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Bowers V. Hard Wick: The Enigmatic Fifth Vote And The Reasonableness Of Moral Certitude

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BOWERS V. HARDWICK: THE ENIGMATIC FIFTH VOTE AND THE REASONABLENESS OF MORAL CERTITUDE

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In *Bowers v. Hardwick*,[1] the Supreme Court upheld the constitutionality of a Georgia sodomy statute in the face of a substantive due process challenge by a practicing homosexual. The vote was five to four. Justice Powell joined the majority opinion. Apparently this was not an easy choice for Justice Powell since he initially agreed with the four Justices who eventually became the dissenters. Some of Justice Powell's angst over the decision is reflected in a short concurring opinion in which he voiced Eighth Amendment concerns regarding the potential for harsh sentences under the Georgia law.[2]

None of this is particularly remarkable. The Court in *Bowers* confronted a volatile issue with difficult constitutional and moral undertones; a decision either way was bound to be controversial and intellectually challenging. It would not be surprising for a Justice to see the merits and demerits of both sides. And such a centrist position was not an uncommon one for Justice Powell.[3] However, the saga continued. After retiring from the bench, Justice Powell, in response to a question asked by a student at a law school function, stated with respect to his *Bowers* vote, "I probably made a mistake in that one."[4] He further explained that he thought the decision in *Bowers* was "inconsistent in a general way with *Roe*."[5] Of course, the decision still stands, but its constitutional elegance is nonetheless tarnished by Justice Powell's belated reflections.

One can envision a wide breadth of responses to the Justice's frank admission. They range from admiration for his honesty and his willingness to engage in critical reflection, to disappointment and even anger for his failure to adhere to his initial predisposition. On that spectrum my response falls into the former category, but that is not my point here. Justice Powell's struggle with this case crystallizes other perceptions of our legal system, perhaps the most intriguing of which is the fragile and somewhat fortuitous

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1. 478 U.S. 186 (1986).

2. Bowers v. Hardwick, 478 U.S. 186, 197 (Powell, J., concurring).

3. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J., announcing the judgment of the Court).-

4. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3.

5. *Id.*

nature of constitutional law—the realist perspective in stark relief. It also invites curiosity. On the assumption that a centrist Justice would be troubled by arguments on both sides—magnetically attracted and repelled by each—one is tempted to envision an alternative approach to the case, to discover a thread of reasoning between the majority and the dissenting opinions. This desire is further augmented by the continuing debate over the legitimacy of noninterpretive judicial review—a factor as central to the *Bowers* opinions as anything pertaining to the rights of homosexuals. Was there a way out?

Two possibilities occur to me. One approach would have placed the centrist vote with the majority, reversing the Court of Appeals' decision; the other would have placed that vote with the dissent, affirming the lower court's decision. The first is purely procedural; the second is substantive. My purpose is not to demonstrate that Justice Powell would have adopted or would endorse either approach. Rather, what follows is best characterized as a meditation or speculation generated by Justice Powell's doubts regarding the polar views defended in the *Bowers* opinions.

THE *BOWERS* DECISION

The decision in *Bowers* germinated when Michael Hardwick was arrested in his bedroom by a police officer who observed the young man in *flagrante delicto*, *i.e.*, engaged in an act of sodomy with another adult male. Hardwick was charged with violating the Georgia sodomy statute, but the prosecuting attorney chose not to proceed with the case for reasons that are not apparent from the record. Hardwick, along with an anonymous married couple, then filed an action in federal district court challenging the constitutionality of the Georgia sodomy law and seeking declaratory relief. The district court dismissed the plaintiffs' case, relying on the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*.[6] A panel of the Eleventh Circuit reversed. The entire panel agreed that Hardwick had standing to challenge the statute and that the married couple did not.[7] On the merits, two members of the court held that the Georgia statute implicated the fundamental right of privacy.[8] The case was remanded to the district court to afford the state an opportunity to justify the statute under the compelling state interest test.[9] The Supreme Court granted the state's petition for a writ of certiorari.

