



# Can Wrongs Be Rights? Why a “Conservative” Might Support Legal Protections for Gay and Lesbian People

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**I**MAGINE THAT YOUR BEST FRIEND OR A BELOVED FAMILY MEMBER IS A SMOKER. (For many, this will not require any imagination!) One evening, as he is settling down in his bedroom for a smoke and a good book, he is interrupted by a loud knock on the door. Two policemen charge in to wrest the cigarette from his hand, insist he dress in front of them, handcuff him, and haul him to jail, where he waits in a lockup for several hours before being released without a word. After tossing and turning in shame all night, he arrives at the school where he teaches social studies only to be called to the principal's office and handed his termination slip, because scores of parents who have heard of his arrest have called the school to demand his resignation. They are angry and afraid that his smoking will corrupt their children; he will be a bad role model for them and will perhaps tempt them to smoke with him, involving them in an irreversibly damaging lifestyle.

But this horrible day is not over. That afternoon, your friend receives a summons, informing him that his ex-wife is suing for custody of their three children, whom he and his second wife have raised since infancy, on the grounds that his home is a vile and immoral place in which to raise children, and their friends will ostracize them if they know the kids live with a smoker. Your friend/loved one knows that the mother is likely to win because he has violated a little-enforced state law, passed in the wake of the Clinton health care reform plan,

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that makes smoking illegal, and because the community is morally revolted by smoking.

In the ensuing days, his friends shun him as a pariah, his parents tell him that they are ashamed and revolted by him and never wish to see him again, and his minister informs him that until he stops the sin of smoking he is not welcome at church or in God's kingdom hereafter. After receiving a telephone call that his medical insurance has been cancelled because he is at such high risk for lung cancer, he dejectedly drives over to his local club to tell his troubles to his buddies. As he leaves the club at midnight through the smokers' lounge entrance, he is accosted by three young punks who grab him, call him unspeakable names, throw him down and kick him in the face and chest until he begins to bleed internally. Although the police called to the scene merely laugh and walk away when they see him, a good samaritan piles him into a car and takes him to the nearest hospital. The emergency room physicians only reluctantly come to his aid: he has no health insurance and, after all, he is a smoker.<sup>1</sup>

#### I. CIVIL RIGHTS FOR GAY AND LESBIAN PEOPLE: WHAT IS AT STAKE?

This article is not addressed to those who conclude that the smoker got precisely what he deserved, because he violated God's commands. Nor is it addressed to Christians who believe that homosexuality or certain kinds of homosexual intimacy are not morally different from similar heterosexual behavior. Such Christians presumably would easily conclude that gay and lesbian people should not be treated differently by their government than anyone else, just like an African American or a woman.

Although I do not make a case for or against the morality of homosexual sex, I do make moral arguments about what the *state* should do about homosexuals. I argue that those Christians who believe that homosexual intimacy is sinful, or are troubled by this question, should nevertheless ask the state to protect gays' and lesbians' civil rights as a *moral* matter.

Some persons want the state to protect homosexuals from discrimination based on status if they are not "practicing" homosexuals, but think the state should punish sodomy and other sexual acts by law.<sup>2</sup> Others are troubled by criminalizing private sexual acts but vote against civil rights legislation which they "hear" gives

<sup>1</sup>I am not the only one to have thought of the smoking analogy. See David Morrison, *You've Built the Bridge, Why Don't you Cross It?*, 26 University of Michigan Journal of Law Reform 245, 263-270 (1992). This article notes that twenty-seven (27) states have passed protections for smokers.

<sup>2</sup>In support of sodomy laws, proponents have argued that decriminalization would result in an increase of homosexual activity; influence young people to choose homosexual over heterosexual relationships, thus weakening the family; and produce an increase in venereal disease. Cf. Charles W. Keyser, ed., *What You Should Know about Homosexuality* (Grand Rapids: Zondervan, 1979) 173.

