

The Hidden Dichotomy in the Law of Morality

INTRODUCTION

It appears that United States Supreme Court Associate Justice Antonin Scalia has joined the ranks of the doomsday prophets. Scalia intimates a dark future in his vivid and spirited dissent to the Supreme Court's 2003 decision in *Lawrence v. Texas*.¹ For example, in Scalia's post-*Lawrence* dystopia it would be perfectly acceptable for prostitutes to participate in "Take Your Daughter to Work Day."² No one would bat an eye at incestuous brothers getting married while their sister and her two husbands perform sex acts.³ In this promiscuous world, the government would have no right to enforce any law based on the state's interest in preserving or promoting morality. Scalia's dissent implies that when Justice Kennedy, writing for the majority, tore down the moral bulwark in *Lawrence*, he set the nation on a downward spiral of decadence and immorality unseen since Sodom and Gomorrah.⁴

But all is not as Scalia fears. A careful reading of American jurisprudence reveals that hidden within the states' so-called interest in protecting morality, there is a dichotomy between the unconstitutional imposition of religious morality and the proper and necessary protection of the civil morality. Rather than annihilating the states' right to enforce laws on the basis of any form of morality,⁵ Kennedy's opinion in *Lawrence* carefully excised and prohibited statutes based merely on religious morality, while leaving the states' ability to enforce laws based on civil morality untouched.⁶

This Comment will begin by exploring the dichotomy itself, and then carefully distinguishing civil and religious morality. The analysis will then examine *Lawrence* and clarify how the opinion affected the dichotomy. Next, this Comment will apply the post-*Lawrence* understanding of the rational basis test to several issues of concern raised by opponents of the decision.⁷ Finally, this Comment will spec-

1. 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

2. *See id.* at 590.

3. *See id.*

4. *Genesis* 19:1-38.

5. *Lawrence*, 539 U.S. at 590.

6. *Id.* at 578 (majority opinion).

7. Susan Austin Blazier, *The Irrational Use of the Rational Basis Review in Lawrence v. Texas: Implications for Our Society*, 26 *CAMPBELL L. REV.* 21 (2004) (discussing likely implications of the *Lawrence* decision).

ulate as to the possible implications of *Lawrence* for moral issues lying on the horizon.

I. THE MORAL DICHOTOMY

Morality as a concept can be loosely divided into two discrete categories: that derived from religious doctrine on the one hand, and that which is universal to all human societies, regardless of religious faith, on the other.⁸ Given that there are many religions represented both throughout the world and within the United States, morality derived from religion cannot be universal. However, there are certain universal principles present in all religions which serve as a common thread throughout. These common threads are portions of what this Comment will refer to as the “civil morality.”

While there is some controversy surrounding this dichotomy, it has precedent in American jurisprudence. The Supreme Court has long recognized that certain public rituals that have a religious flavor, such as opening each session of Congress with a prayer, are in fact neutral civil rituals rather than religious acts.⁹ Indeed, the Court has drawn a distinction between true religion and custom-driven “civil religion,” which is dogmatically neutral.¹⁰

This separation of morality into two divisions is critical to the interplay between preserving First Amendment religious freedoms and Fourth Amendment privacy rights on the one hand, and the states’ interest in promoting morality on the other.¹¹ The Constitution’s prohibition on the establishment of religion makes it imperative that laws are not based on religious foundations. Religion, while an integral part of human experience, lends itself too easily to absolutes that can exclude legitimate minority practices.¹²

A. *Religious Morality*

Religious morality takes its authority from the commands of a higher power, and is considered to bear the weight of a deity’s will by

8. BASIL MITCHELL, *MORALITY: RELIGIOUS AND SECULAR* 7-8 (2000).

9. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

10. *Id.* at 793 n.14.

11. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (explaining that religious morality is not part of the government’s sphere).

12. Jonathan Fox, *Religious Discrimination: A World Survey*, 61 J. INT’L AFF. 1, 47-48 (2007) (discussing the increase of religious discrimination and international intervention).

adherents of the particular belief system involved.¹³ It encourages individuals to behave morally because a higher power wishes it of them.¹⁴ This is in contrast to acting because it is the objectively correct thing to do. These religious imperatives involve tenets specific to each faith and rely on highly particularized sets of behavioral commandments. Examples from various religions include the Judeo-Christian Ten Commandments given to Moses,¹⁵ Islam's Five Pillars,¹⁶ the Hindu Bhagavad Gita,¹⁷ the Wiccan Rede,¹⁸ and Buddhism's Eight-Fold Path.¹⁹ Each of these formulas prescribes specific conduct, but each approaches this conduct differently. While there are commonalities between them, critical contradictions—each legitimate in their own right—create conflict.

Because religious morality commands uniform behavior, often backed by some form of eternal punishment or reward, it encourages civil order and enables human beings to interact with some degree of security.²⁰ Each knows that the other is, at least theoretically, prompted by the same moral imperatives. In turn, this security allows civilization to emerge and economies to develop, secure in the knowledge that each person labors under the same moral compulsions as his or her neighbor.

At least, this would be the case in a homogenous or theocratic society. For better or for worse the United States is neither. American political leaders are not spiritual leaders. While it is true that some spiritual leaders do serve as political leaders, they do not obtain their political positions by virtue of their religious positions.²¹ Indeed, America's pluralism is demonstrated by the various religions and denominations represented in the Presidency, Congress, and the

13. See Pascal Boyer, *Functional Origins of Religious Concepts: Ontological and Strategic Selection in Evolved Minds*, 6 J. ROYAL ANTHROPOLOGICAL INST. 195, 195 (2000).

14. See *id.*

15. *Exodus* 20:1-13.