The majority opinion, authored by Justice White and joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor, described the right at stake as "a fundamental right [of] homosexuals to engage in acts of consensual sodomy."[10] The Court denied that precedent established such a fundamental right, construing prior right of privacy decisions as limited

6. 425 U.S. 901 (1976).
7. Hardwick v. Bowers, 760 F.2d 1202, 1204-07, 1213 (11th Cir. 1985).
8. *Id.* at 1210-13.
9. *Id.* at 1213.
10. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

to the areas of "family, marriage or procreation."[11] In addition, after alluding to the history of proscriptions against sodomy, the Court refused to create such a right, concluding that it would be at best facetious "to claim that . . . such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'"[12] In short, the majority was unwilling to create or discover a fundamental right of privacy that extended to homosexual conduct. In so doing, the majority emphasized the need to resist expanding the substantive reach of the due process clauses, observing that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[13] This merely restates in succinct fashion the interpretivist critique of modern substantive due process jurisprudence. The majority concluded its opinion with a brief paragraph stating that morality, standing alone, provided a sufficient rational basis to justify Georgia's proscription against sodomy.[14]

The primary dissenting opinion was authored by Justice Blackmun and joined by Justices Brennan, Marshall and Stevens, Justices more or less fond of substantive due process. The dissent defined the right at stake broadly as "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[15] Not surprisingly, the dissent found that this fundamental right of privacy was broad enough to encompass a homosexual's right to engage in private, consensual acts of sodomy.[16] Implicitly, the dissent would therefore require the state to establish both a compelling justification for the law and the absence of less burdensome alternatives, the standard adopted by the Court in *Roe v. Wade*.[17] The dissent also criticized the majority's willingness to allow the state to rely on morality as the sole justification for the statute. The regulated activity involved purely private conduct and did not, therefore, impinge upon public sensibilities.[18]

Justice Powell found himself in the middle of this debate over the scope of substantive due process. Certainly one can see how a Justice who had consistently supported the *Roe* line of decisions would initially be attracted to the position espoused by Justice Blackmun in *Bowers*. If the right of privacy permitted a woman to terminate her pregnancy despite the state's conceded interest in protecting the life of the fetus, it would seem that this same privacy right would encompass an individual's sexual preferences, especially when the state's countervailing interest—solicitude for the majority's moral view of proper sexual behavior—was not nearly as compelling

11. *Id.* at 191.
12. *Id.* at 194.
13. *Id.*
14. *Id.* at 196.
15. *Id.* at 199 (Blackmun, J., dissenting) (citation omitted).
16. *Id.* at 203-08.
17. 410 U.S. 113, 153-56 (1973).
18. Bowers v. Hardwick, 478 U.S. 186, 208-13 (1986) (Blackmun, J., dissenting).

as the protection of the potential life at stake in *Roe*. On the other hand, it is one thing to adhere to the precedent in *Roe* as it applies in the specific context of abortion while it is quite another to continue discovering new emanations of the right of privacy in the increasingly ephemeral penumbras of the Constitution. The continuing controversy over *Roe*, including perceived damage to the Court's image as a neutral arbiter of constitutional rights, certainly could foster a reticence to wander further into this jurisprudential mist. The safety line of legitimacy will eventually snap. Experience, not logic, therefore, seemed to dictate a vote with the majority. Logic, however, triggered the rethinking since, as Justice Powell observed, the decision in *Bowers* was undoubtedly "inconsistent in a general way with *Roe*."[19]

A Procedural Alternative

The case or controversy requirement has long been a favored doctrine for avoiding difficult, intractable or just plain controversial issues of constitutional law. In *Warth v. Seldin*,[20] Justice Powell demonstrated his facility with this device by describing and applying strict rules of standing—encompassing both a constitutional and a prudential dimension—that gave the federal judiciary significant latitude in defining the circumstances under which a suit could be brought in federal court. These same rules of standing might have provided him an effective tool to avoid the alternatives advocated by either the majority or the dissent in *Bowers*. Had Justice Powell concluded that Hardwick lacked standing, neither side of the substantive controversy would have gained the necessary five votes. The lower court decision would have been reversed, but the merits of the controversy would remain unaddressed. The net result would have been a dismissal of the suit and an avoidance of the underlying issue until such time as it could be presented in a concrete context.

