



**LEGAL REASONING: JUSTIFYING  
TOLERANCE IN THE U.S. SUPREME  
COURT**

**Harel Arnon\***

**Introduction**

The concept of tolerance is central to liberal political and moral traditions, yet it raises a number of challenging questions. Is tolerance unlimited? When is it required? If acts or beliefs are morally wrong, why tolerate them at all? If they are not morally wrong, is tolerance still necessary? Indeed, the paradox of “tolerating the intolerable” has attracted significant attention in liberal political and moral writings. Several lines of justifications have been offered in the attempt to resolve the paradox of tolerance. John Locke and John Stuart Mill justified tolerance primarily on utilitarian grounds, while contemporary justifications center on notions of personal autonomy and pluralism. This Article tracks a shift within the liberal tradition from utility-based to autonomy- and pluralism-based justifications for tolerance. It further attempts to locate a similar shift in legal argumentation for tolerance, as offered by liberal Justices of the U.S. Supreme Court in the context of homosexuality, and to demonstrate that the transformation of

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\* LL.B., M.A. (Phil), 2000, Bar-Ilan University; LL.M. 2003, S.J.D. 2006, Harvard Law School. I am greatly indebted to Avi Sagi who initially introduced me to the paradox of tolerance and to Lew Sargentich for his comments and insights.

tolerance that had occurred in general liberal discourse trickled into liberal adjudication.

The purpose of this Article is to illuminate a link between the law and political and philosophical discourse through the lens of the Supreme Court Justices' treatments of homosexuality. As the shift in grounds for justifying tolerance has occurred within the liberal tradition, it is only natural to look for an equivalent shift in the opinions of Justices falling within that same tradition. The main interest of the Article lies in the reasoning, the underlying assumptions, and the implicit moral views of the Justices writing these opinions, and not always in the legal outcomes of the cases. Consequently, the Article examines cases that mention homosexuality even if homosexuality, as such, is not their main issue.

Part I of the article is dedicated to a philosophical analysis of tolerance. I begin by providing a minimal definition, and subsequently illustrate the gradual evolution in ways of justifying tolerance. Part II maps a course of Supreme Court jurisprudence that tracks the evolution of tolerance outlined in Part I.

## On Tolerance

### A Paradox

Many scholars who write on tolerance address, in one form or another, the *Paradox of Tolerance*.<sup>1</sup> Oberdiek articulates the paradox as follows:

The paradox arises because we appear to believe both that we have conclusively good reasons *against* tolerating a given attitude, belief, action, practice, person or way of life—and equally compelling reasons *for* doing so. This is not because the reasons are equally balanced, at least not at the same level of reasoning. Instead, we are confident that we are right and they are wrong, but that for reasons of a different kind we should let them alone. This seems highly paradoxical, even

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<sup>1</sup> See, e.g., John Horton, *Tolerance as a Virtue*, in TOLERATION: AN ELUSIVE VIRTUE 28 (David Heyd ed., 1996) [hereinafter TOLERATION].

irrational, and, a critic might add, clearly wicked, for if we are confident in our reasons, why should we tolerate anything that opposes our beliefs, attitudes, or practices? Why allow people to do that or believe that which we know is hideously wrong or deeply misguided?<sup>2</sup>

The paradox demonstrates the inherent tension of the virtue of tolerance. If only the irrational or immoral—that is, the intolerable—deserve tolerance, why tolerate it at all? Why is it not equally irrational or immoral to exercise tolerance? Indeed, tolerance is an elusive virtue.<sup>3</sup>

An array of possible approaches is available in dealing with this paradox. On one end of the spectrum, we can choose to unleash the restraints of tolerance and embrace intolerance. Rejecting the need for self-restraint when a conflicting position is perceived as irrational or immoral resolves the paradox, but leaves us without any grounds for exercising tolerance. Such a position has been quite common in the past and it surely still enjoys some favor today,<sup>4</sup> but it cannot be seriously accepted by anyone who deems tolerance a moral virtue, as is the case within the liberal tradition.

On the other end of the spectrum is radical moral skepticism, which values all positions, including one's own, as being of equal moral weight. Here, one is never justified in resisting a "conflicting" view since there is no basis on which to prefer one's own view to it. Hence, there is never a real need for restraint. Such encompassing relativism renders tolerance analytically impossible. When each viewpoint is always rational or moral, at least by its own terms, true judgment is impossible, and therefore no point of view ever demands tolerance.<sup>5</sup>

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<sup>2</sup> HANS OBERDIEK, TOLERANCE: BETWEEN FORBEARANCE AND ACCEPTANCE 12 (2001) (emphasis in original); see also D.D. Raphael, *The Intolerable*, in JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 142-43 (Susan Mendus ed., 1988) [hereinafter JUSTIFYING TOLERATION]; Bernard Williams, *Tolerance: An Impossible Virtue?*, in TOLERATION, *supra* note 1, at 18.

<sup>3</sup> See Horton, *supra* note 1, at 3.

<sup>4</sup> OBERDIEK, *supra* note 2, at 5; G.W. Smith, *Dissent, Toleration, and Civil Rights in Communism*, in JUSTIFYING TOLERATION, *supra* note 2, at 199.

<sup>5</sup> Cf. Williams, *supra* note 2, at 18; OBERDIEK, *supra* note 2, at 9-11.

These two extreme positions are both incapable of preserving the unique conceptual characteristics of tolerance. The first alternative rejects it altogether while the second renders it unnecessary. In order to understand the analytic structure of tolerance as a virtue, we need to look elsewhere. If we are to conceptualize tolerance without retreating into complete skepticism, we must preserve three distinctive characteristics that the paradox entails.

First, the tolerant cannot be a moral relativist. He must have a structured, defensible moral stance, a certain conception of the *good*—an Archimedean point that enables him to build up a coherent moral position and critically evaluate other moral positions.

Second, the tolerant must be able to justify his belief that the tolerated view is morally wrong. The paradox of tolerance entails that what is tolerated is immoral or irrational within the tolerant's moral system.<sup>6</sup> For example, we cannot rightly call the racist who "tolerates" people of other races "tolerant" because being of different race cannot be morally wrong. Moreover, if tolerance is truly a moral virtue, we cannot regard overcoming our own irrational or immoral inclinations to force our views upon others as tolerant. Nor can tolerance consist of overcoming such an inclination when it is neutral, i.e., based on grounds of tastes or preferences. When a mother dislikes her daughter's hairstyle, but refrains from imposing her tastes, it is doubtful whether we want to label this an instance of tolerance. To refrain from imposing one's will where one has no justifiable reason to impose it can hardly be a moral virtue; it is more like a moral duty. The crux of tolerance, if we deem it a moral virtue, is that the tolerant has good reasons *not* to be tolerant. However, he determines that the balance of moral considerations favors tolerance and, despite the difficulty, overcomes his initial dismay.<sup>7</sup>

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<sup>6</sup> Peter P. Nicholson, *Toleration as a Moral Ideal*, in ASPECTS OF TOLERATION: PHILOSOPHICAL STUDIES 162 (John Horton & Susan Mendus eds., 1985); Horton, *supra* note 1, at 28; Williams, *supra* note 2, at 18-20; D.D. Raphael, *The Intolerable*, in JUSTIFYING TOLERATION *supra* note 2, at 139.

<sup>7</sup> In several languages (e.g., Hebrew, German, and Russian) the word "tolerate" is a derivation of the verb "to suffer," as if to reflect the actual pain that self-restraint in tolerating imposes. See George P. Fletcher, *The Instability of Tolerance*, in TOLERATION, *supra* note 1, at 158-59. Even in English one of the possible meanings of tolerance is

This brings us to the third and final characteristic of tolerance: the tolerant must justify his decision to tolerate the conflict with the other's moral stance on moral grounds. The tolerant must have reasons for restraining his inclinations that are, by themselves, morally justifiable. Seen in this light, tolerance is the result of a moral dilemma, the outcome of balancing competing moral claims, and is desired only when justifications for exercising it outweigh those against it. This also entails that tolerance is always limited and that some things may not be tolerated. Drawing the line between what is tolerable and what is intolerable depends on the nature of the foundation for tolerance. Thus, different justifications for tolerance entail different limits of what can be tolerated.

### **Disentangling the Paradox: Justifying Tolerance**

Regardless of the justification offered, however, all forms of tolerance preserve, to varying degrees, the inherent tension of the paradox involved in the conceptual structure of tolerance. A survey of various philosophical justifications for tolerance, as they appear in past and contemporary liberal literature, illustrates that they are all faithful to the conceptual scheme of tolerance presented above—that is, tolerance as a moral decision in favor of exercising restraint when another's moral stance violates one's substantial view of the good.

In the following discussion I will distinguish between classical and contemporary justifications for tolerance. I identify classical tolerance as utility-based and contemporary tolerance as autonomy- and pluralism-based.

### **Classical Justifications: Social Order Based Tolerance**

One of the earliest philosophers to champion tolerance—and one of the most inspiring—was John Locke.<sup>8</sup> In the beginning of *A Letter Concerning Toleration*, Locke lists three main arguments for tolerance on behalf of the state toward religious minorities. First, he writes, faith is no longer “faith” if it is not a product of an inner intellectual process. It therefore makes no sense to allow the state to

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the “capacity to endure pain or hardship.” MERRIAM WEBSTER COLLEGIATE DICTIONARY 1241 (10th ed. 1995).