16. Qu'ran 2:184.

17. The Bhagavad-Gita in English, <http://www.bhagavad-gita.org/index-english.html> (last visited Feb. 15, 2009).

18. Religious Tolerance.org, The Wiccan Rule of Behavior: The "Wiccan Rede" [hereinafter Wiccan Rede], <http://www.religioustolerance.org/wicrede.htm> (last visited Feb. 15, 2009).

19. Fundamental Buddhism, Noble Eightfold Path, <http://www.fundamentalbuddhism.com/noble-eightfold-path.html> (last visited Feb. 15, 2009).

20. Amitai Etzioni, *Religion and Social Order*, 148 POL'Y REV. 59, 60-62 (2008).

21. Mike Huckabee, for instance, was both governor of Arkansas and an ordained Baptist minister. MikeHuckabee.com, Biography, <http://www.mikehuckabee.com/index.cfm?fa=home.Biography> (last visited Feb. 15, 2009).

Supreme Court. For example, former President Kennedy,²² Justice Scalia,²³ and Senator John Kerry²⁴ are all Catholic; Justice Ginsburg²⁵ and Senators Joseph Lieberman²⁶ (I-CT) and Charles Schumer²⁷ (D-NY) are Jewish; former President George W. Bush²⁸ is a practicing Methodist; Representative Keith Ellison²⁹ (D-MN) is Muslim; Representative Pete Stark³⁰ (D-CA) is an avowed Atheist; Representative Hank Johnson³¹ (D-GA) is Buddhist; and Senator Orrin Hatch³² (R-UT) is Mormon. Indeed, President Kennedy took great pains to lay to rest fears that a Catholic president would be obligated to the Pope for policy decisions.³³

Given the pluralistic nature of the United States and the internal divisions within each religion, issues immediately arise as to which morality applies. For example, do we apply Christian morality? What about Hindu or Shinto? The United States, after all, is home to nearly as many religions as exist in the world. In a self-identification survey, American Christians claimed membership in at least thirty-five sepa-

22. The White House, Biography of John F. Kennedy, <http://www.whitehouse.gov/about/presidents/johnfkennedy/> (last visited Feb. 15, 2009).

23. The Oyez Project, Antonin Scalia, http://www.oyez.org/justices/antonin_scalia/ (last visited Feb. 15, 2009).

24. JohnKerry.com, About John Kerry, <http://www.johnkerry.com/pages/about/> (last visited Feb. 15, 2009).

25. The Oyez Project, Ruth Bader Ginsburg, http://www.oyez.org/justices/ruth_bader_ginsburg (last visited Feb. 15, 2009).

26. Congress.org, Sen. Joseph Lieberman Biography, <http://congress.org/congressorg/bio/id/688> (last visited Feb. 27, 2009).

27. Congress.org, Sen. Charles Schumer Biography, <http://www.congress.org/bio/id/402> (last visited Feb. 27, 2009).

28. Alan Cooperman, *Openly Religious, to a Point*, WASH. POST, Sept. 16, 2004, at A01.

29. Re-Elect Keith Ellison for U.S. Cong., About Keith, <http://www.keithellison.org/about.htm> (last visited Feb. 27, 2009).

30. Secular Coal. for Am., Congressman Holds No God-Belief (Mar. 12, 2007), http://www.secular.org/news/pete_stark_070312.html.

31. Congress.org, Rep. Henry Johnson Biography, <http://www.congress.org/bio/id/51420> (last visited Feb. 27, 2009).

32. Congress.org, Sen. Orrin Hatch Biography, <http://www.congress.org/bio/id/586> (last visited Feb. 27, 2009).

33. Susan Jacoby, *Obama the Unchurched: It Was Good Enough for Lincoln*, WASH. POST, June 4, 2008, http://newsweek.washingtonpost.com/onfaith/susan_jacoby/2008/06/untitled_1.html (quoting President Kennedy's famous statement that, "I do not speak for my church on public matters—and the church does not speak for me." President John F. Kennedy, Address to the Ministerial Association of Greater Houston (Sept. 12, 1960)).

rate denominations.³⁴ Additionally, the same survey identified twenty-one other major religions and five types of secular moral codes.³⁵ The vast religious diversity in the United States, like the ethnic diversity that fueled the economic boom of the industrial revolution, is one of the great pillars of our national stability.³⁶

Several examples of laws based on religious morality existed at one time or another in this country. Prior to the *Lawrence* decision, sodomy laws in Texas and Georgia represented an attempt to impose a religious view regarding sex on the states' residents.³⁷ There was no legitimate non-religious interest being furthered by these laws.³⁸ The only plausible explanation was an interest in forcing people to adhere to a certain religious view.³⁹ Additionally, medical evidence of the health risks in homosexual relationships is inconclusive and contradictory.⁴⁰ Most studies showing a correlation are funded by fundamentalist Christian groups.⁴¹

The morality in this country most often cited by legislative bodies and courts has been that propounded in the Old Testament of the Judeo-Christian Bible.⁴² The vast majority of Americans adhere to one

34. See BARRY A. KOSMIN ET AL., *AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12* (2001), available at http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf.

35. *Id.* at 13.

36. Etzioni, *supra* note 20, at 60.

37. See GA. CODE ANN. § 16-6-2(a)-(b) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years."), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558 (2003); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06(a) (Vernon 2003) (criminalizing "deviate sexual intercourse with another individual of the same sex," where deviate sexual intercourse is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object"), *invalidated by* *Lawrence*, 539 U.S. 558.

38. *Lawrence*, 539 U.S. at 578.

39. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence*, 539 U.S. 558.

40. Franklyn N. Judson et al., *Comparative Prevalence Rates of Sexually Transmitted Diseases in Heterosexual and Homosexual Men*, 112 AM. J. EPIDEMIOLOGY 836 (1980), available at <http://aje.oxfordjournals.org/cgi/content/abstract/112/6/836> (discussing the finding that heterosexual men have a significantly higher rate of STD infection for more diseases than homosexual men).