The simple question is this: Did Hardwick have standing? Or, stated less boldly, is there a reasonable argument that he did not? The constitutional standing requirements are easily articulated. A party seeking redress in federal court must allege with specificity an injury in fact, causation of that injury by the defendant, and, depending upon how strict the Court wishes to be, a showing that the injury comes within the zone of interests protected by the federal statutory or constitutional provision at stake, the application of the latter requirement being within a federal court's prudential discretion. As to the zone of interests, Bower's claimed right to engage in homosexual conduct surely comes within the liberty protected by the due process clause. The right may or may not be fundamental; that question need not be answered at the justiciability stage. But freedom from government action that restrains sexual conduct is well within any sensible defi-

19. Agneshwar, *supra* note 4, at 3.
20. 422 U.S. 490 (1975).

nition of liberty, and Hardwick ought to be able to challenge such action as long as he alleges sufficient personal injury and causation within that context.

The Court, however, will seldom allow a party to construct standing through speculations about future action by the government, even if those speculations are predicated upon a pattern of past conduct. Under such circumstances, the allegations of potential injury and causation are deemed too speculative to trigger the Court's authority to engage in judicial review. That was precisely (or at least potentially) the case presented by Hardwick's allegations. Although Hardwick was originally charged with a crime, those charges were dismissed, and he was not seeking damages related to those criminal charges. Rather, Hardwick was seeking declaratory relief for a potential future prosecution should he ever again be caught and charged. Such speculative allegations challenging future conduct present a prime candidate for dismissal under the standing doctrine. In *City of Los Angeles v. Lyons*,[21] for example, the Court refused to grant standing to a plaintiff seeking an injunction against the police use of chokeholds. The Court denied standing even though the plaintiff demonstrated that the practice was widespread within his community and even though he recently had been subjected to such a chokehold. The parallel between the allegations in *Lyons* and those made by Hardwick is plain enough. That does not mean that Hardwick's allegations were unquestionably inadequate; it does mean, however, that the case against standing was quite plausible.

In the specific context of prospective challenges to criminal laws, the Court requires at a minimum a "credible threat of prosecution."[22] Hardwick did allege that he planned to continue engaging in private acts of sodomy in violation of the Georgia statute, and certainly there was a possibility that he would be caught again and prosecuted. But this possibility has to be assessed against the backdrop of prosecutorial practices in Georgia. The last reported prosecution under the statute was in 1939;[23] moreover, the charges initially brought against Hardwick arose out of the most unusual circumstances. The officer who arrested Hardwick had come to Hardwick's residence to serve the young man with a citation involving a wholly separate matter. Hardwick's roommate ushered the officer into Hardwick's bedroom where the crime was in progress.[24] This unique scenario, coupled with the dismissal of the charges and the relative moribundity of the statute, would certainly permit a Justice to conclude that Hardwick's case was speculative or insufficiently concrete to satisfy constitutional and prudential standing requirements.[25]

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21. 461 U.S. 95 (1983).

22. Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

23. Bowers v. Hardwick, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring).

24. David Lauter, *Complex Issues Still Unresolved on Gay Rights*, NAT'L L.J., Apr. 14, 1986, at 1, 12.

25. Although some of the facts described in the text do not appear in the record of the

Such a conclusion would make sense for several reasons. First, it would conform to the general notion that the Court ought to avoid unnecessary clashes with state governments as well as the unnecessary resolution of constitutional questions.[26] Here the potential conflict was significant since, at the time *Bowers* was decided, twenty-five states had antisodomy laws. At the same time, the actual threat to Hardwick's ability to engage in private acts of sodomy was barely discernible from the allegations, undermining a need for judicial intervention on his behalf. Next, if states were not enforcing their sodomy laws—at least in the context of private acts of sodomy—and if, as the dissent points out, there was a trend toward the abolition of such laws, perhaps the overall question was better left to the evolving political process. Finally, without concrete facts it is difficult to ascertain the precise nature of the intrusion or injury. Certainly if the pattern of prosecutions in Georgia indicated that state officials were invading the confines of the bedroom or were engaging in a widespread pattern of eavesdropping, then one could more clearly envision the scope of the potential transgressions upon liberty. However, since the statute was not enforced against Hardwick under circumstances in which a police officer actually witnessed the event—the charges were, after all, dropped—one is hard pressed to imagine under what circumstances the statute would be enforced. What is the Court being asked to decide aside from the abstract question of the constitutionality of an antisodomy law within the context of a right of privacy? Nothing, it would seem.

