiny of the totality? Philosophically speaking, the supremacy of the will of the majority has arisen in great part from an acceptance of Jeremy Bentham's *of utility*, or utilitarianism—the view that government (as well as individuals) should pursue "the greatest happiness for the greatest number."²² Bentham firmly believed that individuals were generally the best judges of their own best interests.²³ He also believed that a government is not likely to promote the greatest happiness for the greatest number if the political power is consolidated in the hands of only

a few. Thus, utilitarianism has commonly championed popular sovereignty (that is, for white, land-owning men) and has relied accordingly on the will of the majority.

While Justice Rehnquist is correct in his assessment of democracy—that the voice of the majority must ultimately speak as the collective voice of society—American democracy places a fundamental caveat on this majoritarian political outlook; it pledges to respect the will of the majority, while protecting the rights of the minority. In *Rogers v. Lodge* for example, the Court noted that the government must protect against State action which "tends to submerge the will of the minority..." Such sentiments indeed echo the famous words of John Stuart Mill, who ardently professed in his essay *On Liberty* (1859) that governments must act to ensure individual freedom against the "tyranny of the majority."²⁶

Therefore, the conclusion held by Justice Rehnquist and undoubtedly many other Americans—that the United States, as a representative democracy, must obediently conform its law to the will of the majority ad infinitum—is significantly, if not dangerously, misguided. Justice Jackson eloquently articulates this civic philosophy in *West Virginia v. Barnette*,¹¹ as his words directly challenge Rehnquist's majoritarian declaration in *Texas v. Johnson*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

Thus, according to Justice Jackson, considerations of history, tradition, and even majority sentiment have, at best, a limited place in Constitutional interpretation. It would be irrelevant, for example, if the majority of southern inhabitants preferred to racially segregate public schools; the fundamental right to legal and educational equality, as guaranteed by the Fourteenth Amendment, outweighs public opinion and, more significantly, public prejudice. As the Court ruled in *Wisconsin v. Yoder*¹ when it exempted Amish parents from having to send their children to public schools, "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Once again, the Court employed a somewhat Millsian outlook in its interpretation of the Constitution, as it was he who wrote that "the 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," Mill declared, "either physical or moral, is not a sufficient warrant."²⁹

Yet in *Hardwick*, Justice White, without hesitation, makes an appeal to public disapproval to justify denying individuals—in this case, homosexuals—their right to equality. Essentially, he reasons that because homosexuality is, and traditionally has been, publicly unpopular, homosexual individuals ought not to be entitled to the same freedoms and constitutional protections as other Americans. He writes that although *Hardwick* "insists that majority sentiments about the morality of homosexuality should be declared inadequate" for upholding the Georgia statue, "We [of the Court], do not agree..."³⁰

Yet this reasoning poses obvious socio-political dangers, for it enables the "sentiment" of the majority to take precedence over both individual and group liberties. If a majority of American citizens felt that people of the Jewish faith ought to be stripped of their civil liberties—or perhaps sent to concentration camps—would this then bind the Court to make such discriminatory "sentiments" carry the authority of the law? Surely not. Once again, the rights of the minority must not be flung to the wayside simply to accommodate—let alone facilitate—the (ill)will of an American majority. "The Constitution cannot control such prejudices," cites Justice Blackmun, "but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect." In the words of Dworkin, rights trump utility—and thus, Mill's "tyranny of the majority" is effectively disempowered. As Justice Blackmun takes an additional enlightened moment to speak beyond the issue of privacy, he articulates what encompasses the very essence of the Fourteenth Amendment and ultimately what is at the soul of the fundamental American ideal of equality: "No matter how uncomfortable a certain group may make the majority of this Court, we have held that 'mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'"³²

The Moral Argument Against Homosexuality

But even if the Justices could be convinced that history, tradition, and public disapproval provided inadequate justification for refusing to recognize homosexuality and homosexual intimacy as a fundamental right, they would still resist the notion by invoking an appeal to morality. In his concurring opinion, Chief Justice Burger maintains that "condemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards." In addition, Justice Burger goes on to quote the influential eighteenth century legal commentator Sir William Blackstone, who referred to such conduct as "the infamous crime against nature" that is of "deeper malignity" than rape. Blackstone went on to write that it was "a crime not fit to be

named" and that "the very mention of which is a disgrace to human nature."³² To conclude, Justice Burger cites both history and morality to defend his homophobic convictions; he argues that for one to claim that "the act of homosexual sodomy is somehow protected as a fundamental right," would require the Court to "cast aside millennia of moral teachings."³⁵

To their credit, the dissenting justices do, however, successfully expose the flaws that result from Justice Burger's concurring opinion. They argue that his claims of legal moralism merely result from the religious convictions embedded within his decision. "That certain, but by no means all, religious groups condemn the behavior at issue, gives that State no license to impose their judgment on the entire citizenry," reads the dissenting opinion. "The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine..."³⁶

Conclusion

By concentrating their argument primarily on the individual's right to privacy, rather than the individual's right to live as a "practicing" homosexual, the dissenting justices in *Bowers v. Hardwick* failed to formally empower the cause of homosexual civil liberties with the authority of the Constitution. Rather than portray themselves as ardent champions of homosexual equality, they focused much of their dissent on the "safer," less controversial issues of the case. Thus, many of the homophobic arguments put forward by the Court's majority were left insufficiently contested.

The dissenters should have debated the Court's opinion on its own terms, for the Court's decision effectively legitimized and condoned the second-class citizenship of homosexual Americans; it reinforced the all-too-rampant homophobia of American society with legal and judicial approval. Rather than combating this effect, the dissenters missed the opportunity to oppose—and perhaps weaken—the divisive, un-American message of intolerance that the case sent to the nation and the world. Simply arguing the technical and legal flaws of the Court's opinion was not enough; in order truly uphold their commitment to justice, the dissenting justices should have unwaveringly aligned themselves against homophobia.

It has been a part of American judicial tradition that great dissents have given rise to many of the Court's most historic and widely celebrated decisions. Justice Harlan's dissent in *Plessy v. Ferguson*?¹ for instance, paved the way for the momentous victory of *Brown v. Board of Education Topeka*?¹ Kansas, which resulted in the racial desegregation of American society. The Court's conclusion in *Brown* that "separate is inherently unequal" evoked an

almost prophetic resemblance to the words written by Justice Harlan 56 years earlier: "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."

"In my opinion," declared Justice Harlan, "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."³⁹ Undaunted by arguments claiming moral, historical, and traditional justifications for racial segregation, Justice Harlan recognized what was truly required by justice. Accordingly, he made his dissent firm and unwavering.

In all its authority and all its prestige, the Supreme Court is not invulnerable to the imperfections of those who compose it; in truth it is only as fair as its most callous justice. Inevitably, then, the Court will, from time to time, come to decisions that appear to undermine the most fundamental principles of justice and equality. Thus, those justices of the minority who recognize the immediate folly of the Court must have the courage and presence of mind to articulate these flaws to the best of their ability. If the moral vision of today's Court is blurred by present prejudices, one can only hope that those dissenting justices who are able to see beyond the encumbrance of contemporary conformity will have the fortitude to help elucidate a course of truth to guide the Supreme Courts of the future.

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