41. Sara Diamond, *The Christian Right's Anti-Gay Agenda*, BNET, July 1994, http://findarticles.com/p/articles/mi_m1374/is_n4_v54/ai_15493650.

42. See, e.g., H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

form or another of Christianity.⁴³ Two key problems arise when attempting to impose laws based on Judeo-Christian morality on society: First, there is no clear consensus as to what constitutes the Judeo-Christian ethic.⁴⁴ Second, even if there were a consensus, it is not at all clear that applying religious morality through the states' police powers would survive First Amendment analysis.⁴⁵

When the United States Census Bureau did a self-identification survey on religion in America, thirty-five separate varieties of Christianity alone were identified.⁴⁶ Within Judaism—the other half of the Judeo-Christian equation—there are at least three major divisions in the United States.⁴⁷ Within these groups there are significant differences on substantive moral issues.⁴⁸ Some Christian and Jewish groups tolerate homosexual conduct, while others in both categories view it as an abomination.⁴⁹ Additionally, there is significant variation as to the seriousness of certain breaches of the moral code⁵⁰ and how God views the transgressor.

Even if the beliefs were more uniform, there is significant uncertainty as to whether basing laws on the morality of a particular religious group would be permissible under the First Amendment's prohibition on the establishment of religion.⁵¹ Requiring that all American citizens, regardless of their religious beliefs—or lack thereof—adhere to the guidelines set down by the religion of one group could be considered an establishment of religion. Establishment Clause jurisprudence has become a quagmire of oftentimes conflicting tests. However, what is clear is that the existence of a religious pur-

43. KOSMAN ET AL., *supra* note 34, at 12.

44. TOM W. SMITH, JEWISH DISTINCTIVENESS IN AMERICA: A STATISTICAL PORTRAIT 48-49 (2005), available at http://www.ajc.org/atf/cf/{42D75369-D582-4380-8395-D25925B85EAF}/JewishDistinctivenessAmerica_TS_April2005.pdf.

45. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); see also *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222-26 (1963) (“The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”).

46. KOSMAN ET AL., *supra* note 34, at 12.

47. SMITH, *supra* note 44, at 3.

48. *Id.* at 46-51.

49. *Id.* at 127.

50. *Id.* at 123-30.

51. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

pose behind a law can often constitute an establishment within the meaning of the Constitution.⁵² When the government overtly chooses to base a law on religious morality, it necessarily chooses a particular religion as a guide point. This adoption of a particular viewpoint—often necessarily to the exclusion of others—places the government in seriously unsteady constitutional terrain.⁵³

As children of the Enlightenment, the Founding Fathers surely did not intend for any religion—even the majority religion—to be imposed on the minority who believed differently.⁵⁴ This rings true especially in light of serious academic doubts regarding whether the Founding Fathers themselves intended the United States to be a Christian republic.⁵⁵ In the Treaty of Tripoli, for instance, Article XI declares:

As the government of the United States of America is not in any sense founded on the Christian religion; as it has in itself no character of enmity against the laws, religion or tranquility [sic], of [Muslims]; and as the said States never have entered into any war or act of hostility against any [Muslim] nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.⁵⁶

George Washington was President⁵⁷ at the time of the treaty's negotiation, and it was his administration that determined the wording. By the time the Senate—populated by the Ratification generation—approved the treaty, John Adams had been elected as the nation's second President and subsequently signed the treaty into law. Under the Constitution, such treaties are considered the supreme law of the land,⁵⁸ and thus it is unlikely the Founders would have allowed this wording to remain in the treaty if it did not accurately reflect their sentiments.

B. *Civil Morality*

In contrast to religious morality, civil morality is composed of those principles that exist within, and independent of, the various reli-

52. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968).

53. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

54. FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* (2006).

55. *Id.* at 11.

56. Treaty of Peace and Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154.

57. President Washington served from 1789-1797. The White House, Biography of George Washington, <http://www.whitehouse.gov/about/presidents/georgewashington/> (last visited Feb. 15, 2009).

58. U.S. CONST. art. VI, cl. 2.

gions of the country.⁵⁹ These maxims are found all over the world, in various cultures, regardless of the predominant faith traditions or the degree of contact with the rest of the world.⁶⁰ The civil morality is comprised of the mutual interests that each individual has in ensuring that he or she is free from the interference of others.⁶¹ When societies are formed, this ethic is given life as each participant gives up whatever rights he or she does not wish his or her neighbor to have.⁶²

This universal morality might arise from any number of non-spiritual sources. For instance, a stable and reliable means of maintaining a social group would aid in the protection of young members and the group as a whole.⁶³ A moral system, in biological terms, would therefore be evolutionarily beneficial because it would allow for consistent societal systems designed to prolong life and promote reproduction.⁶⁴ Over time, moral imperatives that served these purposes would be retained while those that failed would be discarded.⁶⁵

Socially speaking, the more likely that one individual could anticipate the actions of his or her neighbor, then the more likely that social advancement would follow.⁶⁶ When individuals are able to focus on improvements, rather than merely survival, the entire group is benefited.⁶⁷ In the moral context, where a moral code promotes a physically safe environment with predictable outcomes for social interaction, such improvements become much more commonplace.⁶⁸

American courts have shown an understanding of this ethic by recognizing the states' rights to promote public health,⁶⁹ to prevent

59. MITCHELL, *supra* note 8, at 7-8.

60. *Id.* at 42.

61. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 133 (Kessinger Publishing 2004) (1690).

62. *Id.* at 133-34.

63. See Jody M. Ganiban et al., *Stability and Change in Temperament During Adolescence*, 95 J. PERSONALITY & SOC. PSYCHOL. 222, 223 (2008).

64. CHARLES DARWIN, *THE ORIGIN OF SPECIES* 93-97 (J.M. Dent & Sons 1909) (1859) (discussing how factors promoting the ability to reproduce and sustain population are retained while factors detracting are discarded).

65. See *id.*

66. See R.G. Wahler & J.E. Dumas, *Maintenance Factors in Coercive Mother-Child Interactions: The Compliance and Predictability Hypotheses*, 19 J. APPLIED BEHAV. ANALYSIS 13, 15 (1986) (explaining that high levels of unpredictability in social interactions with children can cause higher levels of aggressiveness and instability).

67. *Id.*

68. See *id.*

69. See, e.g., *Pharm. Soc'y of N.Y., Inc. v. Lefkowitz*, 586 F.2d. 953 (2d Cir. 1978) (providing the state has an interest in regulating prescription drugs).

physical and emotional harm,⁷⁰ to promote fair dealing between citizens,⁷¹ to promote good order,⁷² and to promote social cohesion.⁷³ Together, these individual interests amalgamate into a civil morality that the state governments have every right to enforce through their police powers without fear of running afoul of the First Amendment.

Preventing physical and emotional harm is at the heart of any moral system. A society without some guarantee of physical well-being cannot be stable enough to support the institutions—such as farming, economics, and industry—necessary to maintain a civilization. This universal principle is mirrored in religious dogmas from “[t]hou shalt not kill” in the Ten Commandments,⁷⁴ to “[a]n’ it harm none” in the Wiccan Rede.⁷⁵ This also holds true for the underpinnings of the public health interest, where epidemiological and defensive considerations demand a healthy population.

Religious morality is an attempt to co-opt these principals and attach teleological implications to them. In order to ensure that these imperatives are met, religious morality attaches some form of ultimate punishment or reward to various actions. For the civil morality, considerations of an afterlife—with its attendant religious complication—are replaced with practical goals in the here and now. Since the civil morality, unlike the religious, is really a pure aggregation of other legitimate rights, a court can uphold a law based on civil morality even in the face of the *Lawrence* decision.

II. WHAT *LAWRENCE* DID SAY

Justice Kennedy’s main focus in the *Lawrence* majority opinion was on the liberty interest individuals retained under the Due Process Clause of the Fourteenth Amendment.⁷⁶ In the context of sodomy laws, this liberty interest is grounded in the idea that, because of its

70. See, e.g., *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261 (1990) (recognizing a state’s interest in the preservation of human life).

71. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 US 379 (1937) (upholding minimum wage standards).

72. See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (providing regulation of nude dancing establishments permissible based on secondary effects).

73. See, e.g., *Moore v. E. Cleveland*, 431 U.S. 494 (1977) (discussing how a state’s legitimate interest in family sanctity is rooted in tradition).

74. *Exodus* 20:1-13.

75. Wiccan Rede, *supra* note 18.

76. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (stating that the question presented was “[w]hether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment”).

constitutional difficulties, promoting religious morality is not a legitimate interest of the state, and therefore cannot support an infringement on due process rights.⁷⁷

This concept is borne out by Kennedy's recitation of Justice Stevens's dissenting position in the landmark *Bowers v. Hardwick*⁷⁸ case that, "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice"⁷⁹ This statement resonates well with the division between religious and civil morality. The morality of a mere majority cannot be civil morality, because civil morality is composed of those universal principles common to all cultures and religions.⁸⁰ The civil morality is therefore universal rather than majoritarian. A majority cannot legitimately impose its religious imperatives on a dissenting minority without a showing that the minority's actions violate the civil morality.

Religious morality, by contrast, is composed of the beliefs of a particular group of adherents.⁸¹ This means that so long as there is more than one set of beliefs in practice, the religious morality can never be universal, but only representative of either a majority or minority. Therefore, since the majority—but by no means all—of Texas citizens supported the moral legislation banning private consensual sodomy at issue in *Lawrence*, this religious moral interest cannot be a legitimate state interest sufficient to overcome the substantive due process requirements of the Fourteenth Amendment.⁸² Instead, the majority must show that the practice in some way violates the interests comprising the civil morality.

By relying on Justice Stevens's denial of the majority's right to impose its religious morality on all citizens, the opinion of the Court in *Lawrence* merely made a longstanding judicial trend explicit;⁸³ namely, that while enforcing those discrete state interests that make up

77. See *id.* at 574, 577-78.

78. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

79. *Id.* at 216 (Stevens, J., dissenting).

80. See Stanford Encyclopedia of Philosophy, The Definition of Morality (Feb. 11, 2008), <http://plato.stanford.edu/entries/morality-definition/>.

81. MITCHELL, *supra* note 8.

82. *Lawrence*, 539 U.S. at 578.

83. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (holding that a state's refusal to fund medically necessary abortions could be justified on secular grounds, and therefore did not violate the First Amendment's No Establishment Clause); *McGowan v. Maryland*, 366 U.S. 420 (1961) (stating that Sunday Blue Laws could be maintained on basis of civil tradition, but not religious theology).

the civil morality is acceptable, imposing religious dogma on the entire population is not.⁸⁴ It seems then that Justice Scalia's real worry is the exclusion of religion from the realm of government policy, rather than the bleak future of ethical decay he foretells.⁸⁵

The Texas statute at issue in *Lawrence* furthered no legitimate state interest in promoting civil morality.⁸⁶ Private, consensual sex acts between adults do not cause physical or emotional harm to the participants or others when there is no violence involved. They do not expose children to concepts outside their developmental range because children are not exposed to them at all. They do not incite public unrest because their private nature keeps them from the public eye. In light of this, *Lawrence* rightly tells the states that they cannot merely prohibit conduct because the Bible's Book of Leviticus,⁸⁷ or any religious text for that matter, tells them they should.

III. WHAT *LAWRENCE* DID NOT SAY

What the *Lawrence* Court did not do was completely obliterate the government's ability to make laws based on an interest in promoting morality. As discussed above, the civil morality is alive and well in American jurisprudence, as subsequent court decisions show.⁸⁸ Yet, beginning with Justice Scalia's dissent in *Lawrence*, there has been a stream of law review articles and other writings decrying the end of all morals legislation and the sure slide of American culture into the gutter.⁸⁹

Such moral alarmism is a common trend when society makes big moral changes. Emancipation, desegregation, and interracial marriage were once decried as diluting the moral purity of the white majority.⁹⁰

84. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222-26 (1963). See cases cited *supra* note 83.

85. See *Lawrence*, 539 U.S. at 589-92 (Scalia, J., dissenting).

86. *Id.* at 569 (majority opinion).

87. *Leviticus* 18:22.

88. See *Gonzales v. Carhart*, 550 U.S. 124, 145-47 (2007) (basing the legitimacy of partial birth abortion bans on civil morality concepts of protecting viable fetuses from physical harm rather than religious concepts).

89. See, e.g., Blazier, *supra* note 7 (discussing likely implications of the *Lawrence* decision).

90. See, e.g., Michael J. Klarman, *Brown v. Board: 50 Years Later*, HUMAN., Mar./Apr. 2004, available at <http://www.neh.gov/news/humanities/2004-03/brown.html> ("[Alabama's former Governor George] Wallace declared in his inaugural address: 'In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever.'").

Legalizing birth control was considered the first step toward ultimate moral decay, and women's suffrage was heralded as the death knell of the traditional American family.⁹¹ And yet the United States was made stronger and freer by each of these decisions.

An examination of the most common claims made by critics shows that the controversy over *Lawrence* is likewise no more than moral alarmism.

A. *Incest*

One of the most visceral reactions to the *Lawrence* decision was Scalia's assertion that states no longer have the power to ban conduct such as incest.⁹² Critics argue that since *Lawrence* held that private conduct between consenting adults is protected by the Due Process Clause, a state can only ban this type of conduct if the ban is rationally related to a legitimate state interest.⁹³ Therefore, since *Lawrence* said that a state's interest in morality is not a legitimate interest upon which to base an intrusion, incest between consenting adults, occurring in private, must be allowed.

This argument overlooks two critical points. First, while a state may not have a legitimate interest in preventing incest on religious moral grounds, there is a legitimate interest in preventing physical and emotional harm, which is a part of civil morality. Second, also bound up in civil morality is a state's interest in promoting public health.

In his dissent from the *Bowers* majority in 1986, Justice Blackmun noted that even in apparently consensual incestuous relationships, the consent factor is highly suspect.⁹⁴ Because of the extremely close status relationship which already exists between the parties involved, there is very likely to be coercion on the part of the individual in the position of greater familial power (such as the parent or the older sibling). This likelihood of coercion is parallel to the presumption made in some states' statutory rape provisions with regard to teachers and other custodial parties.⁹⁵ Because the issue becomes one of consent, this falls squarely under the prevention of emotional and physical

91. *Women's Rights*, HARPER'S NEW MONTHLY MAG., Nov. 1853, at 838, available at <http://www.assumption.edu/whw/WomansRightsHarpers.html> ("But this unblushing female Socialism defies alike apostles and prophets. In this respect no kindred movement is so decidedly infidel, so rancorously and avowedly anti-biblical.").

92. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

93. *Id.*

94. *Bowers v. Hardwick*, 478 U.S. 186, 209 n.4 (1986) (Blackmun, J., dissenting), overruled by *Lawrence*, 539 U.S. 558.

95. See, e.g., CONN. GEN. STAT. §§ 53a-73a(a)(6)-(8) (2007); IOWA CODE § 709.4(2)(c)(3) (2006); N.C. GEN. STAT. § 14-27.7(b) (2007).

harm component of civil morality. Inability to consent to intimate contact can have an extremely harmful emotional impact; therefore, states have a legitimate interest in preventing it.⁹⁶

Although there is some debate over the exact extent, there is significant scientific evidence to support the belief that incestuous mating can produce children with a higher rate of substantial birth defects.⁹⁷ This increased rate could justify a state's interest in prohibiting incest because of the avoidable increased burden on the state's health and welfare systems. One of the key dangers of incestuous reproduction is the dramatically increased likelihood of inheriting identical recessive genes.⁹⁸ Many deformities are the result of characteristics created when extremely rare recessive genes are allowed to express themselves.⁹⁹ This is also true for vulnerabilities to developing congenital conditions and resistance to disease.¹⁰⁰ If incest were allowed to become widespread, then states would be faced with severe public health issues.

Critics of this justification point out that the statistical chances of birth defects can be reduced by genetic screening or birth control.¹⁰¹ However, this solution raises the specter of eugenics, where states become, essentially, a genetic police officer. In this scenario, when a related couple wanted to reproduce, they would be required to undergo genetic screening. If a likely complication were found, the state would be placed in the position of forbidding the couple from reproducing, which raises further liberty concerns.¹⁰²

B. Polygamy

The second issue raised by critics of *Lawrence* is polygamy. They argue that since *Lawrence* abandoned morality as a justification for banning conduct, states can no longer ban multi-party marriages. In our post-*Lawrence* understanding of the law of morality, abstract ideas

96. See Sue Stuart-Smith, *Teenage Sex*, 312 BRIT. MED. J. 390, 390 (1996), available at <http://www.bmj.com/cgi/content/full/312/7028/390> (discussing the negative psychological effects resulting from sex without capacity to consent).

97. A.H. Bittles, *Consanguinity and Its Relevance to Clinical Genetics*, 60 CLINICAL GENETICS 89, 92-93 (2001).

98. *Id.* at 92.

99. *Id.*

100. *Id.* at 89.

101. *Id.* at 92.

102. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing the fundamental status of the right to procreate and the potential for abuse in government sterilization programs).

of religious dogma are not a sufficient justification to ban conduct.¹⁰³ However, the building block interests of civil morality still survive. Banning polygamy is still very much within the State's power.

One of the fundamental pieces of the civil morality is the promotion of social cohesion.¹⁰⁴ Because society is made up of multiple family units, social cohesion is based in large part on protecting the family structure. Therefore, states have a legitimate interest in regulating the marital relationship. In *Loving v. Virginia*, the Supreme Court held that the right to marry the person of one's choice is a fundamental right.¹⁰⁵ Implicit in that assertion is the idea that there is one individual with whom we are destined to be united. Marriage is, at a fundamental level, a declaration of monogamous commitment. Polygamy clearly does not fit within this definition of disciplined monogamy, and therefore the state is well within the limits of the civil morality to prohibit it.

Indeed, if a state was to allow polygamous unions, it would be difficult to rationally limit the practice. A state could not say that only the man or only the woman was permitted to take additional spouses. Neither could a state rationally limit the number of spouses each could take. Multiple, after all, does not carry any sort of inherent limit. This could lead to serious consent issues. Imagine a scenario where Alan marries Betty and Catherine. Betty then marries Dan and Eugene, and Catherine marries Frank and George. Now imagine that each of the men takes additional wives, who take additional husbands, *ad infinitum*. Alan is now bound by potential legal obligations to Dan, Frank, Eugene, George, and their potential future spouses, all—quite possibly—without Alan even knowing they exist.

C. Bestiality

Bestiality is very clearly still within a state's power to regulate following the *Lawrence* decision. Religion¹⁰⁶ aside, there are two separate grounds to which prohibitions of bestiality rationally relate. These are subsumed within the civil morality. The first is a state's interest in promoting public health, and the second is a state's interest in preventing physical and emotional harm.

103. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

104. ARISTOTLE, *Ethica Nicomachea*, in INTRODUCTION TO ARISTOTLE 300-543 (Richard McKeon ed., 1947) (discussing Aristotle's belief that the purpose of civil morality is the creation of a cohesive social body, or *polis*).

105. 388 U.S. 1, 12 (1967).

106. *Leviticus* 18:22 ("Thou shalt not lie with mankind, as with womankind: it is abomination.").

Health is seriously implicated by the high rate of disease transmission between humans and mammals capable of intercourse with humans. Indeed, the more closely the animal resembles human beings, physiologically, the more likely disease is to jump species.¹⁰⁷ Logically, for compatibility reasons, those engaging in bestiality are much more likely to choose animals that more physiologically resemble a human. This makes the risk of disease transmission much more likely than it would be otherwise.¹⁰⁸ A state has a strong interest in promoting public health and therefore could easily ban bestiality on this ground alone.

Emotional and physical well-being concerns have also been extended to animals under cruelty-to-animal statutes.¹⁰⁹ Cruelty statutes have been enacted in most states because suffering—including animal suffering—should never occur absent extreme justifying circumstances,¹¹⁰ and because society recognizes that the act of cruelty has a negative effect on the abuser.¹¹¹ Those who abuse animals become desensitized to the cruelty, and are much more likely to transfer such actions to human victims.¹¹² Because of this recognition, states have a legitimate interest in preventing the physical and emotional harm to animals caused by bestiality because this prevention in turn protects the human members of society. These concerns clearly satisfy the rational relation test and are not destroyed by *Lawrence*.

IV. ISSUES ON THE HORIZON

Even though critics have tended to focus on the above objections, there are several other areas of potential concern. Same-sex marriage and adoption issues are looming on the horizon, and it is likely that the decision in *Lawrence* will play a crucial role in their disposition. Similarly, there are potential implications for longstanding issues of

107. Kenneth Rosenman, *Zoonoses—Animals Can Make You Sick*, NASD, Apr. 2002, available at <http://www.cdc.gov/nasd/docs/d000701-d000800/d000752/d000752.pdf>.

108. *Id.*

109. See, e.g., IOWA CODE § 717.1A (2003); N.C. GEN. STAT. § 14-360 (2007); VT. STAT. ANN. tit. xiii, § 352 (2000).

110. See Luis E. Chiesa, *Why Is It a Crime to Stomp a Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 40-58 (2008).

111. Michael D. De Bellis et al., *Psychiatric Co-Morbidity in Caregivers and Children Involved in Maltreatment: A Pilot Research Study with Policy Implications*, 25 CHILD ABUSE & NEGLECT 923, 924-25 (2001).

112. See LINDA MERZ-PEREZ & KATHLEEN M. HEIDE, ANIMAL CRUELTY: PATHWAY TO VIOLENCE AGAINST PEOPLE 30 (2003) (discussing an SPCA study indicating that animal abusers are significantly more likely to commit violent acts against people).

contention like abortion. While there are concerns about how these issues will be resolved, the civil morality provides guidance for their resolution. This guidance is not only as good as that potentially provided by religious morality, it is actually a better representation of the true intent of the Founders, as discussed above.

A. *Same-Sex Marriage*

As discussed above, polygamy can clearly be banned because it does not fit the monogamous commitment that is essential to marriage as a component of social cohesion and good order. Just as clearly, same-sex marriage does fit into the monogamous definition. While homosexuality falls outside the Judeo-Christian religious norm,¹¹³ it is not replete with the consent issues that plague polygamy. Homosexual couples are equally as monogamous as heterosexual couples.¹¹⁴ Indeed, given the amount of persecution that homosexuals endure and the social hurdles they must overcome,¹¹⁵ the fact that homosexuals are statistically just as monogamous as heterosexual couples may imply that, absent such hardship, they would have an even higher rate of monogamy.

Objections to homosexual unions generally rest almost exclusively on religious grounds disguised by terms like “unnatural” and “destructive.”¹¹⁶ These unions are only unnatural or improper in the sense that religion has labeled them so, and they could only be destructive of the institution of marriage if marriage was a purely religious arrangement. However, the essence of marriage is a social compact recognized by the states¹¹⁷ that two people are bound together for life. This is deeply rooted in the civil morality concerns of social cohesion and good order. Marriage of any sort acts to define and formulate

113. *Leviticus* 18:22.

114. Compare Steven Bryant, *National Survey of Gay and Lesbian Couples*, PARTNERS, May/June 1989, available at <http://www.buddybuddy.com/survey.html> (finding sixty-three percent monogamy among gay couples and ninety-one percent monogamy among lesbian couples), with Emily A. Stone et al., *Sex Differences and Similarities in Preferred Mating Arrangements*, 7 *SEXUALITIES, EVOLUTION & GENDER* 269, 274 (2005), available at <http://home.utah.edu/~u0525361/Offprint-final.pdf> (finding that sixty percent of heterosexual married men and seventy percent of heterosexual married women remain monogamous).

115. Bryant, *supra* note 114.

116. Harold S. Martin, *Homosexuality: A Sinful Way of Life*, BRF WITNESS, Jan./Feb. 1981, available at <http://www.brfwitness.org/Articles/1993v28n3.htm>.

117. *Hill v. Hill*, 208 N.W. 377, 377 (Iowa 1926) (“Society has an interest in the permanency and stability of the marriage relation; and as individuals, in entering into the social compact” (quoting *Knight v. Knight*, 31 Iowa 451, 456 (1871))).

the social building blocks of which larger society is composed. Under the civil morality, the real danger to marriage and the concepts it embodies is the ease with which couples can obtain a divorce.

The best example of following these principles is the Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*.¹¹⁸ The *Goodridge* court, faced with deciding whether same-sex couples should be excluded from civil marriage under the Massachusetts constitution, analyzed the claim under a minimum scrutiny test in which the Commonwealth needed only to show that the ban was rationally related to a legitimate government interest.¹¹⁹ Ordinarily, such a standard strongly favors the government, but—as in *Lawrence*—the court in *Goodridge* found that the Commonwealth's ban on homosexual marriage bore no rational relation to any legitimate state interest.¹²⁰ The Commonwealth unsuccessfully argued that the government's interest in promoting heterosexual marriage as a source of societal stability sufficient to justify the law,¹²¹ and ultimately the *Goodridge* court decided the case in much the same way as the United States Supreme Court decided *Lawrence*.¹²²

In finding a state constitutional right to homosexual marriage, the Connecticut Supreme Court went so far as to classify sexual preference as a quasi-suspect class.¹²³ This classification allowed the court to apply intermediate scrutiny, taking it beyond *Lawrence*.¹²⁴ California went even farther than that, ruling that sexual preference is a fully suspect class, and therefore entitled to strict scrutiny.¹²⁵ While these cases relied on their respective state constitutions, each cited *Lawrence* extensively. This reliance seems to suggest that not only is religious morality no longer an appropriate state interest, but the entire jurisprudence of marriage is shifting.

B. Same-Sex Adoption

Nearly identical arguments apply to adoption. There is no credible evidence to indicate that a child adopted by a same-sex couple is any more likely to be harmed by that adoption than a child adopted by

118. 798 N.E.2d 941 (Mass. 2003).

119. *Id.* at 960.

120. *Id.* at 967-68.

121. *Id.* at 965.

122. *Id.* at 966.

123. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008).

124. *Id.* at 407.

125. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *writ of mandate issued*, *Strauss v. Horton*, No. S168047 (Cal. Nov. 5, 2008).

a heterosexual couple.¹²⁶ The commonly presented objections to homosexual adoption are that homosexuals are more likely to sexually abuse their children,¹²⁷ and that homosexual men adopting boys or lesbians adopting girls will “indoctrinate” the child into that lifestyle.¹²⁸ These objections are unfounded, and when refuted only religious objections remain.

There is no empirical evidence available that indicates children of same-sex couples are at greater risk for developmental or abuse issues.¹²⁹ Studies conducted since the late 1970s have repeatedly shown that “[c]hildren raised by lesbian mothers or gay fathers [do] not systematically differ from other children” in any significant area of child development.¹³⁰ Additionally, researchers found that the sexual preference of the parents had absolutely no effect on the gender preferences of the children.¹³¹ Add to this the fact that studies have consistently debunked the link between homosexuality and pedophilia,¹³² and the so-called “health and welfare” justifications for preventing adoptions by same-sex couples come unraveled.

What remains when the fallacious justifications melt away is merely a religious bias against adoption by same-sex couples. Value judgments aside, in the post-*Lawrence* jurisprudence of morality, this is simply not enough to justify the intrusion into a same-sex couple’s right to raise children. In light of this development, the constitutionality of state provisions barring same-sex adoption and marriage seems very dubious indeed.

But, the Court of Appeals for the Eleventh Circuit seems to disagree. In *Lofton v. Secretary of the Department of Children & Family Services*, the court held that Florida’s ban on homosexual adoption was constitutional, despite the decision in *Lawrence*.¹³³ The opinion in *Lofton* began by correctly noting that adoption is not a fundamental

126. Margaret Paccione-Dyszlewski, *Children of Same Gender Parents: What is Known*, CHILD & ADOLESCENT BEHAV. LETTER (Brown Univ., Providence, R.I.), Jan. 14, 2008, at 5.

127. *Id.*

128. See, e.g., Matthew Cullinan Hoffman, *Court: No Opt-Out of Homosexual Indoctrination in Class for Massachusetts Parents*, LIFESITENEWS.COM, Feb. 4, 2008, <http://www.lifesitenews.com/ldn/2008/feb/08020404.html>.

129. Richard D. Krugman, *Sexual Politics and Child Protection: They Don’t Mix*, 94 PEDIATRICS 45, 45 (1994).

130. Paccione-Dyszlewski, *supra* note 126, at 5.

131. *Id.*

132. Krugman, *supra* note 129.

133. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 806, 817 (11th Cir. 2004).

right and that homosexuals are not considered a suspect class, and therefore strict scrutiny would be inappropriate.¹³⁴ The court then applied a rational basis test to the proffered claims.¹³⁵

First, the *Lofton* court opined that Florida could have banned homosexual couples from adopting because these families are, by definition, either fatherless or motherless.¹³⁶ Since the state acts *in loco parentis* for adopted children, Florida's interest in promoting the best interest of the child is furthered by placing children in families where both gender roles are represented.¹³⁷ The court offered this justification even though Florida law specifically allows adoption by single heterosexual individuals.¹³⁸ The court's answer to this inconsistency was a weak offering that single heterosexuals have the "potential" to form stable dual gender households.¹³⁹

The court then turned to a slightly more nuanced argument. Since statistically the vast majority of children adopted will grow up to be heterosexuals, banning homosexual adoption is rationally related to the best interest of the children because they will need heterosexual role models.¹⁴⁰ The court believed that this was a sufficiently rational reason for Florida to ban homosexual adoption.¹⁴¹

Given the statistical data on sexual identification in children raised in homosexual homes,¹⁴² and the internal inconsistencies in the court's reasoning, what really emerges from *Lofton* is an *irrational* basis test serving as a subtle cover for a state's attempt to use religion as the interest to be furthered. The *Lofton* court, undoubtedly aware of its transparency, even takes pains to distinguish itself from *Lawrence*.¹⁴³ The *Lofton* court points out that Justice Kennedy specifically stated that part of the reason for the ruling in *Lawrence* was that the sexual encounter had been between two consenting adults and did not involve children.¹⁴⁴ Rather than acknowledge that Kennedy was referring to the ability to consent to sexual acts, the court instead seems to insist that a state can use religious morality as a basis for laws when children are involved. This improper and facile attempt to limit *Law-*

134. *Id.* at 812.

135. *Id.* at 817.

136. *Id.* at 818-19.

137. *Id.* at 819.

138. *Id.* at 820.

139. *Id.* at 822.

140. *Id.*

141. *Id.*

142. See Paccione-Dyszlewski, *supra* note 126.

143. *Lofton*, 358 F.3d at 817.

144. *Id.*

rence demonstrates resistance to its strictures, rather than acquiescence to the limitations intended by its authors.

C. *Abortion*

Perhaps one of the most controversial topics of modern American morality is the debate over abortion. Even framing the policy issue is contentious, with one side describing it as a woman's right to bodily autonomy¹⁴⁵ and the other side as a child's right to live.¹⁴⁶ This issue is so heated that people have been beaten, arrested, and even killed¹⁴⁷ because of it. Unfortunately, the civil morality does not put this issue to rest. It does, however, illuminate the degree to which the imposition of religious morality into the mix has muddied the waters.

While the civil morality does not resolve the abortion issue, it is nonetheless helpful to view this issue through the lens of the civil morality. On the one hand, we have the mother's own interest in bodily integrity and self-determination.¹⁴⁸ Weighed against these interests are the interests of the child.¹⁴⁹ These interests cannot be invoked by the child itself, and they are not likely to be invoked by the parent seeking the abortion. It falls to the state, then, to enforce the rights of the unborn child. While far from being settled, it seems entirely possible that a state's interest in preserving the child could be grounded on the civil morality interests of prevention of physical harm and the promotion of social cohesion. Clearly, the abortion procedure terminates the life of the unborn child, and social cohesion is not possible if there are no people to cohere. Thus, the demise of religious morality in the jurisprudential sphere does not necessarily spell the end of the pro-life position.

Religious morality and the attendant concerns have only served to muddy the waters. Questions of the creation of the soul and when life—intrinsically valuable life—begins are inherently religious questions, and as such they invite subjective and divisive answers. Relig-

145. See, e.g., Nat'l Org. for Women, *Reproductive Justice is Every Woman's Right*, http://www.now.org/issues/abortion/reproductive_justice.html#justice (last visited Feb. 19, 2009).

146. See, e.g., Nat'l Right to Life, *What is the Pro-Life Response to Abortionists' Arguments?*, <http://www.nrlc.org/abortion/facts/abortionresponses.html> (last visited Feb. 19, 2009).

147. In 1998, Dr. Barnett Slepian, a doctor who performed abortions, was killed by a sniper-style attack in his Amherst, New York home. David Staba, *Life Term for Killer of Buffalo-Area Abortion Provider*, N.Y. TIMES, June 20, 2007, available at http://www.nytimes.com/2007/06/20/nyregion/20kopp.html?_r=1.

148. Nat'l Org. For Women, *supra* note 145.

149. Nat'l Right to Life, *supra* note 146.

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ious morality has polarized the issue, and served to steer the debate from the rational and empirical normative discussions. This debate has focused on absolutist claims about killing and self-determination. Rather than end the debate by foreclosing one position or the other, the ascension of the civil morality after *Lawrence* is more likely to facilitate a reconciliation of two seemingly intractable viewpoints.

CONCLUSION

Lawrence v. Texas illuminated the difference between the purely religious morality and the universal civil morality. Religious morality relies on dogmatic commandments imparted from subjective religious systems that rely on punishment/reward scenarios for enforcement. The civil morality is composed of those universal interests that allow social groups to cohere into stable, prosperous societies. By rejecting laws based solely on religious morality, the Supreme Court in *Lawrence* reaffirmed America's heritage as a religiously neutral republic.

Far from obliterating the use of morality as a basis for laws, *Lawrence* in fact clarified the role of morality in American jurisprudence. *Lawrence* recognized that the purely religious has no place in the police power of the state, but rather that the universal morality common to all cultures should be the foundation of American law. This application of the rational basis test is not only *rational*, but necessary and overdue.

Justin P. Nichols