<sup>8</sup> See OBERDIEK, *supra* note 2, at 69-87, for an historical survey of the development of the concept of tolerance.

enforce beliefs when the merit for having a belief is that it is a product of independent reflection. Forcing faith is thus self-defeating.<sup>9</sup> Second, Locke stresses the irrational and counterproductive nature of the use of force in matters of faith. Not only is it of no value to attain beliefs by coercion, but odds are that force will not be capable of producing conformity in matters of belief. After all, “such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force.”<sup>10</sup> It is therefore inefficient and unwise, on the part of the state, to allocate resources to enforcing matters of faith. Locke’s third argument is prudential: allowing states to enforce religion entails the serious danger that some governments might adopt false religions. If we truly care for the salvation of the souls of all citizens in all states, we must, as a matter of principle, allow room for citizens to act according to their own consciences, rather than according to the prevailing faith in their states.<sup>11</sup>

It is important to note that Locke’s tolerance, even within the religious field, is not unlimited. Indeed, he does not hesitate to outline its borders. As he explicitly writes, there is no room for tolerance of atheists:

Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all . . . .<sup>12</sup>

This exception is clearly in line with Locke’s justifications for tolerance. Since Locke’s concept of tolerance is a component of his arguments about the ideal structure of the state, deviating groups or individuals that pose real threat to the state and its well being are beyond the limits of tolerance.

Locke’s arguments for tolerance demonstrate well its general structure. Locke’s tolerance is based on a firm belief in God

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<sup>9</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 119 (Dover Thrift, Tom Crawford ed., 2002) (1689).

<sup>10</sup> *Id.* at 119.

<sup>11</sup> *Id.* at 120.

<sup>12</sup> *Id.* at 145.

and on the proper role of the state, not on skepticism. The false beliefs that are to be tolerated—the “ways that lead to destruction”—are genuine evils; Locke does not suggest they should not be taken as such. For Locke, utility is the fundamental premise that both justifies tolerance and restricts it at the same time. So long as the evils being tolerated do not challenge the state’s well being, they can be tolerated. At the point where these evils seriously threaten the state, moral arguments in favor of tolerance run out, and tolerance reaches its limits.

### Classical Justifications: Truth-Based Tolerance

Another great champion of utilitarian tolerance is John Stuart Mill. In *On Liberty*, Mill outlines his view of tolerance which, in contrast with Locke, is not limited to matters of religion. Mill presents an evolutionary picture of humankind. As history progresses, various ideas are adopted and refined. Mankind accumulates true propositions about nature and morals. The only way to attain truths is by opening up the marketplace of ideas to a wider range of voices and allowing people to present alternatives to existing moral conceptions. Indeed, some voices might propound falsities. Some might endorse evil claims, but this is the nature of human evolution and the inevitable price of progress. According to Mill, we must enable all opinions to be heard and allow people to live their lives as they wish if we desire progress. Ultimately, the existence of false ideas and habits is a necessary precondition for the attainment of truth.<sup>13</sup>

This version of truth-based tolerance also preserves the necessary conceptual structure of tolerance. It is based on a canonical Archimedean point: truth and its attainment. It is also clear that the falsehoods and evil claims being tolerated really are bad or irrational. That what justifies tolerance also sets its limits is not fully explicit in Mill’s writings; nevertheless, it can be derived from his arguments. Accordingly, it may entail, for instance, that

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<sup>13</sup> JOHN STUART MILL, *ON LIBERTY* 22-27 (John Gray ed., Oxford World’s Classics 1991) (1859); see also KARL POPPER, *Tolerance and Responsibility*, in *ON TOLERATION* 17 (Susan Mendus & David Edwards eds., 1987) [hereinafter *ON TOLERATION*].

toleration is not justified in those areas in which truth has already been acquired and indisputably established.<sup>14</sup>

It is important to note that Mill's arguments, as well as Locke's, center either on the advantages society derives from tolerance, or on the advantages it entails for the tolerant individual. They do not seriously take into account the perspective of those being tolerated. Individuals who are being tolerated and their perspectives are irrelevant to their justifications of tolerance. Their arguments are based on a rational calculus of utility that makes it reasonable, in some instances, to exercise tolerance. Ultimately, however, these arguments offer limited grounds for toleration; when the costs of tolerance outweigh the benefits, tolerance is rejected.<sup>15</sup>

### Contemporary Justifications: Shifting the Focus

Contemporary literature offers strikingly different justifications for tolerance. Heyd, for example, bases tolerance on the detachment of the *person* holding false beliefs or practices from his *acts*.<sup>16</sup> In being tolerant we divert our focus. The tolerant separates the immoral acts or beliefs from the person himself, looking to other human qualities that make it possible to tolerate him as a whole. When a parent overlooks his child's immoral behavior he is still capable (in most cases) of showing love and compassion. This is because a parent sees the "whole picture." He loves his child for what he is. By expressing love and affection the parent is not endorsing these specific immoral habits; he only reflects the overarching nature of parent-child relations that are not based on any utilitarian notion but on unconditional love.

But for many of us, it is not always possible to ignore concrete acts and focus instead on other human qualities. In many

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<sup>14</sup> This raises another difficulty in deciding which of the commonly accepted truths are really "true." If Mill is a skeptic, as it appears not, then he must articulate some criteria so as to distinguish between truths that have been acquired and are really true and "truths" that are yet to be treated as true. See Raphael Cohen-Almagor, *Why Tolerate? Reflections on the Millian Truth Principle*, 25 *PHILOSOPHIA* 131 (April 1997) (critiquing the Millian truth principle).

<sup>15</sup> See Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, in *JUSTIFYING TOLERATION*, *supra* note 2, at 61, 63, 66-67, 85 (arguing that Locke's arguments only go as far as proving the irrationality of intolerance but not its immorality).

<sup>16</sup> See Horton, *supra* note 1, at 10-17.



cases, the gravity and frequency of acts make it impossible to ignore them and to concentrate instead on some abstract “self” that is not significantly expressed in any concrete action. Tolerance here is limited by the extent to which one can separate the immoral acts from the underlying “self.” In extreme cases, even parents cannot separate who their children are from what their children do.

### Contemporary Justifications: Autonomy-Based Tolerance

Another form of justification for tolerance is based on the concepts of personal autonomy and human dignity.<sup>17</sup> It was Kant’s main moral teaching that

[t]he basis of the moral law is to be found in the subject, not the object of practical reason, a subject capable of an autonomous will . . . . Only such a subject could be that “something which elevates man above himself as a part of the world of sense” and enables him to participate in an ideal, unconditioned realm wholly independent of our social and psychological inclinations. And only this thoroughgoing independence can afford us the detachment we need if we are ever freely to choose for ourselves, unconditioned by the contingencies of circumstance. On the deontological view, what matters above all is not the ends we choose but our capacity to choose them.<sup>18</sup>

Since the free, autonomous will grounds morality, any individual should be allowed to choose his own ends, to be the sole legislator of his normative world. If we are genuinely to respect the essence of being human—that is, our capacity to choose freely—we must allow people to make their own choices, even when they make bad ones. Allowing people to make only good choices does not respect their capacity to make autonomous decisions. Autonomy has independent value only if it shelters choices that are

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<sup>17</sup> Susan Mendus, *Introduction to JUSTIFYING TOLERATION*, *supra* note 2, at 15; J. Raz, *Autonomy, Toleration and the Harm Principle*, in *JUSTIFYING TOLERATION*, *supra* note 2, at 155; D. D. RAPAHEL, *The Intolerable*, in *JUSTIFYING TOLERATION*, *supra* note 2, at 137.

<sup>18</sup> MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 6 (1982).

not justified otherwise; if these choices were otherwise justified, the concept of autonomy would be superfluous. Thus, the idea of individual autonomy promises justification and grounding for a broader sense of tolerance, not based on some utilitarian formula but on true respect for human beings and their choices. Likewise, under this conception, intolerance treats people as *means* rather than as *ends* in themselves. Every time we impede another's autonomy by imposing our will on him, we subordinate that person to some goal that we, rather than that individual, have chosen.<sup>19</sup>

It is not too difficult to see how the Kantian notion of the free, autonomous individual serves as a normative basis for the liberal state. A liberal state refuses to impose any conception of the *good* on its members because it fully respects the autonomy of its members. Tolerance on behalf of the liberal state is not reflected merely by its reluctance to punish deviating individuals or minorities. It also aspires to be neutral among conceptions of the *good* and refrain from any implicit imposition of any such conception via the state's laws and institutions:

Society is best arranged when it is governed by principles that do not presuppose any particular conception of the good, for any other arrangement would fail to respect persons as beings capable of choice; it would treat them as objects rather than subjects, as means rather than ends in themselves.<sup>20</sup>

It is important to note here that an autonomy-based justification of tolerance is not identical to tolerance grounded in overlooking another's bad acts.<sup>21</sup> Under the autonomy-based view, tolerance is a by-product of individual autonomy, not of some other contingent human trait. As such, this form of tolerance is broader than focus-shifting justifications; further, it is also available to all human beings, to the extent that free will and autonomy are essential to being human. In contrast, tolerance that is based on shifting one's focus from bad acts to positive qualities is not

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<sup>19</sup> *Id.* at 6-8.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 18-19.

guaranteed to all, since it is based on contingent, rather than essential, characteristics of human beings.

But even autonomy-based tolerance is not unlimited. The concept of autonomy does not deny the possibility of moral condemnation. After all, Kant himself developed a moral theory that renders some acts completely immoral. He did not hesitate, for example, to condemn all extramarital sex and homosexuality as absolutely immoral.<sup>22</sup> Accordingly, choices that do not respect human dignity, either by denying it in others or even in oneself, are not to be tolerated.<sup>23</sup> This conforms with our conceptual scheme of tolerance. The fundamental moral value of autonomy justifies tolerance, yet when autonomy is threatened, tolerance reaches its limits.