On the negative side of this procedural gambit, the Eleventh Circuit opinion on the merits was in conflict with decisions by two other courts of appeals.[27] If the Eleventh Circuit was wrong, assuming there can be a right or wrong answer to such inquiries, then a direct repudiation of that view was appropriate; similarly, if the Eleventh Circuit had correctly assessed the situation, then the other circuits needed to be so instructed. A procedural dismissal would merely sidestep the controversy. Also, given the conflict, one could conclude that the question would inevitably need to be addressed, and, although the allegations in *Bowers* were far from concrete, the actual issue to be resolved was largely abstract: Does the constitutionally protected right of privacy encompass private acts of homosexual sodomy? The facts of any particular case are unlikely to make much difference. Added to this is the fact that the parties had not briefed the standing issue.[28]

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case, one would think that the sparse allegations made by Hardwick would themselves have triggered doubts with regard to justiciability, inviting a remand on that issue. The burden is, after all, on the plaintiff to establish standing. Warth v. Seldin, 422 U.S. 490, 501-02, 518 (1975).

26. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

27. Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986); Dronenburg v. Zech, 741 F.2d 1388 (D.C.Cir. 1984).

28. The Amicus Brief filed by the Catholic League for Religious and Civil Rights did raise the standing issue in a cryptic and truncated fashion.

Justice Powell did not choose this rather obvious alternative; nor did any of the other Justices. They may have been convinced, based on the discussion in the Eleventh Circuit opinion, that Hardwick did have standing. Or they may have been reluctant to press the issue in the absence of briefing by the parties. Certiorari was not, after all, granted on an issue of standing. Yet, it would seem that this alternative would have been ideally suited for a Justice who was not fully persuaded by either the majority or dissenting views; moreover, even conceding the reasonableness of the Eleventh Circuit's disposition of the standing issue, that disposition was at best one possible version of the analysis. Given that standing was at least a potential method for resolving the case, there must have been something compelling about the substantive merits driving all the Justices toward a resolution of the underlying controversy. The significance of this discussion of standing, therefore, is not that Justice Powell erred in failing to consider standing as an option. Rather, the refusal to consider such a plausible and pliable method to avoid the merits underscores the need to develop a substantive alternative that does not lend itself to the doubts generated by both the majority and dissenting opinions in *Bowers*.

A Substantive Alternative

If one is to answer the question on the merits—is private homosexual sodomy entitled to constitutional protection—some type of a choice or accommodation has to be made between the rights asserted by Hardwick and the interests pressed by the State of Georgia. The options are not, however, necessarily relegated to the majority and dissenting views in this case. Both opinions suffer from the political and jurisprudential fallout caused by *Roe v. Wade*.[29] The majority opinion is transfixed by the potential illegitimacy of noninterpretive review, while the dissent embraces unreservedly the unenumerated rights phenomenon. Both opinions assume, as did the parties, that the primary issue involved a determination of whether a fundamental right is at stake. This assumption, however, overlooks a simpler alternative, one that may provide a slightly different perspective on the substantive due process controversy. Before describing that alternative, it will be worthwhile to further examine the majority and dissenting opinions.

There are many things I like about the majority opinion. My inclinations are decidedly interpretivist, though not of the strict constructionist or literalist ilk. I recognize the necessity of placing the literal language of the Constitution into a modern context; I recognize as well that any interpretation is bound to alter somewhat the boundaries of specific constitutional provisions. Some evolution of meaning is inevitable. The majority's observation that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"[30] strikes me as

29. 410 U.S. 113 (1973).

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

just about right. Implicit in this statement is a recognition that constitutional law is neither a precise collection of static scientific formulas nor an unstructured invitation to a judicially generated platonic oligarchy. It is a method of argument within the context of constitutional norms. While I wholeheartedly accept the legitimacy of the judiciary's mediation between the two-hundred-year-old text and the problems of a modern society, I am suspicious of any methodology that places too few restraints on the definition of those norms.

The dissent, on the other hand, is decidedly noninterpretivist; it traces the vector unleashed by *Griswold v. Connecticut*[31] and *Roe v. Wade*.[32] The Court does not mediate; it creates, limited only by its ingenuity. Yet, neither of those cases has been convincingly defended either analytically or in terms of their underlying jurisprudence.[33] Indeed, they are easy fodder for law students, even those who support the underlying claims. As much as one may wish to minimize intrusions on personal freedom, both opinions are transparently nontextual excursions into overblown rhetoric. No less so than the Court's opinion in *Lochner v. New York*,[34] the Court in both cases simply exercised raw judicial power to impose a desired result. The *Bowers* dissent, had it been a majority opinion, would have done no more. The proposition that privacy is a specially protected right was simply repeated, perhaps more fervently, but not more convincingly. An error, repeated often and eloquently, is nonetheless an error. Even a justice unwilling to reverse *Roe* could understandably be reluctant to endorse another foray into the ozone of substantive due process. From such a perspective, the general theme of the majority opinion is quite comfortable. It evokes a deep reluctance to create fundamental rights in the absence of a firm textual foundation. But that reluctance does not fully resolve the issues before the Court in *Bowers*.

In many ways the majority opinion in *Bowers* is as much a reaction to *Griswold* and *Roe* as it is to the claimed rights of homosexuals, explaining, perhaps, the majority's eagerness to ignore the standing difficulty. In this manner, the virtue of the opinion—the above-described judicial restraint in the context of substantive due process—may also be seen as a vice. The legitimate and understandable response to the judicial legerdemain of modern substantive due process overlooks a much simpler and more profound issue. One need not adopt a bold theory of unenumerated rights to assert plausibly that the word "liberty" found in the Fifth and Fourteenth Amendments ought to be defined broadly to cover the widest possible range of human actions. Certainly, there is no language in the Constitution purporting to limit the scope of the term, and, from a common sense perspective,

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31. 381 U.S. 479 (1965).

32. 410 U.S. at 113.

33. With respect to *Griswold*, I refer to the Douglas and Goldberg opinions. Justice White's less expansive concurring opinion, based simply on a reasonableness analysis, is perfectly defensible.

34. 198 U.S. 45 (1905).

every government limitation on my freedom to act is a limitation on my liberty. That does not mean that any particular liberty interest is entitled to special deference requiring searching judicial scrutiny. Nor does it mean that the judiciary is required to develop a hierarchy of liberty interests beyond those specially and specifically protected by express constitutional provisions. It means only that whenever the government deprives one of liberty it must do so in accordance with due process. Even the dissent in *Roe* recognized that a liberty interest was at stake in that case.[35] As long as due process includes some review of legislative action, *i.e.*, until the Court adopts a complete hands-off approach as endorsed by Justice Black,[36] it would seem that the appropriate test is one of reasonableness.[37] An arbitrary or unreasonable deprivation of liberty violates due process.

The question is simple and, in measured degrees, deferential: Has the state acted reasonably in curtailing liberty under the circumstances presented? Stated somewhat differently: Is there a sufficient reason for the state's action? The review is textually generated, although the analysis is not text-bound. Liberty entails the freedom to act; laws that inhibit the freedom to act must satisfy the judicially supervised reasonableness test of due process. The degree of the Court's scrutiny depends more on the burdens imposed than upon the Court's perception of the importance of the right at stake. After all, the importance of any such right can only be defined by the intensity with which an individual wishes to exercise the right, not by the cleverness with which the Court either elevates or deprecates it. This takes the Court out of the business of subjectively creating special categories of unenumerated fundamental rights, while at the same time leaving the Court ample space to assure that liberty is not being arbitrarily curtailed by the legislature.

There is nothing especially astounding about this approach, except that it is too seldom taken seriously. In the context of due process, the rational basis test more often than not operates as a device of complete deference, the so-called "hands off" approach, thereby forcing the Court into the endlessly controversial task of creating "fundamental rights" where some real protection is presumed appropriate. I am suggesting that reasonableness means something more than "we defer."[38] It means at least that the constitutional foundation of any law must be something more than pure abstraction or the mere desire to attain a particular result. That foundation must be structured upon legitimate and relatively concrete ends advanced

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35. 410 U.S. at 172-73 (Rehnquist, J., dissenting).

36. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 507-13 (1965) (Black, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726 (1963).

37. *See, e.g.*, *Griswold*, 381 U.S. at 499 (Harlan, J., concurring); *Ferguson*, 372 U.S. at 733 (Harlan, J., concurring).

38. A good example of a true reasonableness test is found in Justice White's concurring opinion in *Griswold*, 381 U.S. at 502; his majority opinion in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), uses the same approach in the context of an equal protection analysis.

by legitimate and plausibly effective means. A law so structured is, within the context of due process, reasonable.

Stated in the negative, due process is not satisfied by a law resting solely upon a majority preference for the ends ordained by the law. In a very loose sense, the majoritarian preference is a reason for passing the law.[39] However, the presumed justification—satisfying that preference—is merely another way of saying the law is desired. This circular argument does not directly justify the law; it merely describes the forces leading to its enactment. It provides an excuse, not a reason. To be a legitimate end, *i.e.*, to be part of the reasonableness equation, the majoritarian preference itself must represent something other than abstract desire. Defined from this perspective, an end is legitimate only if it can be defined in terms that are independent of the majoritarian preference. Such a test gives the majority broad leeway in creating law and at the same time places some substantive restraints upon majority will. The majoritarian preference is not irrelevant; it is, presumably, the driving force behind adoption of the law. The mere force of this democratic desire, however, merely creates the conflict with liberty; it does not resolve it. Similarly, if the underlying preference of the majority is morality-driven, it does not necessarily follow that the law is reasonable. One abstraction—morality—has merely been substituted for another—desire.

An examination of the approach taken by the majority in *Bowers* should further clarify the point. After accurately and adequately concluding that there was no specially protected right to engage in homosexual sodomy, the majority dismissed the base-level reasonableness inquiry in a brief and cryptic paragraph, the gist of which was that a law based "essentially on moral choices" satisfies due process.[40] More specifically, the Court concluded, without any elaboration, that a law defended by counsel as based solely on "majority sentiments about the morality of homosexuality" does not violate due process.[41] The implicit holding seems to be that a claim of morality, standing alone, is inherently reasonable and, as a consequence, is a sufficient basis for sustaining a law subject to a due process challenge. Just as the majority's conclusion regarding a fundamental right to engage in homosexual sodomy is surely correct, its treatment of the morality-reasonableness inquiry is just as surely wrong.

It is one thing to conclude that a law may conform to a particular moral view; it is quite another to uphold the law based solely on its conformance with that view. In essence, the majority opinion allows the assertion of moral values to substitute for a more precise justification of the law. Since the Georgia antisodomy law presumably reflects the major-

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39. In referring to a "majority preference," I recognize that I have greatly oversimplified the democratic process. See Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1 (1991), in which my oversimplification of democracy is less egregious.

40. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

41. *Id.*

itarian, moral preference of the electorate, the law is simply deemed reasonable without more. But that uses reason in a most unusual and circular sense. The law is deemed reasonable only because it is consistent with a presumed majoritarian preference. Under such an approach all laws are reasonable, even those laws based on a majority's preference for immorality. The assertion of a moral premise for the preference adds nothing to the inquiry; it does no more than reformulate the description of majoritarian desire.

This also confuses the reasonableness inquiry with the more elusive question of legislative motive. It is commonplace for a legislator to vote for a particular law based upon moral considerations; the fact that a majority of legislators are so motivated does not, however, make the enactment reasonable other than in the most simplistic sense that the majority had a reason for acting, namely, to promote their moral preference. One must still attempt to determine why that particular moral preference is reasonable under the circumstances, and reasonableness cannot be satisfied in the absence of something more concrete than a question-begging assertion that the law is desirable. Simply put, the reasonableness inquiry asks, "Why is the law desirable?" If the answer moves from the abstraction of desire to the abstraction of morality, then a further question must be asked: "Why is the regulated activity deemed immoral?" There is no technical measure on the precision of the answer required; however, a Justice must be satisfied that under the circumstances a sufficient, non-question-begging justification has been proffered. That requires the judicial discovery of a legitimate end defined independently of the majority preference.

An example may help. Suppose a state legislature passes a statute outlawing the sale or use of alcoholic beverages within its borders. A due process challenge is mounted. As its first justification, the state claims that the people of the state wish their community to be dry. That is certainly a reason for the legislative response and may have been all that was in the legislators' minds, but it does no more than state the desire of the populace to achieve a certain result and, hence, does not satisfy the due process reasonableness inquiry. Rather, it begs the question. We must move to the next level of inquiry: Why do the people desire a dry community? If there is no reason that can be offered, then the law fails. According to the state, however, the majority of the populace believes that drinking is immoral. Still, a question-begging response. A premise of immorality may explain the desire to establish a dry community, but it provides no more than a second layer of abstraction. Finally, the state explains that drinking causes death on the highways, illness, poverty, etc. The morality is premised upon experience, not blind faith. A concrete base of reason has been established, and the law must be upheld if it plausibly advances the above-described legitimate ends. The *Bowers* majority did not require this final and essential step in the reasonableness inquiry. The foundation of the Georgia law remained no more than an abstract and unexplained circular assertion of a majoritarian preference, described in abstract moral terms, for that which the law ordained.

The dissent recognized and addressed this deficiency in the majority opinion, but the approach is somewhat elliptical and equivocal. Blackmun's dissenting opinion points out that "traditional Judeo-Christian values" provide the primary justification for Georgia's antisodomy law, triggering his further observation: "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."[42] True enough. The majority does not respond to this criticism; it merely assumes that majoritarian morality, regardless of any religious roots, is adequate to support the law. Instead of confronting the majority's obeisance to popular, abstract and unexplained morality, the dissent dissolves by attempting to draw a distinction between private and public morality. Moral values may control the public environment but not "intimate behavior that occurs in intimate places."[43] The dissent states, "Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others."[44] The distinction is premised on the value the dissent places on privacy rights, taking us full circle back to *Griswold* and *Roe*. The state must satisfy a greater burden when dealing with protected privacy rights. In this manner, what starts out to be an attack upon a particularized point in the due process analysis—a critique of the majority's failure to adequately assess reasonableness—is pulled out of focus and shifted back into the diffuse realm of fundamental rights due process.

In sum, neither the majority nor the dissent adequately resolved the case.[45] The debate over the fundamental rights component of substantive due process led both wings of the Court to undervalue a critical aspect of the case. The majority's sweeping acceptance of moral certitude as an adequate basis for a law is as unacceptable as the dissent's continued adherence to the rubric of fundamental rights. As long as laws must be based on reason, assertions of abstract moral certitude without a specific foundation in reason provides nothing more than a circular escape from analysis. Faith, superstition and the sheer weight of tradition are substituted for a thinking response to the issue. Faith may well be a sufficient basis for regulating one's own life; it does not, however, provide an adequate basis for regulating the life of another through the iron fist of the state. If the only reason for proscribing homosexual sodomy is the majority's firm belief that such practices are wrong, there is no proffered rationale for the

42. *Id.* at 211-12 (Blackmun, J., dissenting).

43. *Id.* at 213.

44. *Id.* at 212-13.

45. The sole question decided by the district court and the court of appeals was limited to determining whether homosexuals had a fundamental right to engage in private acts of sodomy. The state's interest in promoting such a ban was never litigated below. A remand on the reasonableness inquiry would have been a most judicious recourse.

law; rather, there is nothing more than a question-begging affirmation of a belief.[46]

POTENTIAL CRITICISM

I anticipate at least two general criticisms to the approach I have endorsed. First, by seeming to elevate reason over morality I have deprecated morality, at least with respect to those moral views premised upon faith or belief. But I do not intend to elevate reason beyond its practical utility in a civil society. Nor do I intend to undermine the legitimacy of faith-based morality. I simply oppose a state-imposed morality that is not based on reason, since I view reason as the only legitimate foundation upon which a diverse society, *i.e.*, a society composed of many different beliefs and a wide array of sometimes conflicting moral principles, can govern itself. That is also the contract of the Religion Clause of the First Amendment: I will not use the authority of the state to impose my faith-generated beliefs upon you; nor will you do so to me. In short, without fully traversing the philosophy of John Locke, it would seem that the essence of civil society is reason; the antithesis is laws premised solely upon abstract faith or belief.

A second criticism argues that reason and faith-based morality are merely different forms of rhetoric or argument. Reason is as much myth-based as is a belief system founded solely upon faith. This critique is not without reason. Reason can be employed as a rhetorical technique to justify a particular result; that result may be nothing more than the product of a mythological belief. But recognizing this potential use or abuse of reason does not establish an identity between reason and belief. It establishes only the need to be wary of the skilled rhetorician. Although such a brief essay cannot provide a forum for fully exploring this point, a few preliminary observations will at least establish my position and perhaps provide a basis for further dialogue.

Reason, it seems to me, is a technique through which we explore and explain our experiences and attempt to develop an understanding of our world through an accumulation and comparison of those experiences; our accumulated experience is our knowledge. One need not argue that knowledge is absolute or unwavering—compare Newtonian physics with the physics of relativity—to note that as a practical matter we use the knowledge gained through tangible experience to function in the world. We reason through the world.

Faith, on the other hand, is not based on experience. The essence of faith is an acceptance of truth without proof of that truth. The apt biblical reference is the story of Doubting Thomas. Thomas would not believe that Jesus had risen in the absence of actual proof. He wanted to touch the

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46. This conclusion is further bolstered when one examines the basis of the belief and discovers that it is quite clearly religiously based. *See* Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (seemingly oblivious to issue); *id.* at 211 n.6 (Blackmun, J., dissenting).

wounds of the risen Christ. Having so touched the wounds, he believed. Jesus mildly rebuked Thomas by observing that blessed were those who, not having seen, still believed. Thomas's belated acceptance of the risen Christ was premised on knowledge. Those who had not seen but still believed acted, and do act, on faith.

There is no doubt that knowledge and faith intersect, but in their pure forms they are quite distinct. Thus, although I might agree that reason and faith can operate as different forms of rhetoric, they are not "merely" different forms. They are qualitatively different. To premise laws solely upon the latter is to permit the arrogance of one belief to dominate all others. To premise laws upon reason permits all beliefs to be accorded a similar treatment.

One final example might help. Suppose a young man is standing atop a ten story building. He contemplates jumping. He knows that if he jumps and if the path to the ground is clear, he will crash onto the sidewalk below. He knows this through a wealth of personal experiences—falling objects, etc.—and perhaps through his knowledge of the laws of gravity. It is true that the laws of gravity may cease to exist at the moment he jumps, but that metaphysical possibility does not discount the realistic probability of the contrary result. Thus, a jump to the death or serious injury would be a product of knowledge. Suppose, however, that our young man believes that a flight of angels will swoop down and save him before his body strikes the earth. That belief is, most likely, not the product of knowledge gleaned through experience, but of faith. Jumping under such circumstances would be an act of faith. Suppose, finally, that our young man looks down and sees four stout fellows holding a safety net into which he can jump. He knows that if he jumps he may hit the net and survive uninjured. He longs for that result and hopes that the men below will be able to hold the net at impact. Since he has never jumped before, his jump is based partly on general knowledge about falling objects and partly on faith in his rescuers below.

This example describes the distinction between knowledge and faith and at the same time recognizes the everyday intersection of the two. Undoubtedly, human existence cannot and should not be cleansed of faith; on the other hand, it would seem most wise and fair to premise laws upon judgments that at least lean toward the knowledge or reason side of the spectrum. Certainly, one would not wish to permit the state to exercise authority on the belief that angels will intervene to prevent any harm. One can philosophically split hairs over these points, but it would seem that in the practical, everyday world there is a distinction between reason and knowledge on the one hand and faith and unadorned belief on the other. A due process test of reasonableness must take this distinction into account if the word reasonableness is to have any common sense application. The Court in *Bowers* did not do so. Instead, it accepted at face value the state's assertion that homosexual sodomy is immoral. Without further information, that assertion is no more than an articulation of a faith-based belief. It is virtually identical to our young man's belief that his fall will be cushioned

by a bevy of angels. As such, the state's reliance on a claim of morality does not satisfy even the most minimal due process inquiry.

CONCLUSION

Given the strikingly different views articulated by the majority and the dissent in *Bowers*, and given the perceived need to provide guidance to lower courts, a Justice who was troubled by the polar views expressed in those opinions could have developed a middle course focusing on a realistic appraisal of reasonableness in the context of due process. I have described one alternate approach that draws a distinction between reason and faith-based morality. Like any concurring opinion, I fully expect this hypothetical one to be subject to qualification and criticism. It does, however, provide a basis to explore the judicial role in assessing reasonableness under the due process clauses without at the same time granting the courts an unrestricted power to discover or dislodge constitutional rights.