Some church synods and committees have condemned assaults and harassment of gays and lesbians and/or anti-discrimination laws, while reserving their stance on the state's or church's responses to sexual activity. Among Lutherans, see, e.g., the ALC statement, *Human Sexuality and Sexual Behavior* (October 1980) 8; the 1993 memorial of the New Jersey Synod, ELCA; and "A Resolution Opposing Harassment, Assault and Discrimination Due to Sexual Orientation" (Board of the Division for Church in Society, ELCA, March 6, 1993).

gays preferred status. In fact, civil rights legislation being considered in most states is designed to reverse the existing “right” of private persons to treat gays and lesbians less favorably than others solely because they are homosexual<sup>3</sup> – it is about whether a landlord can refuse to rent to the mild-mannered (incidentally lesbian) librarian, not about whether the state can punish random sex in public restrooms.<sup>4</sup>

Christians who move swiftly from condemning homosexuality to demanding legislation banning sodomy or civil rights for homosexuals often forget what they are seeking. In reality, they are asking the state to involve itself in the moral life of its citizens in some of the most punitive ways devised by human beings.

Legislation prohibiting sexual acts such as sodomy when performed by gays and lesbians does not simply condemn these acts or exclude people from participation in our moral community (like church shunning practices); it makes people criminals. In the Virginia case where the Supreme Court refused to protect homosexual intimacy as a constitutional right of privacy, the felony penalty for one act of sodomy was set at 1 to 20 years in the state prison.<sup>5</sup> Imprisonment does not mean just the loss of one’s freedom within a dangerous, morally debilitating prison atmosphere. It can also mean the loss of one’s home, estrangement from family and loss of parental rights over children, loss of assets (as debts mount with no income), and even permanent loss of one’s good name and privileges of citizenship, such as the right to vote. Yet, our beloved smoker could undergo all of this for that one cigarette, if we decide to criminalize all immoral behavior.

The Colorado initiative and others that would take away the political right to prevent discrimination against gays and lesbians is different from criminalization, to be sure. The loss of one’s civil rights is not imprisonment; it is perhaps not as shaming as the state’s condemnation through criminal sanctions. However, anyone who has observed the civil rights movement should understand the badge of inferiority stamped on those who are not protected by the law, not to mention the insecurity of knowing that anyone can brutalize them with impunity.

<sup>3</sup>The recent Colorado constitutional amendment provided that no state or local government entity could have a policy whereby homosexual “orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination.”

“Protected status” merely means that a certain characteristic, such as homosexuality, is specifically mentioned in a state or local law as a basis upon which public or private entities may not discriminate.

“Minority status quota preferences,” while a term made up by the amendment’s sponsors, presumably refers to affirmative action programs prior to the 1986 *Bakke* case, which used to provide that employers and others could select a certain quota of minorities before whites had a chance at the opportunities afforded. However, *Bakke* has made it clear, at least for race cases, that a public or private entity may not reserve a certain number of slots based solely on minority race, *unless* a court has found that the entity has discriminated against the minority in the past and that a quota is the only realistic way to remedy that past discrimination. Thus, the legislation erroneously raises the fear that homosexuals will be given *special* rights not available to everyone else.

<sup>4</sup>Modern state and federal civil rights statutes have traditionally covered discrimination in public accommodations, employment, government-assisted programs, housing, education, contracting, and voting.

<sup>5</sup>*Bowers v Hardwick*, 478 US 186 (1986), citing Ga. Code Ann. ss 16-6-2 (1984).

The refusal of the law to protect people against more tangible harms can be almost as punitive as prison. For if the state refuses to protect people who are denied equal treatment because of their homosexuality, all of the harms suffered by our beloved smoker are legally permissible: loss of jobs, children, and homes, and the ability to get credit and basic services like health care and police protection.<sup>6</sup>

Though we as a society have protected a private person's right to discriminate more than governmental discrimination, even in the case of private discrimination we have balanced the harm to those excluded against the gain to the excluder and, in many cases, banned private arbitrariness. Indeed, the civil rights movement is a history of private businesses and individuals who said they simply did not want to associate with black people—at lunch counters, on buses and trains, in hotels and restaurants, in schools, even in restrooms—and who, like the Colorado initiative proponents, sought the state's legal approval so they and their children did not have to associate with "such people."