### Contemporary Justifications: Pluralism-Based Tolerance

Another contemporary justification for tolerance can be grounded in the concept of pluralism. In the following paragraphs, I will briefly sketch the contours of the concept of pluralism and consequently show its relation to the concept of tolerance.

Pluralism involves a cluster of interrelated ideas.<sup>24</sup> The first of these is well captured by Isaiah Berlin's *The Decline of Utopian Ideas in the West*.<sup>25</sup> Pluralism rejects a single, universal, absolute source of normative human values. It posits that there is no value or set of values that consistently overrides all others. Instead, pluralism argues that values are conditional—predetermined by historical and cultural contexts and always a product of the personal, local, and incomplete perspective of the individual or individuals who hold them. As a result, the plurality of normative values forms the basis of the human condition. Historical attempts to articulate a canonical moral category, the ultimate moral Archimedean point, were doomed to failure precisely because they overlooked this simple fact. All forms of utilitarian formulas, even the Kantian categorical imperative, are incomplete. Not only are

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<sup>22</sup> Immanuel Kant, *Duties Towards the Body in Respect of Sexual Impulse*, in LECTURES ON ETHICS 162-71 (L. Infield trans., 1930).

<sup>23</sup> Raphael, *supra* note 2, at 137, 146; F. A. Hayek, *Individual and Collective Aims*, in ON TOLERATION, *supra* note 13, at 35, 47; Mendus, *supra* note 17, at 13.

<sup>24</sup> See JOHN KEKES, THE MORALITY OF PLURALISM 3-16 (1993); Raz, *supra* note 17, at 155, 160.

<sup>25</sup> ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 20 (1998).

they incapable of producing adequate solutions in a variety of contexts, they also express an impoverished attempt to reduce life's richness to a one-dimensional normative reality.<sup>26</sup>

Pluralism also demands that we acknowledge not only a plurality of values and normative sources but also that these values are often incommensurable and incompatible.<sup>27</sup> The world of moral ideals cannot be harmoniously ordered in Platonic fashion. If we have no canonical moral criteria to turn to, we must give up the aspiration to rank and prioritize competing values.<sup>28</sup> The tension between incommensurable and incompatible values is here to stay. It is part of our new moral understanding. But it is something we should welcome, not regret or fear. These ever-going conflicts make our lives richer, more meaningful and colorful.<sup>29</sup>

These arguments lead to rejection of a "single right answer" moral theory. If there is no single canonical criterion, then any given moral dilemma can produce several "right answers," each of which is a product of a different moral perspective. This does not mean that there are no wrong answers; it means only that there could be more than one solution.

Even so, the pluralist does not reject real commitment to moral views. He is not a relativist.<sup>30</sup> The pluralistic vision of the *good life* has to do with "moral imagination"<sup>31</sup>—the ability to create a meaningful life based upon freely chosen commitments drawn from a variety of societal value choices. Exercising moral imagination is analogous to creating art. A work of art cannot be said to be true nor false in an absolute sense, since it does not draw its value from conformity to external, universal artistic criteria. A play can be tasteless, or poorly done, but it cannot be "false." Similarly, in a pluralist society, there is a shared understanding that moral choices cannot be true or false in this sense, since there are no absolute universal criteria against which to judge them. Pluralism does not entail a lack of moral commitment; instead, it offers a dual

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<sup>26</sup> See KEKES, *supra* note 24, at 38-52, 132-38.

<sup>27</sup> Raz, *supra* note 17, at 159; KEKES, *supra* note 24, at 53.

<sup>28</sup> Raz, *supra* note 17, at 160.

<sup>29</sup> See, e.g., Margaret Canovan, *Friendship, Truth and Politics: Hannah Arendt and Toleration*, in JUSTIFYING TOLERATION, *supra* note 2, at 177.

<sup>30</sup> See KEKES, *supra* note 24, at 48-52, for an elaborate analysis and distinction between pluralism and relativism.

<sup>31</sup> See *id.* at 9.

mindset, one that embraces commitment to moral values on one hand but remembers that choices are acts of “moral imagination,” personal and subjective, on the other hand.<sup>32</sup>

The most immediate political implications of pluralism are liberty and tolerance. In a pluralistic society, individuals must be allowed maximum liberty in order to exercise moral imagination, which in turn requires that individuals tolerate choices made by others. Choices that seem plainly bad or tasteless should not be seen as a threat but as an expansion of the moral choices available in society. For this reason, the fact that different people have different views should be welcomed and celebrated.

It now also becomes clear how pluralism-based tolerance differs from autonomy-based tolerance. The autonomy-based tolerant understands that autonomy entails the liberty to choose differently, but nevertheless wishes that others would make the choices he thinks are right. Even if his vision of free individuals making correct moral choices proves unattainable, he does not abandon it. The autonomy-based tolerant overlooks the actual moral choices a tolerated individual makes and focuses instead on the human aspect of making autonomous choices. The focus is not the concrete moral choice but the autonomous agent behind it.

In contrast, a pluralism-based tolerant does not see other moral choices as a regrettable side-effect of human autonomy but as valuable and meaningful. He does not ignore the other’s opposing moral choices and does not need to focus on the autonomy of the other as a moral agent. He may judge an opposing moral stance and, at least initially, condemn it, but his commitment to pluralism requires him to acknowledge that his condemnation is based on his own incomplete view of the truth. This does not diminish the pluralist’s commitment to his own ideals and moral views, but the pluralist acknowledges that he does not possess exclusive access to truth.

Pluralism-based tolerance best preserves the inherent tension built into the concept of tolerance. Without offering the luxury of diminishing real commitment to personal moral views (as does moral relativism), pluralism-based tolerance demands that we value the opposing view on its own terms. In some sense,

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<sup>32</sup> *Id.*

pluralism-based tolerance requires one to play two contradictory roles simultaneously.

It is obvious that both of these forms of tolerance are radically different from classical forms of utilitarian tolerance. Earlier justifications of tolerance allow room for tolerance only because it is either the best political choice (since intolerance is not useful and does not serve social order) or it is simply to society's advantage (by helping it to attain truth, for example). Thus, utilitarian justifications offer a limited space for tolerance. In contrast, autonomy- and pluralism-based justifications of tolerance reflect a deep respect for human dignity and create more room for tolerance. These justifications see tolerance not as a political or other compromise but as a moral virtue, which acknowledges our humanity as autonomous moral agents or as free moral imaginative actors.<sup>33</sup>

#### **Tolerance: Final Observations**

Contemporary discourse tends to resort to pluralism-based and autonomy-based justifications much more than it does to classical justifications, such as Locke's and Mill's.<sup>34</sup> Generally, American liberal discourse has abandoned utilitarian conceptions of morality and shifted toward neo-Kantian conceptions.<sup>35</sup> This shift enables modern forms of tolerance to become broader and more accepting. Whereas classical forms of tolerance are a result of a cold utility calculus that balances the disadvantages of tolerance against the advantages the tolerant can gain by exercising tolerance, autonomy- and pluralism-based tolerance ascribe real merit to the choices made by those being tolerated, even if these choices conflict with one's own views. Accordingly, tolerance is not merely a moral compromise or a matter of pragmatic politics, but rather a moral virtue that involves taking the choices of the other seriously.

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<sup>33</sup> See Raz, *supra* note 17, at 155, 161-63.

<sup>34</sup> *Id.* at 155; Alon Harel, *The Boundaries of Justifiable Tolerance: A Liberal Perspective*, in TOLERATION, *supra* note 1, at 114.

<sup>35</sup> See Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765 (1994) (book review) (suggesting that the abandonment of utilitarian conceptions of morality is greatly due to the work of John Rawls).

Moreover, a pattern can be identified from the intolerance of the past through utility based tolerance; we have reached the age of autonomy-based and pluralistic tolerance. Indeed, some suggest that we are well on our way to radical skepticism:

Toleration as a practice will be around until people become suitably blasé. Tolerance as an attitude or virtue seems squeezed between moral indifference, politically expedient compromise, and skeptical pluralism. As those who inhabit contemporary pluralist cultures become increasingly indifferent to religion, sexual orientation, and expression, the argument goes, we will have less and less need to be tolerant and less and less need to practice toleration. Either we ourselves will not care much one way or another about these things or, even if we do, we will not care what others think or do regarding them . . . .

Finally, however historians may characterize the present, they are unlikely to call it the “age of certainty.” Skepticism is no longer merely a philosophical stance to occupy our idle thoughts. With the possible exception of science, skepticism permeates our age. Our skepticism shows itself not merely theoretically but practically. We may be attached to our religions faith, moral beliefs, and way of life, but we doubt they can be satisfactory defended, even to ourselves. We will soon replace tolerance by a shoulder shrug as we say, “Who knows?” about nearly everything that once mattered deeply.<sup>36</sup>

Finally, the etymology of the word tolerance captures the term’s conceptual journey. The word “toleration” was introduced

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<sup>36</sup> OBERDIEK, *supra* note 2, at 27-28; *see also* Horton, *supra* note 1, at 5; Silliams, *supra* note 2, at 26.

into the English language circa 1531.<sup>37</sup> The earliest dictionary definition I found for it dates back to 1755:

Tolera'tion. *n.s.* [*tolero*, Latin.] Allowance given to that which is not approved.<sup>38</sup>

In a modern day Webster's dictionary, alongside the original meaning of allowing something forbidden, sits another, quite novel, meaning:

Tolerance - sympathy or indulgence for beliefs or practices differing from or conflicting with one's own.<sup>39</sup>

The shift is unmistakable. What was once an act of permission, perhaps by some political authority, has become a personal disposition—sympathy, an attitude. Tolerance has become a personal trait. Tolerance has abandoned the moral superiority implicit in utilitarian-based justifications and replaced it with “sympathy.” Indeed, this shift mirrors the modern shift in rationales for tolerance to those that emphasize autonomy and respect for choices of others.

### **Tolerance, Homosexuality, and the U.S. Supreme Court**

I will now turn to trace and reconstruct the underlying moral justifications for tolerating homosexuality by liberal Justices in the U.S. Supreme Court. As I have previously outlined, within liberal tradition, the justification for tolerance shifted from a narrow utilitarian-based tolerance to a pluralism-based tolerance. My goal now is to demonstrate that the reasoning given by liberal Justices of the U.S. Supreme Court reflects a similar shift in attitude.

Since I am looking for the underlying, sometimes implicit moral conceptions, I am less interested in the legal “bottom line” than I am in the reasoning that leads to the “bottom line” result. Indeed, sometimes the explicit outcome of the opinion reflects a

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<sup>37</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1241 (10th ed. 1995).

<sup>38</sup> SAMUEL JOHNSON DICTIONARY OF THE ENGLISH LANGUAGE (1755).

<sup>39</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1241 (10th ed. 1995).



different attitude toward homosexuality than what can be inferred from the reasoning behind it.

My only methodological requirement is the existence of some reference to homosexuality from which an underlying attitude can be inferred; accordingly, I examine not only cases that directly raise gay rights issues, but also Supreme Court opinions that mention homosexuality tangentially.

### **The Early Stages: Moral Dismay and Disapproval**

Mention of homosexuality in Supreme Court opinions is a relatively recent phenomenon; the earliest reference that I found dates back to 1961. Between the years 1961-1963 the Supreme Court issued three opinions that mentioned homosexuality. These cases share an attitude of moral dismay regarding homosexuality and a lack of any readiness to tolerate it.

#### **Poe v. Ullman (1961)<sup>40</sup>**

The substantive legal issue in *Poe v. Ullman* was the private use of contraceptives and the right to privacy. The case involved two Connecticut couples who received prescriptions for contraceptives from their physician. Connecticut law prohibited the use of contraceptives; the couples sought judgments striking down the relevant law. The Court denied relief on grounds of nonjusticiability, by a five-to-four majority.

The dissenting opinions of Justices Douglas and Harlan are relevant to our discussion.<sup>41</sup> Both Justices rejected the majority's argument that the claim was nonjusticiable, and attacked the substantive issue at hand: the constitutionality of the state law banning contraceptives. Justice Douglas stressed the right of a doctor to advise his patients according to his best judgment, even when this involves prescribing contraceptives; to ban a doctor from prescribing contraceptives, he claimed, violates the constitutional freedom of expression. In doing so, he referred to Mill's justifications for tolerance.

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<sup>40</sup> 367 U.S. 497.

<sup>41</sup> Though not a liberal in the ordinary sense, Justice Harlan expressed liberal views in the issues with which we are currently dealing.

The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. The chronicles are filled with sad attempts of government to stomp out ideas, to ban thoughts because they are heretical or obnoxious. As Mill stated, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion."<sup>42</sup>

As to the right of the couples to use contraceptives, Douglas added that it is clear to him that "this Connecticut law as applied to this married couple deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment."<sup>43</sup> State intervention in these matters is an unjustified invasion of the private sphere.<sup>44</sup>

Justice Harlan was just as harsh in his dissent. His opinion consisted of two parts. In the first part, he challenged the majority's conclusion that the current issue was not justiciable.<sup>45</sup> In the second, he attacked the substantive issue. He reasoned that the state has power to regulate morality since:

society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.<sup>46</sup>

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<sup>42</sup> *Poe*, 367 U.S. at 515 (Douglas, J., dissenting) (quoting JOHN STUART MILL, ON LIBERTY 37 (John Gray ed., Oxford World's Classics 1991) (1859)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 521.

<sup>45</sup> *Id.* at 524.

<sup>46</sup> *Id.* at 545-46 (Harlan, J., dissenting).

This did not mean that the government's legislative power was without limit, however. The Constitution, he argued, guarantees individuals a right to privacy, i.e., some sphere of non-intruded space.<sup>47</sup> But where do we draw the line? How large is this secured sphere of privacy? How far can a state legislature reach when it tries to ensure the morality of its citizens? Some acts, he argued, cannot justify regulatory invasion of privacy, and must be tolerated by the state.<sup>48</sup> Other acts simply cannot be tolerated:

“[T]he family . . . is not beyond regulation,” . . . and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.<sup>49</sup>

As we have seen, tolerance is never unlimited, so it is to be anticipated that a distinguishing line between the tolerable and the intolerable must be drawn somewhere. Interestingly, despite the liberal spirit of the dissenting opinions, and their willingness to go quite far in championing the right to privacy, at the end of the day

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<sup>47</sup> *Id.* at 549.

<sup>48</sup> *Id.* at 518-22.

<sup>49</sup> *Id.* at 552-53 (internal citations omitted).

contraceptives were “in” and homosexuality remained “out”—along with sexual misconduct and other crimes against morality.<sup>50</sup>

### **Manual Enterprises v. Day (1962)<sup>51</sup>**

Just over a year after *Poe v. Ullman* the Supreme Court decided *Manual Enterprises v. Day*, a First Amendment obscenity case. Petitioners were three corporations engaged in publication of magazines that consisted largely of “photographs of nude, or near-nude, male models and [which gave] the names of each model and photographer, together with the address of the latter.”<sup>52</sup> As part of the Court’s findings it was accepted that the magazines were “composed primarily, if not exclusively, for homosexuals, and have no literary, scientific or other merit.”<sup>53</sup> Parcels of the magazines sent via U.S. mail were detained by a city postmaster and later declared nonmailable by the Judicial Officer of the Post Office Department. After two lower courts affirmed the administrative decision the petitioners sought reversal of these decisions in the Supreme Court. The Supreme Court reversed the lower courts’ decisions and as a result the administrative ruling was overturned and the magazines were “mailable” again.

At first glance, the decision seems like a victory for the homosexual community. The Supreme Court had explicitly declared that homosexual material was entitled to constitutional protection—in contrast to the apparent discrimination by the Judicial Officer of the U.S. Post Office and two lower federal courts. But a closer reading of the opinion suggests otherwise, and illustrates how explicit legal outcomes do not always conform to implicit underlying attitudes.

Two legal paths were available to the Court in reversing the lower courts. The Court could have declared the material “non-obscene” under *Roth v. United States*;<sup>54</sup> alternately, the Court could have declared that the administrative decision lacked authority, since Congress had not conferred administrative censorship

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<sup>50</sup> The liberal spirit of both opinions is unmistakable. Besides the citations referred to above, there are plenty more underlying liberal notions about liberty, autonomy, and privacy throughout the opinion.

<sup>51</sup> 370 U.S. 478.

<sup>52</sup> *Id.* at 480-81.

<sup>53</sup> *Id.* at 481.

<sup>54</sup> 354 U.S. 476 (1957).

capacity upon the Postal authorities – thus avoiding the substantive question of whether or not the magazines were obscene. The first route would have required the Court to confront the homosexual issue head-on, and to align homosexuality with heterosexuality by applying the norms for evaluating heterosexual pornography to homosexual pornography. The second alternative would allow the Court to refrain from explicitly extending or refusing to extend these norms.

Out of the five Justices who voted to reverse, three (Justices Brennan, Warren, and Douglas) chose the second route and two (Justices Harlan and Stewart) chose the first. This is somewhat surprising since the three judges that avoided the substantive issue are considered to be quite liberal; it would not have been unexpected had they declared the magazines non-obscene by applying standards of heterosexual porn to homosexual porn, thereby conveying a clear social message, as Harlan and Stewart did.

But even Justice Harlan was somewhat reserved in this case. Close reading of his opinion suggests that he did not overcome his attitude of dismay toward homosexuality. At the outset of his opinion he differentiates between homosexuals and heterosexuals, referring to the former as “sexual deviates” and to the latter as “sexually normal individuals.”<sup>55</sup> Later, when he explained that he declined to attribute any meaning to the related law that would allow broad censorship authority, he referred to the magazines as stimulating “impure desires relating to sex,” thus implicitly referring to homosexual conduct as “impure.”<sup>56</sup> He also commented that the magazines are “dismally unpleasant, uncouth, and tawdry.”<sup>57</sup> Such remarks are obiter – irrelevant and unnecessary to the structure of his overall legal argument; once he had concluded that the materials were not “obscene” he had made

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<sup>55</sup> *Manual Enters.*, 370 U.S. at 481; *contra* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 941 n.11 (1992) (Blackmun, J., concurring in part, dissenting in part) (“Obviously I do not share the Chief Justice’s views of homosexuality as sexual deviance.”).

<sup>56</sup> *Manual Enters.*, 370 U.S. at 487; *see also Roth*, 354 U.S. at 519 (“Brother Harlan, writing for himself and Brother Stewart, finds that the magazines themselves are unobjectionable because § 1461 is not so narrowly drawn as to prohibit the mailing of material ‘that incites immoral sexual conduct’ . . . .”) (Clark, J. dissenting).