My smoking analogy tests the moral fault line for Christians troubled by the morality of homosexual activity who must also act as citizens, for it raises the same "folk morality" claims often levelled at gays and lesbians to justify precisely the same kinds of the treatment that our smoker has endured. The following arguments (clearly not my own) against homosexual intimacy work as well to justify legally punishing smoking:

Smoking (or read gay sex) violates God's word, both one of the Ten Commandments (here, "Thou shalt not kill" as opposed to "Thou shalt not commit adultery") and other biblical exhortations against doing harm to one's body

Smoking (read gay sex) is "unnatural," an unnecessary corruption of the body and a degradation of the soul, potentially harmful to the health, indeed the life, of the individual who does it. Christians should be able either to contain their desire (for a cigarette) or find satisfaction in a more God-pleasing way, if they only try hard (and get good counseling)

Smoking (gay sex) can potentially cause great harm to others, including transmission of disease (cancer from second-hand smoke/ AIDS), family tensions, and the consequences of losing a parent or loved one to death from (cancer/ AIDS)

Smoking is usually taught by older people who set the example or entice young people to become involved. If given the choice, kids will choose smoking (homosexuality) over moral activity

It must also be said that the same tired "liberal" arguments can be marshalled

<sup>6</sup>Gays and lesbians have been denied protection by courts from discharge from the military (mostly recently in *Steffan v Aspin*, 8 F3d 57 [DC Cir 1993]) and from other employment discrimination (see, e.g., *Smith v Liberty Mutual Insurance Co.*, 395 FSupp 1098 [ND Ga 1975], affirmed 569 F2d 325 [5th Cir 1978]). Courts have also refused to protect them from loss of custody of their children (*Roe v Roe*, 324 SE 2d 691 [Va 1985]; *L. v D.*, 630 SW 2d 240 [Mo Ct App 1982], and denied their participation in prison worship services (*Phelps v Dunn*, 965 F2d 93 [6th Cir 1991]), and denied state protection from gay-bashing (Note, *Approaches to Privacy*, 23 Connecticut Law Review 861, 917 [1991]). As of 1992, only five states—Connecticut, Hawaii, Massachusetts, New Jersey, and Wisconsin—and the District of Columbia had passed general laws prohibiting discrimination on the basis of sexual orientation.

in favor of protecting smokers and sexual activity of all sorts, e.g., it doesn't hurt anybody; people have the right to decide what to do with their own bodies; and, according to Dear Abby, once someone starts, it's unrealistic to expect them to stop, so help them make it as safe as possible (filters and pipes).

Even those Christians who are persuaded that homosexual intimacy is immoral by Christian standards, however, should press for the principle that the power of the state should not be used to disadvantage people solely because of their homosexuality, even if they engage in intimate homosexual relations. I say "even if" because homosexuals, unlike smokers, are punished as described not only for their current behavior, but for what they *are* as well as what they have done or might do. (Imagine how you would view a judge's ruling that your beloved smoker should lose custody of his kids because he once smoked for a while, and will not promise the court that he will never, ever do it again, as many gay and lesbian parents have.)

In considering whether smokers or homosexuals should be punished, Christians must consider what values they would require, as citizens, before they impose such severe sanctions as imprisonment or removal of state protections for groups of citizens. I will make just two arguments: one argument about the concerns of a Christian in a pluralistic society, or a civic argument for civil rights; and one argument about the moral balance of competing harms, or a moral argument for civil rights.

## II. A CIVIC ARGUMENT FOR CIVIL RIGHTS

American Christians are also United States citizens. While I would never argue that a citizen must accept the moral expectations of her society *carte blanche*, those expectations must be weighed seriously – not just as a practical matter but also as a matter of fairness, because Christians take advantage of those moral expectations and rights to live out their own faith.

Chief among American political mores are the values of tolerance and respect for the equality of the other, which are embodied explicitly in the constitutional text and embedded in the structure of the American community. The values for tolerance and respect for equality can be most easily grounded in the pragmatic task of keeping peace in a complex, pluralistic society: we must have some rules of social cooperation in the face of profound disagreement about the nature of the good society and how to achieve it. Thus, we tolerate much of what we do not like, and we respect even profound difference.

However, more is at stake, especially for Christians: the values of tolerance and respect recognize that sinful human beings, even when they constitute a democratic majority, can abuse their power, blind to the suffering caused to those who are "other," or can even deliberately destroy "the other," who is God's creation. The framers' addition of a Bill of Rights to protect against the "tyranny of the majority" or the spectre of government oppression of the individual are reminders to Christians that we need to consider most humbly whether we know

God's will and how to achieve it in the face of the profound differences in moral belief that we encounter in our fellow citizens.

Most particularly, the constitutional protection of religious liberty in the first amendment's free exercise and establishment clauses, a welcome relief to Protestant dissenters who fled to America, has been a critical opportunity, long taken for granted, for Lutherans to live out their faith with each other and to evangelize their fellows. That amendment bespeaks our common commitment to curb government's coercion against those who must dissent to the majority's moral expectations in religious conscience, unless a most "compelling" reason requires dissenters to submit. The same constitutional value that requires protection and respect for Christians who oppose homosexuality also requires Christians to take seriously those who believe that all aspects of gay and lesbian sexuality are a gift from God.

Of course, not all challenges, even by conscientious dissenters, to the state's moral code can be honored. For example, we would probably not be willing to waive our laws against murder for the religious objector who believes that human sacrifice is commanded by God, since the protection of life is a compelling government concern. The precise principled basis for drawing the line between what can be punished by the state in a tolerant society and what cannot is difficult.

As it happens, debates about whether gay sex can be punished *have* occurred in American and British jurisprudence in the past thirty years. In the United States, they were occasioned by the 1955 Model Penal Code drafted by the prestigious American Law Institute, which urged states to eliminate all criminal sexual offenses unless they involved force, corruption of minors, or public offense (such as public nudity). In England, the debate got started by the 1957 Wolfenden Report, which recommended repeal of British crimes punishing consensual homosexual sex. The ensuing scholarly debate, known best by exchanges from 1959 to 1965 between famed jurisprudence professor H. L. A. Hart and distinguished British jurist Lord Patrick Devlin, attempted to demarcate the line between proper and improper legal regulation of morals.<sup>7</sup>

Arguing that some cannot be punished simply for what causes others moral distress, H. L. A. Hart would regulate John Doe's liberty only to prevent him from harming John himself or others. Hart, who would only permit the law to protect those values which are universally recognized and without which society could not be viable, worked from John Stuart Mill's claim that human liberty is generally a positive good which permits us to experiment with living to create a better world.

Lord Devlin, by contrast, criticized the Wolfenden Report, giving credence to the moral disgust of the average person for gay sex. He argued that the state could not regulate all behavior that was distasteful to a majority, but that it could reach behavior that would profoundly change the distinctive moral character of a par-

<sup>7</sup>For samples of the debate, see Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965); and H. L. A. Hart, *Law, Liberty and Morals* (Oxford: Oxford University Press, 1963).

ticular society. For example, he noted that a society could be either effectively (and morally) monogamous or polygamous; but that a monogamous society which did not ban polygamy would suffer profound changes in its family structure, property relations, and social structure.

Even under Devlin's broader mandate to regulate morals, American Christians would be morally required to demonstrate how homosexual sex in all of its forms constitutes a threat to the distinctive character of the United States before the state could permissibly punish it, either criminally or by withdrawing state protection from those who are disposed to engage in such sex acts. Lord Devlin never really put forth a reasoned argument for the regulation of sodomy, noting only that the "man in the street" thought it disgusting and that England was, after all, a Christian country.

While many have argued that decriminalization of such sex threatens the American family, most popular arguments on the subject have not attempted to describe *which* American family is threatened, and why any particular form of the American family or even any form of sexual expression is constitutive of the social, moral, or political character of the nation. Lord Devlin's assertion that England was a Christian country would not fly in a country that is constitutionally without particular religious beliefs.

Even assuming that the American family is the two-parent, heterosexual couple and their children, proponents of homosexual regulation have not made very cogent arguments about why the exclusive homosexuality of perhaps 1-4% of the U.S. population threatens that family or that sexual structure. The clearest argument, that, given the option, many children would choose lifelong homosexuality over heterosexuality and a traditional family does not have much currency within the scientific community.

Under Hart's formulation, one seeking to criminalize homosexual relations would need to demonstrate the tangible harm such behavior creates for those who engage in homosexual sex or for others, apart from any moral harm we would deduce from a particular Christian perspective. That harm must be one universally recognized, e.g., something communities in all times and all places have condemned as harmful, a somewhat difficult feat with gay sex, and even more difficult for lesbian sex. (In this regard, one must admit that though several of the Ten Commandments, including blasphemy and bearing false witness, were criminally enforced in colonial America, the only remaining universally enforced commandments are those against killing and stealing.<sup>8</sup>)

<sup>8</sup>Bearing false witness is now subsumed under the civil causes of action for damages called slander and libel. However, even in a damage suit, the injured party must show a tangible injury to his reputation in most states, and public officials and famous figures must show that the bearer witnessed with intent or reckless disregard for the truth.

While adultery statutes remain on the books in several states, they are seldom if ever enforced, and most states do not even permit them to be referred to in divorce proceedings to establish the fault of a spouse.

Blasphemy and similar statutes have been excluded as violations of the establishment clause of the first amendment.

While certain forms of sexual behavior (whether gay or straight) such as multi-partner or coerced sex might be shown to be universally recognized as harmful and threatening to the family, it would be difficult to make a non-sectarian argument about the tangible harm caused by all sexual expression between same-sex couples. Yet, existing criminal laws and cases denying civil protections to gays make no distinction at all among homosexual acts based on the nature of the relationship between the actors.

Although the lines drawn by Hart and Devlin are not the only ones that can be drawn between permissible and impermissible state regulation, they demonstrate the real difficulty of taking diversity of religious and moral belief seriously in the construction of state sanctions. Until another defensible line is drawn, the political values of tolerance and respect for the other as a morally responsible equal would counsel against such state sanctions against homosexuals.

### III. THE MORAL BALANCING ARGUMENT FOR CIVIL RIGHTS

American criminal law borrows some of its norms from ancient Christian philosophy. For instance, at the common law, criminal punishment is expected to be relevant and proportional to the crime (an eye for an eye). American constitutional law enforces this notion through its prohibition against cruel and unusual punishment. In judging the validity of state action that infringes on important protections such as liberty of conscience, the Supreme Court often uses interest-balancing to decide the strength of the state interest against the potential harm that the state's action can cause the individual. These criminal principles suggest that the suffering and shame caused by punishing behavior (either criminally or civilly) be warranted by the gravity of the offense. They also demand that sanctions work, that they be efficacious in achieving the goals of punishment, e.g., in rehabilitating or deterring the criminal from this act. In civil law, compensation of the victim may also be a goal; or in criminal law, retribution for a wrongful act may be sought. Moreover, the moral decision-maker must consider other "side" values that are harmed in the process of imposing sanctions on individuals' behavior.

While Christians might well scorn absolutist rhetoric about the rights to "privacy" and "autonomy" said to overrule the state's ability to regulate morality, these concerns are not morally irrelevant. The state *did* barge into Hardwick's bedroom while he was naked, having intimate relations with another man, and demand that he come "downtown" as part of an arrest. Granting the state—a perfect stranger who can legally kill to arrest if necessary—the right to enter homes and even bedrooms at will threatens individual security and dignity in a significant way. Similarly, one does not need to believe in the maxim "do your own thing" to recognize that state sanctions against behavior it deems immoral pose a threat to the positive values of individual freedom. If, for instance, a person is deciding for or against an act based simply on the fear of punishment, the ability to make moral or religious decisions as a responsible person, to exercise the gifts that person has been given to love and choose, are severely constrained unless he or she is very brave indeed. And what fairly applied principle will distinguish between



today's state decision that I risk jail for making love to someone and tomorrow's state decision that my child can't go to a religious school because it malforms his character in the secular state — or determine that I can't be a pastor, because it contributes nothing to the economy.

Other values, balanced against the value of imposing sanctions on immoral behavior, may outweigh whatever good may be achieved. For instance, criminalization of gay sex may reinforce stereotypes that the *person* involved in this criminal act is less worthy of regard, and may be used by others to justify their own evil, such as gay-bashing. One has only to consider how tales of welfare fraud have been used as excuses to deny housing, jobs, or credit to innocent, hard-working welfare recipients, or how segregation laws were used to justify black lynchings in the south, to understand this dynamic. State sanctions, criminal or civil, against all homosexuals may similarly permit some gays and lesbians to justify abusive or inhumane behavior in their own relationships, such as sadomasochism or faithlessness to a dependent partner, since, before the law, both loving and harmful homosexual acts and relationships are equally condemned.

Moreover, it is more difficult to justify punishments of homosexual relations if the punishments are not efficacious. It is harder and harder to find those who believe that punishment of gays and lesbians will rehabilitate them into heterosexuals, or others who believe that criminal sanctions against sodomy deter many gay and lesbian people from the crime.

One might, of course, argue that denial of civil protections to gays and lesbians compensates some victim of their homosexuality or that society's retributive goals are satisfied by criminalizing homosexual activity. However, then one has to confront Hart's dilemma. We might understand how victims of a murder, or even a community, might find retributive value in putting a murderer to death. But what is the harm to society for which retribution is sought in the case of mutual gay sex? Who is the victim? How does imprisonment "cancel" the criminal debt owed for homosexual sex or permit the community to release its fear or anger in the way that an execution may permit a community to "cancel" the debt or release its emotions about a murder? And how would one identify the persons deserving compensation at civil law for a homosexual's sexual acts?

Finally, the problem of proportionality looms large with state sanctions against all homosexual activity, whatever its nature. Morally, it is difficult to argue that we may justifiably inflict more suffering on a criminal than he has himself caused, even under a retributive theory. In American criminal law, therefore, the Supreme Court has ruled that life imprisonment without parole is a disproportionate sentence for a series of non-violent crimes<sup>9</sup> and that capital punishment cannot be meted out for the crime of rape.<sup>10</sup> If the case of the beloved smoker seems bizarre, it is probably because we cannot imagine such heavy penalties being

<sup>9</sup>See *Solem v Helm*, 463 US 277 (1983) — the offenses were three cases of third degree burglary, three incidents of bad checks, grand larceny, and driving while intoxicated.

<sup>10</sup>*Coker v Georgia*, 433 US 584 (1977).

imposed by the state for a moral fault that many would consider relatively harmless to anyone but the smoker.

If it is difficult to pinpoint the harm caused society by a single act of consensual adult homosexual intercourse, it is even more difficult to quantify an amount of that harm which would equal the loss of those things most critical to an individual's sense of self—liberty, family, home, opportunity to work, opportunity to love—created by state sanctions against homosexuals. Unless such proportionality between the harm and the punishment can be demonstrated, criminal punishment, or even the withdrawal of basic civil protections such as non-discrimination in employment, is on precarious moral ground.

#### IV. ONE AFTERTHOUGHT

I offer, hesitantly as a lay person, one final thought. The separatists, part of our political heritage, fought for the separation of church and state because they worried that if the state had the authority to speak for God, the word would not be God's. Yet, Christians are often quick to resort to the state's powers in order to wipe evil and evil people from the earth in the name of what God speaks. For them, it would not seem possible that God can or does will good things not only by eradicating evil, but also by bringing good from the very clay of evil; that blessing can be brought out of sin. One has only to know an unwed mother, whose child has brought unimagined, if complicated, blessings, to consider this possibility. If the state intervenes quickly and harshly in judgment, will even those who regard homosexual behavior as sin lose the opportunity to wonder whether, when they see gay or lesbian people who treasure each other and support each other's capacity to care for their world, they are glimpsing such a paradoxical blessing?