<sup>57</sup> *Manual Enters.*, 370 U.S. at 490.

his case. Finally, as if to leave us of with no doubt as to how he personally perceived the contents of the magazines, Justice Harlan added that:

In conclusion, nothing in this opinion of course remotely implies approval of the type of magazines published by these petitioners, still less of the sordid motives which prompted their publication. All we decide is that on this record these particular magazines are not subject to repression.<sup>58</sup>

Harlan's reservations leave us with the impression that he retained a considerable degree of distaste for the petitioners in this case.

**Rosenberg v. Fleuti (1963)<sup>59</sup>**

Fleuti, a homosexual and a Swiss national, was admitted into the United States as a permanent resident in October of 1952. Aside from an hours-long excursion into Mexico in 1956, he remained continuously in the U.S. until 1959, when the INS sought to deport him on grounds that, when he reentered the U.S. from Mexico, he "was within one or more of the classes of aliens excludable by the law existing at the time of such entry."<sup>60</sup> Specifically, the INS claimed that, as a homosexual, Fleuti was "afflicted with a psychopathic personality,"<sup>61</sup> under section 241(a)(1) of the Immigration and Nationality Act of 1952, which had become effective two months after Fleuti's initial entry into the U.S. After Fleuti's appeal of his deportation order was dismissed by the Board of Immigration Appeals, he filed for a declaratory judgment in the United States District Court for the Southern District of California. The district court granted declaratory judgment against him. The Ninth Circuit Court of Appeals set aside the deportation on the grounds that the term "psychopathic personality" does not encompass homosexuality and that § 241(a)(1) was unconstitutionally vague as applied to Fleuti's case.

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<sup>58</sup> *Id.* at 495.

<sup>59</sup> *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

<sup>60</sup> *Id.* at 450.

<sup>61</sup> *Id.* at 451.

Justice Goldberg's opinion for the Supreme Court focused on a point that was not seriously discussed in the lower courts. He raised the possibility that Fleuti's reentry into the U.S. was not an "entry" for the purposes of the immigration laws because it was an "innocent, casual, and brief excursion" and "may not have been 'intended' as a departure disruptive of [Fleuti's] resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return."<sup>62</sup> The Court vacated the judgment and remanded the case so that the parties could resolve whether Fleuti "intended" to leave the country in the manner contemplated by the Act.

Although ostensibly a victory for Fleuti, the Court's decision skirted the important issue of whether the term "psychopathic personality" encompassed homosexuality. This evasion was contrary to the best reading of the statute. It is difficult to overlook the fact that Justice Goldberg's construction of the terms "entry" and "intent" ran against the literal meanings of the terms, against case law, and against legislative purpose, as Justice Clark observed in dissent:

I dissent from the Court's judgment and opinion because "statutory construction" means to me that the Court can *construe* statutes but not that it can *construct* them. The latter function is reserved to the Congress, which clearly said what it meant and undoubtedly meant what it said when it defined "entry" for immigration purposes as follows. The word "entry" had acquired a well-defined meaning for immigration purposes at the time the Immigration and Nationality Act was passed in 1952. The leading case was *United States ex rel. Volpe v. Smith*, which held that an alien who had resided continuously in the United States for 26 years except for a brief visit to Cuba made an "entry" at the time of his return from Cuba. The Court there stated that the word "entry" in the Immigration Act of 1917 "includes any coming of an alien from a foreign country into the United States whether such

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<sup>62</sup> *Id.* at 462.

coming be the first or any subsequent one." That conclusion was based on sound authority, since the Court had earlier held that a resident alien who crossed the river from Detroit to Windsor, Canada, and returned on the same day made an entry upon his return.

All this to the contrary notwithstanding, the Court today decides that one does not really intend to leave the country unless he plans a long trip, or his journey is for an illegal purpose, or he needs travel documents in order to make the trip. This is clearly contrary to the definition in the Act and to any definition of "intent" that I was taught.<sup>63</sup>

That the Supreme Court, in its interpretive capacity, is not always bound by precedent and legislative intent is well-established. But when it decides to exercise this capacity where the issue is neither raised by the parties nor the lower courts, and when in doing so it avoids a contentious social issue, it seems that something more than statutory interpretation is at work. While the Ninth Circuit was willing to tackle the issue, and to send a clear statement affirming homosexuality, the Supreme Court's unwillingness to affirm the Court of Appeals' ruling that a homosexual was not necessarily afflicted with "psychopathic personality" is a statement in itself.

### Introducing Utilitarian Tolerance

During the 1966 and 1967 terms—three years after *Fleuti*—the Supreme Court decided two more important cases: *Ginzburg v. U.S.*<sup>64</sup> and *Boutilier v. INS.*<sup>65</sup> Their significance for our purposes lies not in their explicit legal result, but rather in the underlying change in the Court's attitude toward homosexuality.

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<sup>63</sup> *Id.* at 463-64, 468 (citations omitted) (emphasis in original).

<sup>64</sup> *Ginzburg v. United States*, 383 U.S. 463 (1966).

<sup>65</sup> *Boutilier v. INS*, 387 U.S. 118 (1967).



**Ginzburg v. U.S. (1966)**

The facts in *Ginzburg* have nothing to do with homosexuality as such. The petitioners had been convicted of violating the federal obscenity statute by sending obscene material via U.S. mail. In a five-four opinion, the Supreme Court affirmed their conviction. The main issues discussed by both the majority and the dissent had to do with the definition of obscenity and the scope of First Amendment protections; of primary interest for our purposes, though, is Justice Douglas' dissent, which marks a shift in the moral attitude toward homosexuality.

In his dissent, Douglas lamented the Court's willingness to censor a piece of literature, "valueless" though it may be, for the sole reason that its publishers used "sex symbols" in order to better promote it.<sup>66</sup> In addition, several paragraphs convey quite explicitly a Millian version of tolerance. The paragraphs are both important and elaborate, and bear quoting at length:

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated. Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be

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<sup>66</sup> *Ginzburg*, 383 U.S. at 482.

barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?<sup>67</sup>

And later on:

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires . . . . How can we know that this expression may not prevent antisocial conduct? I find it difficult to say that a publication has no "social importance" because it caters to the taste of the most unorthodox

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<sup>67</sup> *Id.* at 489-90.

amongst us. We members of this Court should be among the last to say what should be orthodox in literature. An omniscience would be required which few in our whole society possess. This leads me to the conclusion, previously noted, that the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the “good” and the “bad” and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted “reasonable” regulation of freedom of expression, as do the constitutions of some nations, we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the “truth” is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one’s time poring over government bulletins, political tracts, or theological treatises. The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas.<sup>68</sup>

Justice Douglas’ words are quite far reaching. It is the first time that anyone on the Court has expressed such outspoken skepticism about the immorality of homosexuality (and other nonconforming sexual behaviors). He explicitly questions society’s ability to condemn homosexuality. In this light, it could be fairly argued that Douglas’s skepticism rejects the notion of toleration altogether since it is impossible to “tolerate” what is not regarded as immoral. In fact, it may seem that he has reduced moral discourse to relativism, in which morality is all about “tastes and preferences,” lacking any objective moral criteria. Clearly, Douglas’

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<sup>68</sup> *Id.* at 491-92.

dissent marks a change of attitude toward homosexuality, a “quantum leap” from the moral dismay implicit in earlier cases. Several observations about his reasoning, however, suggest that he has not gone all the way over to relativism.

If we ignore his remarks about the inability to be judgmental and try to locate the underlying rationales for his attitude, we find both Lockean and Millian arguments undergirding his thesis. First, he writes that oppressing deviant literature might hold tremendous disadvantages, since it denies the “therapeutic value” of free expression. That is, he implicitly refers to the “redeeming social importance” of sexual deviant literature since it might help “cure,” or at least “cool down, the sexually deviant.” This point is later underscored as he asks, “How can we know that this expression may not prevent antisocial conduct?” Here Justice Douglas clearly adopts a Lockean notion that the welfare and stability of the social order provide a rationale for tolerance.

Douglas goes further in the final paragraph when he writes of the constitutional impermissibility of drawing lines between “good” and “bad.” It is not the government’s role to reveal the “truth”; this job is left to the people. In describing how this is to be done he writes—in a classic Millian sentence—of the people independently differentiating between good and bad, between works of merit and trash, so they are able “to move from plateau to plateau and finally reach the world of enduring ideas.”<sup>69</sup>

This mention of enduring ideas suggests that Douglas’ skepticism is limited; he does not deny the concept of objective truth. It is difficult to know exactly what to make of his professed skepticism; perhaps his relativistic tilt is merely hyperbole, part of his rhetorical strategy in marketing tolerance. What cannot be doubted is his explicit endorsement of tolerance, in its classical forms, toward homosexuality.

### **Boutilier v. INS (1967)**

*Boutilier* revisited the issue so neatly avoided in *Fleuti*: whether a homosexual was necessarily “afflicted with psychopathic personality” and was thereby excludable under § 241(a)(1) of the Immigration and Nationality Act of 1952. *Boutilier*, a Canadian

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<sup>69</sup> *Id.* at 492.

homosexual, had been ordered deported back to Canada, since upon his entry into the United States, his homosexuality rendered him excludable under the Act. Both the Board of Immigration Appeals and the Second Circuit Court of Appeals dismissed his appeal, the Second Circuit court holding that the term "psychopathic personality," as used in the Immigration and Nationality Act, was not void for vagueness, and encompassed homosexuality. The Supreme affirmed the Court of Appeals' dismissal in a six-to-three decision. This time Justice Clark, who wrote the dissent in *Fleuti*, wrote for the majority. In *Fleuti*, Justice Clark had called for the Court to "proceed to the only question which either party sought to resolve: whether the deportation order deprived respondent of due process of law in that the term 'afflicted with psychopathic personality,' as it appears in s 212(a)(4) of the Act, is unconstitutionally vague."<sup>70</sup> It was now time for the Court to do just that.

Justice Clark held that the Act's legislative history clearly included "homosexuals and other sex perverts" within its definition of psychopathic personality,<sup>71</sup> and that "Congress commanded that homosexuals not be allowed to enter" the U.S.<sup>72</sup> He added that the Congress was not laying down a clinical test, but rather setting a legal standard according to which those having "homosexual and perverted characteristics" are of "psychopathic personality."<sup>73</sup>

Justice Douglas again dissented. Aware of the social consequences of labeling homosexuals as "psychopathic," even if for "legal" purposes only, he asserted that

[t]he term "psychopathic personality" is a treacherous one like "communist" or in an earlier day "Bolshevik." A label of this kind when freely used may mean only an unpopular person. It is much too vague by constitutional standards for the imposition of penalties or punishment.<sup>74</sup>

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<sup>70</sup> *Rosenberg*, 374 U.S. at 468.

<sup>71</sup> *Boutilier*, 387 U.S. at 121.

<sup>72</sup> *Id.* at 119.

<sup>73</sup> *Id.* at 124.

<sup>74</sup> *Id.* at 125.

Douglas further asserted that homosexuality is a product of “heredity, a glandular dysfunction, (or) of environmental circumstances,” thus rendering it a “product of an arrested development.”<sup>75</sup> This, he argued, is insufficient to label homosexual traits “psychopathic.”

Here, from our perspective, lies the interesting twist: homosexuals should not be deported—not because homosexuality is normal; it is quite abnormal—but because their homosexuality does not necessarily negate other positive traits. “Many homosexuals become involved in violations of laws; many do not,”<sup>76</sup> wrote Douglas, adding that

[i]f we are to hold, as the Court apparently does, that any acts of homosexuality suffice to deport the alien, whether or not they are part of a fabric of antisocial behavior, then we face a serious question of due process.<sup>77</sup>

For Douglas, to assert that homosexuality, *per se*, is a sign of readiness to break the law is to do injustice. He went on to point out that many great people in Western history were homosexuals, but have nonetheless contributed significantly to our common heritage:

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society.<sup>78</sup>

Douglas neither endorsed homosexuality nor did he make any claims about its moral legitimacy. Instead, he demanded we divert our attention and understand that homosexuals can

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<sup>75</sup> *Id.* at 127.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 131.

<sup>78</sup> *Id.* at 129.

contribute to society, regardless of any sexual abnormality. This implicit justification for tolerating homosexuality is very similar to the justification for tolerance offered by Heyd and other contemporary writers, who ask us to detach immoral acts from the person committing those acts.<sup>79</sup> As such, this brand of tolerance does not respect the actual choice of the tolerated or the autonomy of the tolerated individual. Instead, it demands that we overlook the specific “bad” choices of the homosexual and respect his *other* good traits.

Further evidence of Justice Douglas’ refusal to endorse homosexuality can be gleaned from the last paragraph of his dissent:

I cannot say that it has been determined that petitioner was “afflicted” in the statutory sense either at the time of entry or at present. “Afflicted” means possessed or dominated by. Occasional acts would not seem sufficient. “Afflicted” means a way of life, an accustomed pattern of conduct. Whatever disagreement there is as to the meaning of “psychopathic personality,” it has generally been understood to refer to a consistent, lifelong pattern of behavior conflicting with social norms without accompanying guilt. Nothing of that character was shown to exist at the time of entry. The fact that he presently has a problem, as one psychiatrist said, does not mean that he is or was necessarily “afflicted” with homosexuality.<sup>80</sup>

Not only does Justice Douglas want us to “ignore” Boutilier’s homosexuality, he also trivializes it by reducing it to “occasional acts” of no accumulated meaning, not forming any pattern, not constituting a way of life.<sup>81</sup>

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<sup>79</sup> See *supra* text accompanying note 16.

<sup>80</sup> *Boutilier*, 387 U.S. at 133-34.

<sup>81</sup> This trivialization is important since homosexuality, for many who practice it, is a dominant component of their identity. They want it to be taken seriously. Yet this form of practical tolerance offered by Justice Douglas refuses to respect that view and is, paradoxically, based on the exact opposite approach.

In *Boutilier*, Justice Douglas offers a novel line for justifying tolerance toward homosexuals, different from the one he himself took in *Ginzburg* a year earlier.<sup>82</sup> This approach stops short of endorsing homosexuality. Instead, in order to tolerate homosexuality, it diminishes its significance by asking us to avert our eyes.

### **The Last Phase: Tolerance, Respect, and Acceptance**

For nearly twenty years after *Boutilier*, the Court was not confronted with issues regarding homosexuality.<sup>83</sup> During these two decades, America, along with the rest of the world, changed drastically in its perception of homosexuals. So when a case dealing with discrimination against homosexuals finally came up in 1985, it was no surprise that the rhetoric of the Court had changed as well.

### **Rowland v. Mad River Local School District (1985)<sup>84</sup>**

Marjorie Rowland was a guidance counselor at a public high school whose contract was not renewed after she admitted in a private conversation that she was bisexual. She filed a claim in federal court based on the alleged violation of her rights to free speech and to equal protection; the jury determined that her contract had not been renewed solely because she had revealed her sexual orientation, and had suffered damages “in the form of personal humiliation, mental anguish, and lost earnings.”<sup>85</sup> The trial judge subsequently entered a judgment for damages. The U.S. Court of Appeals for the Sixth Circuit reversed, concluding that her termination did not violate her right to free speech, since her revelation was not “a matter of public concern,” and did not violate equal protection, since there was no evidence of how other employees with different sexual preferences were treated.<sup>86</sup>

While the majority Justices wrote no opinion at all, Justice Brennan dissented. There is no doubt that the Supreme Court, as a

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<sup>82</sup> See *supra* text accompanying notes 66-69.

<sup>83</sup> See *Ratchford v. Gay Lib*, 558 F.2d 848 (8th Cir. 1977), *cert. denied* 434 U.S. 1080 (1978) (gay student organization claims for discrimination).

<sup>84</sup> 470 U.S. 1009.

<sup>85</sup> *Id.* at 1010 (Brennan, J., dissenting).

<sup>86</sup> *Id.* (quoting *Rowland v. Mad River Local School Dist.*, 730 F.2d 444, 451 (6th Cir. 1984)).



whole, did not provide Rowland with the relief she desired. Brennan's dissent, however, illustrates an important change in underlying reasoning and the change of attitude toward homosexuals can indeed play a role in our story.

Justice Brennan's dissent introduced a rights discourse into the homosexual context by aligning it with "racial discrimination."<sup>87</sup> Brennan explicitly acknowledges that discrimination against homosexuals based "solely on their sexual preference raises significant constitutional questions."<sup>88</sup> He adds that homosexuals are a "significant and insular minority of this country's population,"<sup>89</sup> and thus are oftentimes incapable of openly pursuing their political rights.<sup>90</sup> "Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely...to reflect deep-seated prejudice rather than...rationality.'"<sup>91</sup> Ultimately, he suggests that public employees who are homosexuals are shielded by a "constitutional right to make 'private choices involving family life and personal autonomy.'"<sup>92</sup>

The significance of this rhetoric should not be overlooked. Brennan equates discrimination against homosexuals with irrational and immoral discrimination against racial minorities. Moreover, Brennan suggests that "sexual preferences" are matters of personal autonomy and private choice. Thus, his justification of tolerance toward homosexuality mirrors those justifications of tolerance advanced by contemporary neo-Kantian writers. For Brennan, sexual preference is not sexual deviance; it is a product of a private choice and is within the private sphere of the individual, where intrusion by the state should be strictly scrutinized.

Brennan's dissent thus marks a clear shift in justifying tolerance toward homosexuality. He grounds his argument for tolerance not on concerns of utility or on detachment of homosexual acts from the person committing them, but on explicit endorsement of the autonomy of human beings and on their entitlement to independently make intimate choices. This line of argument offers a

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<sup>87</sup> *Id.* at 1012 (quoting *Connick v. Myers*, 461 U.S. 138, 148 n.89 (1983)).

<sup>88</sup> *Id.* at 1014.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

<sup>92</sup> *Id.* at 1015 (quoting *Whisenhunt v. Spradlin*, 464 U.S. 965, 971 (1983)).

basis upon which tolerance toward homosexuals becomes a reflection of the liberal idea of free, autonomous individuals. But the dissent in *Rowland* was just the appetizer for the main dish, which was served one year later in *Bowers v. Hardwick*.

### **Bowers v. Hardwick (1986)<sup>93</sup>**

At first glance, *Bowers v. Hardwick* appears to be openly hostile towards homosexuals. But here again, from the vantage point of our journey, I suggest that a close reading of the dissenting opinions casts it in new light. Accordingly, *Bowers v. Hardwick* preserves and further nourishes the seeds of arguments for tolerance toward homosexuals first planted by Brennan in *Rowland*.

Hardwick was charged with violating a Georgia law prohibiting sodomy. Although Hardwick's charge was not presented to a grand jury, he brought suit in federal district court to challenge the "constitutionality of the statute insofar as it criminalized consensual sodomy."<sup>94</sup> Hardwick also claimed that "he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution."<sup>95</sup>

The District Court dismissed the case for failure to state a claim.<sup>96</sup> A divided Eleventh Circuit Court of Appeals reversed. The court found that the Georgia statute violated Hardwick's fundamental rights, since "his homosexual activity [was] a private and intimate association...beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."<sup>97</sup> A five-to-four opinion of the Supreme Court reversed the Eleventh Circuit.<sup>98</sup>

Justice White's plurality opinion focused on "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,"<sup>99</sup> which it answered in the negative. Justice White classified homosexuality with adultery,

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<sup>93</sup> 478 U.S. 186.

<sup>94</sup> *Id.* at 188.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 188-89.

<sup>97</sup> *Id.* at 189.

<sup>98</sup> *Id.* at 188-89.

<sup>99</sup> *Id.* at 190.

incest, and other sexual crimes.<sup>100</sup> Justice Burger concurred, adding that “Blackstone described ‘the infamous *crime against nature*’ as an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’”<sup>101</sup> The social message conveyed by this rhetoric could not be mistaken.

But it is mainly Justice Blackmun’s dissent that is of interest here. In his fierce attack on the plurality opinion, Justice Blackmun not only affirmed arguments for “tolerance of [sexual] nonconformity”<sup>102</sup> such as those offered by Justice Brennan in *Rowland*, but he also introduced a set of arguments that bring the case for tolerating homosexuality closer to pluralism-based tolerance.<sup>103</sup>

From the start, Justice Blackmun explicitly affirms autonomy-based tolerance, emphasizing the “right to be let alone”<sup>104</sup> and the right of individuals “to decide for themselves whether to engage in particular forms of private, consensual sexual activity.”<sup>105</sup> He asserts that:

[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”<sup>106</sup>

To the objection that the Georgia statute criminalized homosexual conduct, rather than homosexuals themselves, Blackmun answered:

An individual’s ability to make constitutionally protected “decisions concerning sexual relations,”

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<sup>100</sup> *Id.* at 196; *see also id.* at 209 n.4 (Blackmun, J., dissenting).

<sup>101</sup> *Id.* at 197 (Burger, C.J., concurring).

<sup>102</sup> *Id.* at 214 (Blackmun, J., dissenting).

<sup>103</sup> *See supra* text accompanying notes 24-33.

<sup>104</sup> *Bowers*, 478 U.S. at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 212 (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)) (alteration in original).

is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.<sup>107</sup>

But Justice Blackmun was reluctant to ground tolerance solely in the right of privacy. He went further, making a two-prong argument: first, he broke the determinist linkage of homosexuality with evil or immorality; secondly, he championed the idea of pluralism, of people making different choices that cannot be said to be absolutely “good” or “bad.” Instead these choices should be respected, since, among other choices, they comprise the “fiber of an individual’s personality.”<sup>108</sup>

Although some of his remarks might lead one to conclude otherwise,<sup>109</sup> Justice Blackmun’s skepticism that homosexuality and immorality are linked is quite apparent:

Like Justice Holmes, I believe that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>110</sup>

And later on:

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a “disease” or disorder. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual’s personality<sup>111</sup> . . . .

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<sup>107</sup> *Id.* at 202 n.2 (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 711 (1977) (Powell, J., concurring in part and concurring in the judgment)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 199 (“But the fact that the moral judgments expressed by statutes like [Georgia’s anti-sodomy law] may be ‘natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.’”) (quoting *Roe v. Wade*, 410 U.S. 113, 117 (1973)).

<sup>110</sup> *Id.* at 199 (quoting *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>111</sup> *Id.* at 202 n.2.

Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.<sup>112</sup>

Justice Blackmun questioned not only the immorality of homosexuality, but also the purported immoral effects of society's tolerance of homosexuality:

Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."<sup>113</sup>

But Justice Blackmun went even further and explained why the so-called "right to sodomy" – that is, the right to define one's own sexual identity – should be acknowledged just like other rights concerning family matters:

We protect those rights [associated with the family] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not

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<sup>112</sup> *Id.* at 209 n.4.

<sup>113</sup> *Id.* at 212.

commercial or social projects." We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. The Court recognized . . . that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds . . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.<sup>114</sup>

Justice Blackmun wants us to understand why choices of sexual orientation have intrinsic merit, specifically why they should not merely be tolerated as evil but respected for what they are:

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<sup>114</sup> *Id.* at 204-05.

reflections of a fundamental component of personal identity. In Blackmun's view, tolerating homosexuality is not a mere by-product of the idea of personal liberty; it is not the "side effect" of free and unfettered choices. Instead, it is based on the understanding that individual choices about sexual orientation are a *good* by their own terms and should be respected as such. Homosexuality, under this view, should be tolerated not just because it is shielded by the right to liberty but because it carries its own moral merit.<sup>115</sup>

It is also important to notice the Amish analogy Justice Blackmun offers.<sup>116</sup> By suggesting that pluralism in matters of sexual orientation is equivalent to pluralism in matters of cultural differences, such as between the Amish and the general American public, Blackmun reflects the transformation in attitude towards homosexuality.

Although Blackmun's view failed to carry a majority, *Bowers v. Hardwick*—contrary to common perceptions—reflected a change, within liberal jurisprudence, toward a more positive attitude toward homosexuality. For the first time in history of the Supreme Court, a Justice recognized homosexuality as a choice that reflected human dignity. Indeed, after *Bowers* the Court began to recognize homosexuals as a legitimate group deserving of rights. After *Bowers*, there is no mention of homosexuality as sexual deviance or as a "psychopathic personality" trait. The moral legitimacy of homosexuality became the assumption underlying liberal opinions, to the point where now biases *against* homosexuality arouse dismay, and hostility toward homosexuality has become the "deviant" attitude. Homosexuals have become a legitimate component of a pluralistic society.

The four cases relating to homosexuality that have reached the Court in the wake of *Bowers v. Hardwick* demonstrate these points. They bear out the conclusion that Justice Blackmun's dissent was not a temporary outburst, but the beginning of a new era of tolerating homosexuality.

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<sup>115</sup> See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521-38 (1989), for further elaboration on the distinction between substantive and formalistic (or "naïve" and "sophisticated") arguments for homosexuality.

<sup>116</sup> *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

**Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995)**<sup>117</sup>

In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston (“GLIB”) wished to participate in the South Boston St. Patrick’s Day parade as a separate unit to “express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, [and] to demonstrate that there are such men and women among those so descended.”<sup>118</sup> When the parade council refused to admit GLIB, GLIB filed suit in state court. The state trial court ruled that the parade was a “public accommodation,” and that the exclusion of GLIB from the parade therefore violated state laws that prohibit discrimination based on sexual orientation. The court rejected the parade council’s claim that the parade was a form of expressive conduct, and that GLIB’s admission would constitute a First Amendment violation. Since the parade had no specific message or theme, the court reasoned that it was not entitled to First Amendment protection, and ruled that “GLIB was entitled to participate in the Parade on the same terms and conditions as other participants.”<sup>119</sup> The Supreme Court of Massachusetts affirmed the lower court’s decision.

The U.S. Supreme Court granted certiorari to “determine whether the requirement to admit a parade contingent expressing a message not of the private organizers’ own choosing violates the First Amendment.”<sup>120</sup> A unanimous opinion held that it did and reversed the state court judgment. Although the Supreme Court’s decision was not in GLIB’s favor (and is therefore likely to be read as hostile to gay rights, generally), the reasoning in the decision clearly indicates that the Court has already moved past the stage where homosexuality needs to be legitimized. In *Hurley*, those who oppose homosexuality are the ones seeking First Amendment protection.

Absent from Justice Souter’s majority opinion was any suggestion that GLIB’s message was immoral or less worthy of protection. The issue, the Court claimed, was not discrimination; gay individuals were not banned from participating in the parade,

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<sup>117</sup> 515 U.S. 557.

<sup>118</sup> *Id.* at 561.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 566.



and were not denied any such rights.<sup>121</sup> Rather, at issue was the right of a private organization to exclude a message it did not wish to convey. Not only did the Court avoid characterizing GLIB's message as illegitimate, but instead it explicitly stressed the illegitimacy of sexual orientation-based discrimination—adding that, if producing a bias-free society was the Court's only goal, then perhaps it would have been appropriate to intervene.<sup>122</sup> The Court concluded:

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message.<sup>123</sup>

In *Hurley*, the tables are turned. Without hiding its disapproval of the parade council's message, the Court demonstrates its willingness, when necessary, to protect freedom of speech even for those whose opinions it explicitly disfavors. While this willingness is not new, what is new is that the parade council needed the protection.

#### **Romer v. Evans (1996)**<sup>124</sup>

After several Colorado municipalities enacted ordinances banning discrimination based on sexual orientation, the people of Colorado, in a statewide referendum, adopted Amendment 2 to the Colorado state constitution, which repealed these ordinances to the extent that they prohibited discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."<sup>125</sup> The amendment read:

NO PROTECTED STATUS BASED ON  
HOMOSEXUAL, LESBIAN OR BISEXUAL

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<sup>121</sup> *Id.* at 572-73.

<sup>122</sup> *Id.* at 581.

<sup>123</sup> *Id.*

<sup>124</sup> 517 U.S. 620.

<sup>125</sup> *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual 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. This Section of the Constitution shall be in all respects self-executing.<sup>126</sup>

Shortly after the amendment was adopted, litigants challenged its validity in state court and sought to enjoin its enforcement on grounds that “enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation.”<sup>127</sup> The trial court granted a preliminary injunction to stay enforcement of the amendment. The Supreme Court of Colorado held that the amendment was subject to strict scrutiny, since it “infringed the fundamental rights of gays and lesbians to participate in the political process.”<sup>128</sup> On remand, the trial court held that the amendment was not “narrowly tailored to serve compelling interests” and enjoined its enforcement.<sup>129</sup> The Colorado Supreme Court affirmed. In a six-to-three decision, the U.S. Supreme Court applied rational basis scrutiny and, unable to find a legitimate government interest behind the amendment, affirmed the judgment of the Colorado Supreme Court and invalidated Amendment 2.

*Romer* is seen by many as a great victory for the homosexual community in the United States,<sup>130</sup> and with good reason. In *Romer*, the Supreme Court explicitly acknowledged that homosexuals are

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 625.

<sup>128</sup> *Id.* (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)).

<sup>129</sup> *Id.* at 626.

<sup>130</sup> See, e.g., CHUCK STEWART, *HOMOSEXUALITY AND THE LAW: A DICTIONARY* 231-36 (2001).

not “unequal to everyone else.”<sup>131</sup> *Romer* marks an important step in legitimizing homosexuality in mainstream liberal adjudication—not only because of the explicit legal outcome, but also because of the assumptions and rhetoric of the opinion. These underlying factors were not novel at all; they were merely restatements of Justice Blackmun’s arguments in *Bowers v. Hardwick*. Only this time, they commanded a majority of the Court.

The state courts had invalidated Amendment 2 on grounds that it infringed on homosexuals’ fundamental rights and did not survive strict scrutiny; in contrast, the Supreme Court invalidated the amendment because it placed homosexuals in a solitary class and deprived them of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.<sup>132</sup> Thus, claimed the court, the amendment imposed a special disability upon homosexuals by forbidding them the safeguards that others enjoy.<sup>133</sup>

The Supreme Court proceeded on the assumption that discrimination against homosexuals was illegitimate and irrational, even as it pertains to non-fundamental rights. The question of the immorality of homosexual conduct does not even arise; it is simply not relevant to the decision. Homosexuals are treated as equal. In fact, the Court suggests that discrimination against homosexuals, as reflected in the proposed amendment, is nothing but an expression of “animus toward the class it affects.”<sup>134</sup> “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>135</sup> The social message conveyed by the Court cannot be overestimated; had the Court wanted to diminish *Romer*’s social message it could have tacked onto its opinion—as it had done in other cases—a qualifying phrase with the effect of detaching the court’s actual decision from its “real,” substantial, view about the morality of homosexuality.<sup>136</sup> Thus, it seems fair to conclude that

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<sup>131</sup> *Romer*, 517 U.S. at 635.

<sup>132</sup> *Id.* at 630.

<sup>133</sup> *Id.* at 631.

<sup>134</sup> *Id.* at 632.

<sup>135</sup> *Id.* at 634.

<sup>136</sup> See, e.g., *Manual Enters.*, 370 U.S. at 495 (1962) (“[N]othing in this opinion of course remotely implies approval of the type of magazines . . . . All we decide is that on this

the court had finally chosen a side in the debate over the moral legitimacy of homosexuality. Indeed, this is precisely how the dissent read the majority opinion:

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias . . . . When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers . . . . Striking [Amendment 2]

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record these particular magazines are not subject to repression"); *Boy Scouts of America v. Dale*, 530 U.S. 640, 661 (2000) ("We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.").

down is an act, not of judicial judgment, but of political will.<sup>137</sup>

Though divided on the outcome, the Court unanimously agreed that *Romer v. Evans* cannot be read narrowly or emptied of its social significance.

### **Boy Scouts of America v. Dale (2000)**<sup>138</sup>

James Dale joined the Boy Scouts of America ("BSA") in 1978 and was approved for adult membership in 1989. In 1990, after Dale's homosexuality was publicized in a newspaper, the BSA revoked his membership on grounds that the BSA "specifically forbid[s] membership to homosexuals".<sup>139</sup> Dale filed a complaint in the New Jersey Superior Court, claiming that the BSA violated New Jersey's public accommodations statute by revoking his membership solely on the basis of his sexual orientation. The court granted summary judgment in favor of the BSA, holding that the New Jersey Public Accommodations Act was inapplicable since the BSA is a private organization entitled to discretion in deciding which members to exclude. The Appellate division of the New Jersey Superior Court reversed, holding that the Public Accommodations Act did apply, and the New Jersey Supreme Court affirmed. The New Jersey Supreme Court further held that requiring the BSA to reaccept Dale's membership did not in any way infringe on its rights to intimate association and to expressive association.

In a five-to-four opinion, the U. S. Supreme Court held that the "state interests embodied in New Jersey's public accommodations law d[id] not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>140</sup> The Court reversed the New Jersey Supreme Court's judgment, and remanded for proceedings consistent with its opinion.

The result of this case is far from a triumph from the perspective of the homosexual community. Nevertheless, Justice

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<sup>137</sup> *Romer*, 517 U.S. at 636-53 (Scalia, J., dissenting).

<sup>138</sup> 530 U.S. 640.

<sup>139</sup> *Id.* at 645.

<sup>140</sup> *Id.* at 659.

Stevens' dissent picks up the themes of *Bowers* and *Romer*, taking them a step further.

Stevens' dissent does not dispute that BSA was an expressive association entitled to choose which messages to convey and which to exclude. His main question is whether Dale's membership would send a message incompatible with the BSA's mission statement. This required Justice Stevens to interpret the BSA's mission statement, the "Scout Oath," and "Scout Law." To Justice Stevens,

It is plain as the light of day that neither one of these principles—"morally straight" and "clean"—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters.<sup>141</sup>

Thus, the dissent implicitly affirmed the view that homosexuality is not morally wrong and rejected the argument that was raised explicitly by the BSA.<sup>142</sup> The dissent further asserted that the right to freely associate for expressive purposes is not absolute, specifically referencing racial and gender-based discrimination cases to justify intervention in this case.<sup>143</sup> Justice Stevens continued this theme toward the end of his dissent:

Unfavorable opinions about homosexuals "have ancient roots." Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of

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<sup>141</sup> *Id.* at 668-69 (Stevens, J., dissenting).

<sup>142</sup> *Id.* at 699.

<sup>143</sup> *Id.* at 679-84.

thinking about members of unfamiliar classes, have modified those opinions . . . . As Justice Brandeis so wisely advised, “we must be ever on our guard, lest we erect our prejudices into legal principles.” If we would guide by the light of reason, we must let our minds be bold.<sup>144</sup>

Here, again, prejudice against homosexuality is perceived as contrary to “reason,” as a product of old habits that must be abandoned. By the time of *Boy Scouts of America v. Dale*, the legitimacy—the acceptance, even—of homosexuality has become firmly rooted in liberal judicial tradition. In fact, one may argue that the tension inherent in tolerance has been broken; since homosexuality is no longer perceived as morally wrong, acceptance, rather than tolerance, has become the prevailing attitude. Tolerance is now required for those who *cannot* tolerate homosexuality, since it is their position that is being challenged as lacking moral justification.

#### **Lawrence v. Texas (2003)**<sup>145</sup>

The foregoing discussion has outlined the course of opinions tolerating homosexuality in the Supreme Court, from early moral disapprobation to acceptance. Although *Lawrence v. Texas*—which overruled *Bowers* and prohibited anti-sodomy statutes as unconstitutional—was hailed as a milestone in the gay rights movement, the preceding evidence suggests that by the time the Court decided *Lawrence*, the battle had already been won. Justice Kennedy’s opinion clearly states that homosexual conduct is not immoral but rather a legitimate exercise of human liberty. The majority opinion repeatedly compares homosexual conduct to heterosexual conduct; the Court refuses to demean the former, holding instead that both activities achieve similar purposes from the standpoint of liberty. *Lawrence* declares that homosexual conduct is a legitimate part of a more extensive intimate personal relationship between consenting adults; banning homosexual sodomy is an unjustified intrusion on the right to personal autonomy. “When sexuality finds overt expression in intimate

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<sup>144</sup> *Id.* at 699-700.

<sup>145</sup> 539 U.S. 558.

conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."<sup>146</sup> Moreover, "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."<sup>147</sup> *Lawrence* accepts homosexuality as "an integral part of human freedom."<sup>148</sup>

Justice Blackmun's dissent in *Bowers* had paved the way for the line of cases leading up to *Lawrence*. Although *Lawrence* contained the formal declaration of the Court's acceptance of homosexual conduct, by the time it was decided, it was already old news.

### Conclusion

In his dissent in *Romer*, Justice Scalia made much of the "enormous influence" and political power that the homosexual minority possesses.<sup>149</sup> "Quite understandably," he wrote, the homosexual minority "devote[s] this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."<sup>150</sup> It seems today that, at least within the Supreme Court's liberal adjudication, this has been achieved. In *Lawrence v. Texas*, Justice Scalia asked:

If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual

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<sup>146</sup> *Id.* at 567.

<sup>147</sup> *Id.* at 574.

<sup>148</sup> *Id.* at 577.

<sup>149</sup> *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

<sup>150</sup> *Id.* at 646.



couples exercising “[t]he liberty protected by the Constitution”?<sup>151</sup>

Indeed, liberal adjudication has undergone a radical shift in the way it addressed homosexuality over the past four decades. From complete moral disapprobation, to utilitarian tolerance, to autonomy-based tolerance, to pluralism-based tolerance, liberal adjudication has ultimately arrived at moral approval and acceptance. This shift tracks a similar shift in the various justifications of tolerance that have been put forth within liberal philosophical discourse. This resemblance illuminates one case in which legal reasoning tracks general moral and social transformations.

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<sup>151</sup> *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting).