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Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation

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NOTE

EVOLVING OBJECTIVE STANDARDS: A DEVELOPMENTAL APPROACH TO CONSTITUTIONAL REVIEW OF MORALS LEGISLATION

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INTRODUCTION

"[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[1]

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1. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

With this single sweeping statement in *Lawrence v. Texas*, the Supreme Court threw the validity of an entire class of laws and a long line of precedents into doubt.[2] In dissent, Justice Scalia asserted that "[t]his effectively decrees the end of all morals legislation."[3] "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . . ."[4]

The responses have taken a number of forms. Some have followed Justice Scalia's lead, criticizing the *Lawrence* decision and warning of the social and legal upheaval to come.[5] Others have taken a more skeptical and pragmatic approach, suggesting that widespread moral disapproval may still provide a legitimate state interest, despite the Court's apparent declaration to the contrary.[6]

By far the most common response, however, has been to abandon the idea that morality alone provides a sufficient basis for law. Harkening back to or explicitly invoking John Stuart Mill's harm principle,[7] scholars argue that courts should "permit morality-inspired government action only when it is supported by reference to empirical or otherwise demonstrable harms."[8]

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2. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); Samuels v. McCurdy, 267 U.S. 188, 196 (1925) ("The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . .") (quoting Mugler v. Kansas, 123 U.S. 623, 669 (1887)); Phalen v. Virginia, 49 U.S. 163, 168 (1850) ("The suppression of nuisances injurious to public health or morality is among the most important duties of government.").

3. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

4. *Id.* at 590 (Scalia, J., dissenting).

5. *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1585 (2004) ("[W]e think that the most salient characteristic of *Lawrence* is the impossibility of determining what it means, other than that five Justices have decided to forbid laws proscribing sodomy."); Susan Austin Blazier, Note, *The Irrational Use of Rational Basis Review in* Lawrence v. Texas*: Implications for Our Society*, 26 CAMPBELL L. REV. 21, 38 (2004).

6. *See, e.g.*, Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 348 (2004) ("Is all moral disapproval now an illegitimate state interest, or will the Court continue to allow moral disapproval to justify statutes where that moral disapproval is of a certain sort, and if so, what sort? My guess is that where moral disapproval is of long enough standing and still widely agreed upon by most Americans, the Court would be unlikely to overturn a law reflecting such disapproval."); *cf.* Williams v. Attorney Gen. of Alabama, 378 F.3d 1232, 1237 n.8 (11th Cir. 2004) ("[T]he Supreme Court has noted on repeated occasions that laws can be based on moral judgments. . . . One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale . . . .") (citations omitted).

7. This is the idea that, as Mill put it, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY 52 (Edward Alexander ed., Broadview Press 1999) (1859); *see also* H.L.A. HART, LAW, LIBERTY, AND MORALITY 4–6 (1963).

8. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1240 (2004); *see also* Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal*

This response tends to minimize, if not ignore, the extent to which morality and law are intertwined.[9] At the most basic step, individuals, legislatures, and courts decide what is and is not a harm based on moral judgment.[10] Despite the best efforts of some lawmakers, judges, and scholars, "no matter how carefully we might disavow moral judgments in light of the challenges they present for adjudicators, they are inextricably bound up in our lawmaking and, as a result, inevitably present in our adjudication as well."[11]

This is not a new proposition; many scholars have attempted to describe what they see as the proper role of moral judgment in adjudication and constitutional interpretation.[12] Conspicuously missing from this discussion, however, is empirical research about moral and psychological development.[13] Courts and scholars alike have spoken of evolving or developing standards,[14] but rarely do they invoke the findings of psychologists and social researchers who make a career studying evolving and developing standards and abilities. This Note aims to begin filling that void.

Researchers in developmental studies have uncovered a series of demonstrable developmental stages. There is considerable cross-cultural evidence for the general stages of moral development, extending from childhood

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Punishment, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 415 (2004); Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 568 (2004).

9. *See* Ronald C. Den Otter, *The Place of Moral Judgment in Constitutional Interpretation*, 37 IND. L. REV. 375 (2004); Goldberg, *supra* note 8, at 1300–04.

10. *See* Goldberg, *supra* note 8, at 1303 ("Even determinations that concrete injuries amount to cognizable harms to others are, ultimately, informed by judgments about what harm means."); Jami Weinstein & Tobyn DeMarco, *Challenging Dissent: The Ontology and Logic of* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 423, 457 (2004) ("[M]oral justification is a necessary condition for having a law, no matter how convoluted or hidden that ultimate moral justification is.").

11. Goldberg, *supra* note 8, at 1303–04.

12. *See, e.g.*, Den Otter, *supra* note 9, at 403–16; Dubber, *supra* note 8, at 546–70; Howard A. Levine, Hugh R. Jones Lecture at Albany Law School, *in* 67 ALB. L. REV. 1, 17–18 (2003); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 77–83 (2004).

13. Ken Wilber wrote: "The Constitution of the United States is generally a moral-stage 5 document (postconventional and worldcentric)." KEN WILBER, A THEORY OF EVERYTHING 90 (2000) [hereinafter TOE]. Professor Wilson Huhn cited the work of psychologist Lawrence Kohlberg and suggested that certain justices of the Supreme Court have fundamentally different understandings of morality. Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 91–93 & n.161 (2003). Thorough research found these to be the only sources connecting psychological development and constitutional interpretation. This Note will expand on these observations.

14. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) ("It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law.") (citation omitted); JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY (2001); Post, *supra* note 12, at 54 ("Constitutional law can . . . enforce constitutional culture only by intervening in an ongoing process of historical development, so that constitutional law is always faced with the choice of encouraging or retarding these evolutionary changes.").

through adulthood.[15] Indeed, the broad outlines of most models used in developmental studies today are strikingly similar.[16] Empirical research with these models demonstrates that the stages they reflect are universal and invariant.[17]

This is not to say that models used in developmental studies are rigidly deterministic. In prevailing systems, "[d]evelopment is not a linear ladder but a fluid and flowing affair, with . . . what appear to be an almost infinite number of modalities. Most of today's sophisticated developmental theories take all of that into account, and—more important—back it with substantial research."[18] Because of this "almost infinite" number of modalities, no stage is inherently good or bad.[19]

Moreover, even within this more fluid developmental framework, one's developmental stage is not completely determinative of one's moral choices. Professor Lawrence Kohlberg, for example, distinguishes between what this Note calls *structure* and *content*—between the capabilities, skills, methods, and reasoning embodied in the structure of a given stage and the specific moral decisions one makes within that stage using that structure.[20] The stages are "species-wide, shared human characteristics, but culture plays

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15. Ken Wilber, *Waves, Streams, States and Self: Further Considerations for an Integral Theory of Consciousness*, 7 J. CONSCIOUSNESS STUDIES 145, 146, 147–48 (2000) [hereinafter *Waves, Streams, States and Self*].

16. TOE, *supra* note 13, at 5. In fact, one can align most major developmental models, and models of moral development in particular, along common developmental patterns. *See* KEN WILBER, *Integral Psychology*, *in* 4 THE COLLECTED WORKS OF KEN WILBER 422, 471–77, 627 chart 1A, 633–38 charts 4A-5C, 644–45 charts 9A-9B (1999) [hereinafter *Integral Psychology*] (aligning major developmental models, including those of Jane Loevinger, Don Beck (Spiral Dynamics), Susanne Cook-Greuter, Robert Kegan, Lawrence Kohlberg, Carol Gilligan, Jean Gebser, and Wilber himself); *cf.* JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 73–75 (Thomas McCarthy trans., 1979) (describing "points of convergence" among various developmental models).

17. *See* TOE, *supra* note 13, at 6 ("Many of the stage models, in fact, have been carefully checked in first-, second-, and third-world countries."); *see also* RONALD INGLEHART, THE SILENT REVOLUTION 43 (1977) ("The results show a cross-national consistency that is almost breath taking."); DAVID R. SHAFFER, SOCIAL AND PERSONALITY DEVELOPMENT 330–37 (5th ed. 2005) (reviewing support for and criticisms of Kohlberg's theory and concluding that it describes "an invariant and universal sequence of moral growth" and "a universal sequence of changes in moral reasoning extending from childhood through adulthood"); *cf.* Alastair Heron & Elke Kroeger, *Introduction to* Developmental Psychology, *in* 4 HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY: DEVELOPMENTAL PSYCHOLOGY 7–9 (Harry C. Triandis & Alastair Heron eds., 1981) (reviewing evidence for the universality of various areas of psychological development and concluding that "the amount of evidence for some degree of universality in human development . . . is perhaps surprising and certainly encouraging").

18. TOE, *supra* note 13, at 5.

19. *See id.* at 56 (arguing that each stage is "*an absolutely necessary and desirable element* of the overall spiral").

20. Lawrence Kohlberg et al., *The Current Formulation of the Theory*, *in* 2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 212, 250–52 (1984); *cf.* KEN WILBER, *Sex, Ecology, Spirituality*, *in* 6 THE COLLECTED WORKS OF KEN WILBER 68 (1999) [hereinafter *Sex, Ecology, Spirituality*] (distinguishing between deep structures and surface structures); DON EDWARD BECK & CHRISTOPHER C. COWAN, SPIRAL DYNAMICS: MASTERING VALUES, LEADERSHIP, AND CHANGE 42 (1996) ("[Stages] determine *how* people think or make decisions in contrast to *what* they believe or value.").

variations on these underlying similarities."[21] Thus, individuals at the same stage of development may sometimes make different moral choices, while individuals at different moral stages, using different reasoning, might arrive at the same conclusion.

That said, the universal and invariant aspects of developmental stages have important effects. The successive stages mark successive decreases in egocentrism.[22] Across systems, stages of moral development step from preconventional to conventional to postconventional, egocentric to sociocentric to worldcentric.[23]

Recognizing these similarities and links across developmental systems, this Note will draw primarily from the Spiral Dynamics developmental model in its analysis of morals legislation along developmental lines.[24] This Note uses Spiral Dynamics solely for ease of understanding, as its plain language and real-world examples make it generally accessible to nonspecialists. Importantly, one could perform a similar analysis using other major developmental models.[25]

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21. *Waves, Streams, States and Self*, *supra* note 15, at 148 (quoting J. BERRY ET AL., CROSS-CULTURAL PSYCHOLOGY (1992)).

22. TOE, *supra* note 13, at 17.

23. *See id.* at 18–20; Lawrence Kohlberg, *A Current Statement on Some Theoretical Issues*, *in* LAWRENCE KOHLBERG: CONSENSUS & CONTROVERSY 485, 488 tbl.2 (Sohan Modgil & Celia Modgil eds., 1985) [hereinafter Kohlberg, *Current Statement*]; *Integral Psychology*, *supra* note 16, at 477.

As defined by Professor Kohlberg, a person operating from the preconventional level follows rules only if they are externally imposed and enforced, effectively forcing the person to follow the rules out of pure self-interest. 2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 172 (1984). Someone operating from the conventional level "conform[s] to and uphold[s] the rules and expectations and conventions of society or authority just because they are society's rules, expectations, or conventions." *Id.* Someone operating from the postconventional level "understands and basically accepts society's rules, but acceptance of society's rules is based on formulating and accepting the general moral principles that underlie these rules. . . . [He or she has] differentiated his or her self from the rules and expectations of others and defines his or her values in terms of self-chosen principles." *Id.* at 173.

As detailed by Wilber, an egocentric person's morals are "heavily centered on [his or her] own impulses, physiological needs, and instinctual discharges." TOE, *supra* note 13, at 19. At the sociocentric stage, a person's moral guide is the view and perspective of his or her social group or groups, be it family, religion, ethnic group, or nation. *Id.* at 20. At the worldcentric stage, universal care, justice, and fairness emerge as ideals, and the guiding moral principle becomes "[w]hat is right and fair, not just for me or my tribe or my nation, but for all peoples . . . ." *Id.*

24. *See* BECK & COWAN, *supra* note 20. Based on "decades of research, real-world applications, and the latest findings of both organizational theorists and neurobiology," Ronnie Lessem, *Introduction* to BECK & COWAN, *supra* note 20, at 1, the Spiral Dynamics system has been tested in more than fifty thousand people around the world without any major exceptions to the general scheme, TOE, *supra* note 13, at 6.

25. *Supra* note 16; *see also* Adam B. Leonard, Integral Communication 75–90 (2004) (unpublished M.A. thesis, University of Florida), *available at* http://etd.fcla.edu/UF/ UFE0004902/ leonard_a.pdf (detailing the correlations between Spiral Dynamics and the work of Ken Wilber, Jean Gebser, Gerald Heard, Paul Ray and Sherry Ruth Anderson, and Ronald Inglehart); *cf.* Lawrence Kohlberg & Donald Elfenbein, *Capital Punishment, Moral Development, and the Constitution*, *in* LAWRENCE KOHLBERG, 1 ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 243 (1981) (using Professor Kohlberg's developmental model to analyze approaches to capital punishment).

The Spiral Dynamics model uses eight general stages;[26] the focus of this Note will be on stages four and five. The following is a brief outline of stages four and five, with further details elucidated through the analysis in this Note.[27]

Individuals operating primarily from stage four are strongly conventional and conformist, with life's meaning, direction, and purpose predetermined by an all-powerful other or order.[28] Unquestioned absolutist principles of right and wrong govern moral reasoning.[29] This stage emphasizes law and order, concrete-literal and fundamentalist beliefs, and ethnocentric or sociocentric values.[30] Thus, a person using stage four reasoning would support a ban on certain behavior if the person's ethnic or social

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26. Note that Spiral Dynamics uses colors, rather than numbers, to identify the various stages. BECK & COWAN, *supra* note 20, at 31, 41; *see also* TOE, *supra* note 13, at 7–8 (detailing reasons for the choice to use colors to identify stages). For ease in understanding, this Note will identify the stages by number while retaining the sequence laid out in BECK & COWAN, *supra* note 20, at 41, 45–47. Thus, the stage numbers correlate to the colors as follows: Stage 1—Beige; Stage 2—Purple; Stage 3—Red; Stage 4—Blue; Stage 5—Orange; Stage 6—Green; Stage 7—Yellow; Stage 8—Turquoise.

27. The stages in the Spiral Dynamics model, summarized:

> Stage 1: Survivalistic. Individuals use instincts and habits just to survive, with priority on food, water, warmth, sex, and safety.
>
> Stage 2: Magical. Individuals use animistic and superstitious thinking, with a focus on rituals, kinship, and lineage.
>
> Stage 3: Impulsive. Individuals emerge as selves distinct from the group and are impulsive and egocentric. Power, glory, and self-enjoyment, without regret or remorse, dominate moral reasoning.
>
> Stage 4: Conventional/conformist. Absolutist principles of right and wrong govern moral reasoning. Individuals emphasize law and order, concrete-literal and fundamentalist beliefs, and ethnocentric or sociocentric values.
>
> Stage 5: Rational/scientific. Individuals break away from the herd mentality of stage four and seek truth, meaning, and morality in individualistic terms. Hypothetico-deductive, experimental, objective, mechanistic, and operational modes of thinking and demonstrable facts are the primary tools of moral reasoning.
>
> Stage 6: Sensitive. Relativism, diversity, egalitarianism, and tolerance take precedence in moral reasoning. Individuals embrace postconventional and worldcentric values.
>
> Stage 7: Integrative. Individuals recognize the strengths, as well as the shortcomings, of the various stages of development, complementing egalitarianism with natural degrees of excellence where appropriate.
>
> Stage 8: Holistic. Individuals recognize and use the entire spiral, unifying the multiple stages into one conscious system.

BECK & COWAN, *supra* note 20, at 45–46; *Integral Psychology*, *supra* note 16, at 481–84; TOE, *supra* note 13, at 21.

28. BECK & COWAN, *supra* note 20, at 46, 231; *Integral Psychology*, *supra* note 16, at 481; TOE, *supra* note 13, at 21, 85.

29. BECK & COWAN, *supra* note 20, at 46; *Integral Psychology*, *supra* note 16, at 481.

30. BECK & COWAN, *supra* note 20, at 46; *Integral Psychology*, *supra* note 16, at 481–82; TOE, *supra* note 13, at 21, 85. This absolutist idea of right and wrong is often what we think of when someone mentions the word "morals." *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "morality" as "[c]onformity with recognized rules of correct conduct"). The researchers cited here, and many others, suggest that we need not restrict ourselves to so narrow a definition.

group or long-established rules and laws supported such a ban.[31] Researches refer to this stage with such tags as "conformist,"[32] and "traditional."[33]

With the emergence of stage five, individuals break away from the herd mentality of stage four and seek truth, meaning, and morality in individualistic terms.[34] Absolutist moral principles, standing alone, are no longer sufficient for moral judgment. Instead, hypothetico-deductive, experimental, objective, mechanistic, and operational modes of thinking and demonstrable facts are the primary tools of moral reasoning.[35] This stage emphasizes achievement, merit, ability, and rational and scientific inquiry and begins to recognize postconventional and worldcentric values, expanding beyond tradition and one's own ethnic or social group.[36] Thus, a person using stage five reasoning would support a ban on certain behavior if objective facts and deductive reasoning supported such a ban and it applied without regard to ethnic or social classifications.[37] Researchers have given this stage names such as "scientific achievement,"[38] "modern,"[39] and "materialist, secular-rational."[40]

This Note argues that the Supreme Court's recent jurisprudence regarding morals legislation[41] mirrors the findings of empirical research on moral and psychological development. Specifically, the Supreme Court upholds morals legislation only if it is justified by stage five reasoning. Part I examines significant Supreme Court cases related to morals legislation over the last 50 years and argues that the Supreme Court has consistently upheld morals legislation that is justified by stage five reasoning, while consistently striking down as unconstitutional morals legislation that is not. Part II argues

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31. *Cf.* Kohlberg, *Current Statement*, *supra* note 23, at 494–95 (describing Kohlberg's conventional stage four and responses to the "Heinz dilemma").

32. *Integral Psychology*, *supra* note 16, at 481.

33. *See* TOE, *supra* note 13, at 30; PAUL H. RAY & SHERRY RUTH ANDERSON, THE CULTURAL CREATIVES 30–32 (2000); Ronald Inglehart & Wayne E. Baker, *Modernization, Cultural Change, and the Persistence of Traditional Values*, 65 AM. SOC. REV. 19, 23–25 & tbl. 1, 26 tbl. 2 (2000); Leonard, *supra* note 25, at 75.

34. *Integral Psychology*, *supra* note 16, at 482.

35. *Id.*; BECK & COWAN, *supra* note 20, at 46, 256.

36. BECK & COWAN, *supra* note 20, at 46, 256; TOE, *supra* note 13, at 21, 81, 86.

37. *Cf.* Kohlberg, *Current Statement*, *supra* note 23, at 495–96 (describing Kohlberg's postconventional stage five and responses to various dilemmas).

38. *Integral Psychology*, *supra* note 16, at 482.

39. *See* TOE, *supra* note 13, at 30; RAY & ANDERSON, *supra* note 33, at 25–30; Leonard, *supra* note 25, at 79.

40. *See* INGLEHART, *supra* note 17, at 40–43 & fig. 2–1; Inglehart & Baker, *supra* note 33, at 23, 24–25 & tbl. 1, 26 tbl. 2; .Leonard, *supra* note 25, at 79

41. This Note follows Professor Goldberg in using the term "morals legislation" in a broad general sense. Though this Note focuses on morals legislation as popularly described and other laws with explicit morality-based justifications, it discusses and pertains "to rationales for lawmaking based on tradition, social conventions, decency, ethics, majoritarian disgust, and other similar sentiments. That is, to the extent these positions reflect theoretical positions about the dividing line between good and bad, they present courts with challenges like those triggered by morals-based rationales." Goldberg, *supra* note 8, at 1242–43 (citations omitted).

that a developmental approach to constitutional review of morals legislation, while consistent with many aspects of the common responses to morality and the law after *Lawrence*, yields significant advantages over those approaches. Most significantly, Part II argues that a developmental approach lends reliability and determinability to the use of evolving standards in constitutional review of morals legislation, while still maintaining primary state control over public health, safety, and morals. Part III applies this framework to questions raised by Justice Scalia's dissent in *Lawrence*, arguing that the Court is indeed likely to strike down certain laws as unconstitutional while others appear to pass developmental and constitutional muster.

I. THE PATTERN: THE CONSTITUTION AS A STAGE FIVE DOCUMENT

If, as described above, stages of moral development are the structures within which individuals and groups reason, make, and justify moral decisions, it would be instructive to examine which stages of development are at work in adjudication and constitutional interpretation. This Part defends the thesis that over recent decades, the Supreme Court has consistently upheld morals legislation justified by stage five reasoning and has consistently struck down as unconstitutional morals legislation justified only by stage four reasoning. Sections I.A, I.B, and I.C argue that this principle is consistent with the Court's morals legislation cases involving matters of race, gender, and other group classifications, respectively. Subsequent sections show that stage five moral development accurately describes the Court's decisions involving specific behaviors. Section I.D shows that the thesis holds for decisions regarding adult entertainment, and Section I.E shows that the thesis holds for cases concerning assisted suicide. Section I.F returns to *Lawrence* and its predecessors, arguing that the Court's decision striking down the Texas law banning sodomy also supports the thesis. Section I.G concludes Part I by outlining some instances where the Court may have moved beyond stage five structures and reasoning.

A. *Race*

Beginning with *Brown v. Board of Education*,[42] the Supreme Court has consistently struck down laws justified by ethnocentricism, an element of stage four moral reasoning. While it might not appear at first blush that *Brown* is a case involving morals legislation,[43] much of its progeny considered morals legislation directly. In *Loving v. Virginia*,[44] for example, the Court struck down Virginia's anti-miscegenation law justified on grounds of preserving racial integrity and preventing a "mongrel breed of citizens."[45]

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42. 347 U.S. 483 (1954).

43. But recall that laws justified by tradition and social conventions, active in *Brown*, are properly within the scope of this Note. *See supra* note 41.

44. 388 U.S. 1 (1967)

45. *Id.* at 7.

Virginia justified its law using ethnocentric stage four moral reasoning—the state must keep races separate simply to preserve racial divisions—and the Court found it unconstitutional despite "equal application" of the law.[46] In *Brown*, *Loving*, and related cases,[47] the message has been clear: stage four ethnocentrism is an unconstitutional justification for classifications by race.

This conclusion may seem obvious, as the great weight of late-twentieth Century jurisprudence made racial discrimination unconstitutional; in other cases, however, the Supreme Court upheld the constitutionality of racial discrimination if rooted in stage five moral structures. As a prime example, in *Washington v. Davis*,[48] the Court upheld the constitutionality of the District of Columbia police department's use of a verbal skills test given to police recruits that had the effect of screening out more black applicants than white applicants.[49] The *Davis* Court repeated the principle that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[50] "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[51] The court found it "untenable," however, that the Constitution prevents the government from seeking applicants with better communicative abilities, "particularly where the job requires special ability to communicate orally and in writing."[52] It was constitutional to screen out a greater number of black applicants if the screening process related to ability, merit, and achievement, all core stage five values.[53]

Thus, with *Davis* and similar cases,[54] the Supreme Court "reaffirmed the nation's commitment to merit and the idea that people ought to be able to

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46. *Id.* at 8 ("[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . ."); *see also* Jay Michaelson, *On Listening to the* Kulturkampf, *or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1613 (2000) ("[A]s *Loving* must tell us, a state's 'moral' choice can sometimes be constitutionally *wrong*.").

47. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (invalidating a law prohibiting an unmarried interracial couple from "habitually liv[ing] in and occupy[ing] in the nighttime the same room").

48. 426 U.S. 229 (1976).

49. *Id.* at 245–46.

50. *Id.* at 241.

51. *Id.* at 242.

52. *Id.* at 245, 246.

53. *Integral Psychology*, *supra* note 16, at 482.

54. See MELVIN I. UROFSKY, THE CONTINUITY OF CHANGE: THE SUPREME COURT AND INDIVIDUAL LIBERTIES 1953–1986, at 229–32 (1991), for a good discussion of *Davis* and related cases, including *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Palmer v. Thompson*, 403 U.S. 217 (1971); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); and *City of Rome v. United States*, 446 U.S. 156 (1980).

compete for jobs on the basis of their ability"[55]—in other words, the Court reaffirmed justifications based on stage five moral reasoning. But, "[i]f the plaintiff[ ] could make out a case for intentional discrimination, then such action violated the constitutional promise of equal protection"[56]—in other words, if plaintiff could persuade the Court that stage four moral reasoning was actually at work, the law or policy would be deemed unconstitutional.

B. *Gender*

The sociocentrism of stage four moral development need not take the form of ethnocentrism rooted in racial classifications. One might just as easily define social groups by gender rather than race. Stage four sociocentrism tends to separate men and women into distinct social and legal spheres.[57] With the emergence of stage five, however, one can no longer justify granting certain rights to men alone based on stage four traditions and social norms.[58] The worldcentric stance of stage five incorporates rights for women as well.

Along these stage five lines, the Supreme Court has generally struck down laws that granted men rights, opportunities, or advantages to the exclusion of women. In *Stanton v. Stanton*,[59] for example, the Supreme Court rejected the state court's reliance on "old notions" of gender roles in invalidating a Utah law that granted child support payments to male children until age 21, but female children only until age 18.[60] In *Kirchberg v. Feenstra*,[61] the Court struck down a Louisiana law that gave a husband, as "head and master" of the household, power to dispose of jointly owned marital property without his wife's consent.[62] This general pattern—overturning laws that gave legal preferences to men—has held steady from the 1970s through the past decade.[63]

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55. UROFSKY, *supra* note 54, at 231.

56. *Id.*

57. RAY & ANDERSON, *supra* note 33, at 31 (including "[m]en need to keep their traditional roles and women need to keep theirs" among the list of values that define traditionals); *Sex, Ecology, Spirituality*, *supra* note 20, at 397–98; *cf.* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1084 (2004) (arguing that "traditionalist" societies maintained social divisions between men and women).

58. TOE, *supra* note 13, at 81. With the emergence of postconventional and worldcentric awareness in stage five, moral justifications rest on "[w]hat is right and fair . . . for all peoples, regardless of race, religion, sex, or creed." *Id.* at 20.

59. 421 U.S. 7 (1975).

60. *Id.* at 14–15.

61. 450 U.S. 455 (1981).

62. *Id.* at 457, 459–61.

63. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (striking down Virginia's policy of admitting only men to Virginia Military Institute); Frontiero v. Richardson, 411 U.S. 677, 684–85, (1973) (rejecting stage four "romantic paternalism" and "gross, stereotyped distinctions" in striking down a law making it more difficult for a woman to claim her husband as a dependent than for a man to claim his wife); Reed v. Reed, 404 U.S. 71 (1971) (striking down an Idaho statute that provided a preference for males over females of equal degrees of relationship to be appointed to

The Supreme Court has also struck down laws that arguably benefited women when those laws were justified by stage four sociocentric traditions and social norms. In *Orr v. Orr*,[64] the Court invalidated an Alabama law that exempted women from paying any potential alimony to their ex-husbands after divorce.[65] The Court, relying on *Stanton*, accepted that any justification based on "old notions" or the state's preference for wives playing "dependent role[s]" could not survive constitutional review.[66] Similarly, in *Mississippi University for Women v. Hogan*,[67] the Court struck down the School of Nursing's policy of excluding males from admission, finding that it "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively women's job."[68] In these cases and similar recent decisions,[69] the Court further solidified the notion that laws that "merely perpetuated traditional stereotypes about women and their roles in society . . . would fail an equal protection analysis."[70] That is, laws justified by the assumptions and stereotypes of traditionalist stage four moral reasoning are unconstitutional, regardless of whether men or women benefit.

Just as in decisions concerning race, however, the Supreme Court has upheld the constitutionality of gender discrimination when rooted in stage five moral structures. In *Schlesinger v. Ballard*,[71] the Court upheld a statute providing female officers a longer period of time to attain promotion before facing discharge, explaining that the disparate treatment reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."[72] Hypothetico-deductive and

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administer an estate). This marked a reversal from the Court's earlier approach. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1873) (upholding the right of the Illinois Supreme Court to deny a person's application for a license to practice law because she was a married woman).

64. 440 U.S. 268 (1979).

65. *Id.* at 282–83.

66. *Id.* at 279–80. The Court went on to analyze Alabama's other asserted justifications, finding that they would have been just as well served by a gender-neutral classification. *Id.* at 283. In a carefully worded footnote, the Court suggested that those asserted justifications might have been disingenuous. *Id.* at 280 n.10.

67. 458 U.S. 718 (1982)

68. *Hogan*, 458 U.S. at 729.

69. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (striking down a federal law requiring a stricter standard to pay benefits to widowers than to widows); Craig v. Boren, 429 U.S. 190 (1976) (striking down an Oklahoma statute allowing the sale of 3.2% beer to females 18 years or older, but prohibiting sales to males until the age of 21). This marked another reversal from the Court's earlier approach. *See, e.g.*, Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (upholding a Montana statute exempting laundries owned by women from a licensing fee); Muller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon law setting maximum hours for women).

70. UROFSKY, *supra* note 54, at 246; *see also* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 348 (3d ed. 2003) ("[The Supreme Court] generally strike[s] down laws that deny women opportunities that men have . . . or that deny men opportunities that women have when the state was motivated by archaic stereotypes . . . .").

71. 419 U.S. 498 (1975).

72. *Id.* at 508. The Court detailed how male and female officers are not similarly situated:

objective modes of thinking and rational, scientific inquiry—stage five structures—produce the "demonstrable fact" that justifies the statute, not "archaic" stage four sociocentrism. In *Michael M. v. Superior Court of Sonoma County*,[73] the Court nicely summarized this line of jurisprudence: "[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[74] Or, in developmental terms: the Court has consistently upheld gender classification based on demonstrable facts indicative of worldcentric stage five values.[75]

This is not merely a matter of semantics. As Professor Goldberg explained:

> Because fact-based reasoning . . . tends to be publicly accessible, a court potentially will be exposed to greater scrutiny—and greater criticism—by both dissenting judges and the general public if it accepts dubious facts to

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> Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants.

Id. (quoting 10 U.S.C. § 6015). Petitioner did not challenge the restrictions on women officers' participation in combat and sea duty. *Id.*

73. 450 U.S. 464 (1981). The Court upheld a California statute making only men potentially criminally responsible for statutory rape, with the plurality opinion reasoning that the statute was substantially related to the important state interest of preventing illegitimate pregnancy. *Id.* at 470–72. Some have criticized *Michael M.* and statutory rape laws in general as reinforcing gender stereotypes. *See, e.g.*, Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 404–06, 413–32 (1984) ("In terms of rights theory, gender-based statutory rape laws violate the right of all women to be treated equally to men."). *But see* Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1304–06 (1991) (arguing that both the plurality opinion and the dissent in *Michael M.* missed the point that "[w]omen and men are not similarly situated with regard to sexual assault in the sense that they are not equally subject to it or equally subjected to it."). For the purposes of this Note, the important point is that the Court explicitly avoided relying on stage four stereotypes or social norms, but instead used stage five hypothetico-deductive, scientific reasoning. *See infra* text accompanying note 76. How accurate the Court's reasoning is an issue for another Note.

74. *Michael M.*, 450 U.S. at 469 (plurality opinion); *cf.* United States v. Virginia, 518 U.S. 515, 533 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ."); UROFSKY, *supra* note 54, at 246–47 (discussing the Court's approach to employment and pregnancy).

75. Again, the complexities of this area of law reflect the complexities of the developmental approach. *Cf. supra* note 47. This is especially evident in cases concerning women in the military. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), for example, the Court upheld a law limiting registration for selective service to males. The Court found that Congress permissibly relied on the demonstrable fact that any future draft would be characterized by a need for combat troops, and since women were not eligible for combat, there was no need to require women to register for selective service. *Id.* at 76. However, the Court did not investigate whether that underlying difference in combat status was justified by stage four stereotypes and social norms or stage five demonstrable facts. In this case, then, there was no clear line between stage four and stage five reasoning.

In *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), the Court upheld a Massachusetts law giving preference for state civil service positions to veterans, who were overwhelmingly male. The Court rested its decision on its finding that there was no discriminatory intent towards women, again without investigating the underlying differences in military status between men and women. *Id.* at 279–80. While *Feeney*'s intent requirement is consistent with stage five reasoning, *see supra* notes 49–55 and accompanying text, the line between stage four and stage five blurs when, as here, stage four stereotypes may loom in the background of a decision resting on stage five reasoning.

> allow a traditional moral regulation to survive. This, in turn, may have a constraining effect on courts otherwise inclined to accept nonlegitimate or nonexplanatory morals rationales.[76]

That is, the Court's use of language reflective of stage five is itself a catalyst for deeper reliance on stage five reasoning and values.

C. *Other Groups*

Even in situations that do not call for heightened scrutiny, the Supreme Court has struck down group classifications motivated by stage four sociocentrism. In *USDA v. Moreno*,[77] the Supreme Court struck down a provision of the Food Stamp Act of 1964 that barred food subsidies to any household containing an individual unrelated to any other member of the household.[78] Legislative history indicated that the provision "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[79] The Court held that this could not pass constitutional muster, as "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[80] Or, in development terms, a law justified by a stage four preference for one social group over another is unconstitutional.

One might also exercise stage four sociocentrism by defining social groups by presence or absence of disability. In *City of Cleburne v. Cleburne Living Center*,[81] the Court found that the City of Cleburne had violated the Equal Protection Clause by requiring Cleburne Living Center to obtain a special use permit before establishing a group home for the developmentally disabled.[82] The Court noted that two of the Cleburne City Council's objections to the facility were premised on the negative attitudes and fears of neighborhood residents and the fear that nearby junior high school students might harass the occupants of the group home.[83] The Court made short shrift of objections rooted in stage four sociocentrism, rejecting classifications based on "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding . . . ."[84] Another of the City

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76. Goldberg, *supra* note 8, at 1309–10 (footnotes omitted).

77. 413 U.S. 528 (1973).

78. *Id.* at 529.

79. *Id.* at 534.

80. *Id.* In the district court, the government had explicitly argued that this provision might be justified as promoting morality. *Id.* at 535 n.7.

81. 473 U.S. 432 (1985).

82. *Id.* at 450.

83. *Id.* at 448–49.

84. *Id.* at 448. This bears striking resemblance to the principles applied to the race context in *Palmore*, a case that the *Cleburne* opinion cited with approval. *Id.*
Justice Stevens made this point even more forcefully in his concurrence:

> [T]he Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment." . . . The

Council's objections was that the home would have too many occupants for its size, despite the fact that the same number of non-disabled occupants would not violate the zoning ordinance.[85] Here, the Court looked for any objective, rational, stage five justification for treating the developmentally disabled differently, but found none:

> It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the [group home] *rationally* justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.[86]

In *Cleburne*, though, the Court hinted that such objective, scientific, non-sociocentric justifications do exist for treating the developmentally disabled differently in certain cases.[87] Just such a case arose in the form of *Heller v. Doe*.[88] Under Kentucky law, both mentally retarded and mentally ill persons could be involuntarily committed to a mental institution if: (1) the person presented a danger or threat of danger to themselves or others; (2) placement in a residential treatment center was the least restrictive method of treatment; and (3) the person could reasonably benefit from residential treatment.[89] For mentally retarded persons, these three factors had to be proven by clear and convincing evidence, but for mentally ill persons, Kentucky law required proof beyond a reasonable doubt.[90] The Court, citing the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and other expert works on mental illness and mental retardation, accepted Kentucky's argument that mental retardation and any corresponding danger to self or others is easier to diagnose and a more sta-

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> record convinces me that this permit was required because of the irrational fears of neighboring property owners . . . .

Id. at 454–55 (Stevens, J., concurring) (quoting Cleburne Living Ctr. v. Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)). This broke with the Court's earlier approach. *See* Buck v. Bell, 274 U.S. 200, 205 (1927) (upholding a Virginia statute allowing the involuntary sterilization of "mental defectives" in order to promote the "welfare of society").

85. *Cleburne*, 473 U.S. at 449.

86. *Id.* at 449–50 (emphasis added).

87. For example:

> [T]hose who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.

Id. at 442 (footnotes omitted).

88. 509 U.S. 312 (1993).

89. *Id.* at 317–18.

90. *Id.*

ble condition than mental illness.[91] Thus, the Court found objective, demonstrable facts that supported a hypothetico-deductive stage five justification for providing a higher standard of proof in mental illness cases: to ensure against the heightened risk that a person would be involuntarily committed.[92]

D. *Adult Entertainment*

At first glance, restrictions on adult entertainment might appear firmly rooted in stage four social norms and absolutist principles of right and wrong.[93] In 1973, the Supreme Court first addressed the constitutionality of a state law banning theaters from showing obscene films in *Paris Adult Theatre v. Slaton*.[94] In upholding the Georgia law, the Court did indeed give deference to the notion that a state could act to protect "the social interest in order and morality."[95] The Court's reasoning, however, revealed that its conception of morality was not wholly rooted in stage four absolutist principles of right and wrong, but mixed with stage five objectivity:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[96]

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91. *Id.* at 321–24; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41–49, 297–534 (4th ed. text revision, 2000) (detailing different diagnostic and other criteria for mental retardation and various mental illnesses).

92. *Heller*, 509 U.S. at 322–23.

93. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed . . . that any benefit that may be derived from [such utterances] is clearly outweighed by the social interest in order and morality.") (footnote omitted); Goldberg, *supra* note 8, at 1268 ("Given both the moralistic terms of the public debate about sexually explicit entertainment and the Court's strong rhetorical support for morals-based lawmaking, the argument that a majority of the Court has not relied exclusively on morals rationales in the last fifty years, other than in *Bowers*, may be somewhat surprising.") (footnotes omitted); Stephen Chapman, *When Censorship Isn't Censorship; The Debate Over Public Nudity*, CHI. TRIB., Apr. 2, 2000, at C21 (quoting an Erie, Pennsylvania council member: "We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion"); Jodi Wilgoren & Kimberly Sanchez, *Strip Club Defies City, Opens Doors*, L.A. TIMES, Nov. 23, 1996, at B1 (quoting one citizen in opposing a local strip club: "We're fighting too many other things without this one that's immoral and will do nothing for our neighborhood"). Notice that these excerpts equate morality with stage four moral conceptions—social norms and absolutist principles of right and wrong. *Cf. supra* note 28–31 and accompanying text.

94. 413 U.S. 49 (1973).

95. *Id.* at 61 (quoting Roth v. US, 354 U.S. 476, 485 (1957)).

96. *Id.* at 69 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)) (alteration in original). One might wonder, however, how exactly one can make a "morally neutral judgment" that a certain activity injures the community or endangers public safety. *See supra* notes 9–11 and accompanying text. This is quite easy to understand, however, if "morally neutral

A more recent case has further solidified the Supreme Court's reliance on stage five structures and reasoning in the context of adult entertainment. In *City of Erie v. Pap's A.M.*,[97] the Court upheld Erie, Pennsylvania's ordinance banning public nudity against a challenge from a nude dancing business.[98] The plurality opinion found that Erie's ban was justified in order to combat the "harmful secondary effects" of nude dancing identified in previous case law[99] and the City of Erie's own findings.[100] Thus, even in a context where the Court could allow stage four social norms and absolutist principles of right and wrong to dominate and reach the same result,[101] the Court has felt the need to rely on demonstrable facts, representative of stage five reasoning.[102]

E. *Assisted Suicide*

Assisted suicide, like adult entertainment, is an issue in which one might expect the debate to center around stage four absolutist and fundamentalist reasoning. When the Supreme Court addressed the issue, however, stage five principles again dominated the opinion. In *Washington v. Glucksberg*,[103] the Court upheld Washington's assisted suicide ban with a list of justifications including preserving life, preventing suicide, protecting the integrity and ethics of the medical profession, protecting vulnerable groups, and avoiding

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judgment" is understood to mean resting on stage five objective and hypothetico-deductive structures, as opposed to stage four absolutist principles of right and wrong.

97. 529 U.S. 277 (2000).

98. *Id.* at 283; *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding an Indiana public indecency statute that restricted nude dancing).

99. *Pap's A.M.*, 529 U.S. at 296–97 ("Because the nude dancing at [Pap's A.M.] is of the same character as the adult entertainment at issue in [*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *California v. LaRue*, 409 U.S. 109 (1972)], it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.").

100. *Id.* at 293 ("In any event, Erie also relied on its own findings. The preamble to the ordinance states that 'the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.'") (quoting Petition for Cert., *Pap's A.M.*) (emphasis added in *Pap's A.M.*). Even if this reasoning appears weak, the appeal to stage five demonstrable facts and evidence is significant. *See supra* note 76 and accompanying text.

101. *See, e.g.*, *Barnes*, 501 U.S. at 575 (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities . . . because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral.").

102. That is, the results in these cases would be the same whether the Court allowed states to rest on a stage four justification (e.g. "Nude dancing should be banned because the state says it is wrong.") or required a stage five justification (e.g. "Nude dancing should be banned because findings show it may be harmful to public health and safety."). *See supra* notes 20–21 and accompanying text; *see also* Eskridge, *supra* note 57, at 1084 ("Modern society can have morals legislation just as premodern society can, but it has to be justified along socially instrumental lines."); Goldberg, *supra* note 8, at 1268–74 (arguing that the Court has abandoned "morals rationales" for "secondary-effects analysis" in adult entertainment cases).

103. 521 U.S. 702 (1997).

movement towards euthanasia.[104] In considering the state's interest in preventing suicide, for example, the Court cited numerous studies showing that suicide itself was a "serious public-health problem."[105] The Court further noted that those who attempt suicide or request assisted suicide often suffer from depression or other mental disorders and that legalized assisted suicide may actually decrease the likelihood of those persons getting effective treatment.[106] Working through the other justifications on the list in the same manner, the Court found objective, demonstrable stage five justifications for Washington's ban on assisted suicide and upheld the law.

Of course, there may also be stage five justifications for upholding a law allowing assisted suicide. While a given stage's structures may be universal, the content—the specific decisions reached using a given stage's structures—may vary greatly.[107] Also, the primary justification raised in *Glucksberg*, preserving life, can take on a number of different forms when approached from stages four, five, or six.[108] Even as it found stage five justifications to support the Oregon law's constitutionality, the Court seemed to recognize that assisted suicide does not fall neatly along developmental stage lines: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue . . . ."[109]

F. *Sodomy and Sexuality*

Surprisingly, the two pre-*Lawrence* cases that dealt with sodomy and sexual orientation did not engage in the type of stage five analysis seen in cases previously discussed. In *Bowers v. Hardwick*,[110] the Court spent the vast majority of its discussion weighing whether or not sodomy was a fundamental right under substantive due process analysis.[111] The Court spent but a single five-sentence paragraph discussing the justifications for Georgia's law banning sodomy, concluding:

> The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent

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104. *Id.* at 728–35; *cf.* Vacco v. Quill, 521 U.S. 793, 808–09 (1997) (upholding a similar New York law resting on similar justifications).

105. *Glucksberg*, 521 U.S. at 730.

106. *Id.* at 730–31.

107. *See supra* notes 20–21 and accompanying text.

108. *See, e.g.*, Lawrence Kohlberg & Donald Elfenbein, *Capital Punishment, Moral Development, and the Constitution*, *in* LAWRENCE KOHLBERG, 1 ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 243 (1981).

109. *Glucksberg*, 521 U.S. at 735. Perhaps this helps explain the number and variety of concurrences in *Glucksberg*. *Id.* at 736–92 (O'Connor, J., concurring; Stevens, J., concurring; Souter, J., concurring; Ginsburg, J., concurring; Breyer, J., concurring).

110. 478 U.S. 186 (1986).

111. *Id.* at 186–96.

> makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[112]

Hardwick argued that Georgia must support its law with more than just an appeal to morality. Without taking a closer look at the state's justification, the Court rejected the challenge with "[w]e do not agree."

In *Romer v. Evans*,[113] the Court did not fully address the analysis missing from *Bowers*. The *Romer* Court invalidated an amendment to Colorado's state constitution, finding, among other problems, that it was "born of animosity" towards people of homosexual, lesbian, or bisexual orientation.[114] Quoting *Moreno*, the Court found that the desire to harm a politically unpopular group—here, a group defined on the basis of sexual orientation—was not a constitutional justification for the law.[115] Previously, however, the Court had recognized that important differences between men and women or between various types of mental disabilities might call for unequal treatment in certain situations.[116] The majority opinion in *Romer* failed to address whether differences in sexual orientation might also support unequal treatment. With *Bowers* still good law at the time, Justice Scalia, in his dissent in *Romer*, made a strong argument that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[117] After *Bowers* and *Romer*, the Court still had not explicitly discussed whether stage five structures could support laws banning sodomy or disfavoring people on the basis of sexual orientation.[118]

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112. *Id.* at 196. *But cf.* Michaelson, *supra* note 46, at 1613 ("[A]s *Loving* must tell us, a state's 'moral' choice can sometimes be constitutionally *wrong*.").

113. 517 U.S. 620 (1996).

114. *Id.* at 632, 634 ("[The amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ."). The Court addressed another general flaw making Colorado's amendment unconstitutional: "[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation." *Id.* at 632. This second flaw, however, is outside the scope of this Note.

115. *Id.* at 634–35.

116. *See supra* notes 72–74, 87–92 and accompanying text.

117. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

118. More specifically, at this point the Court had not discussed whether stage five hypothetico-deductive reasoning justified such laws, as Justice Scalia argued in his *Romer* dissent, or whether only stage four sociocentrism supported them, as the *Romer* opinion suggested. In particular, many scholars struggled with the distinction drawn in *Moreno* and *Romer* between animus and legitimate moral judgment. *See, e.g.*, Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 KY. L.J. 885, 902 (2001) ("Is there no distinction between 'animus' and 'morality' except the value judgments of a given court?"); Matt Larsen, Note, Lawrence v. Texas *and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 60–63 (2004). This Note suggests an answer: "animus" is a moral judgment justified only by stage four reasoning, while judgments justified by stage five reasoning are permissible.

In this context, the Court revisited the central holding of *Bowers* in *Lawrence v. Texas*.[119] Notably, Texas asserted that its goals in banning sodomy were the "implementation of public morality and promotion of family values."[120] To keep with the long line of precedent discussed above, though, the Court could not rest on the state's assertion of "public morality" alone. Implicitly, the Court had to determine on its own whether the statute could be justified as a valid exercise of stage five moral reasoning or an unconstitutional implementation of stage four moral reasoning.

The *Lawrence* Court supported its decision with two general stage five themes. First, the Court repeatedly invoked the privacy ideal, especially as it relates to personal relationships, in postconventional stage five language. For instance, after criticizing the *Bowers* Court's "failure to appreciate the extent of the liberty at stake,"[121] the Court counseled "against attempts by the State . . . to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[122] Later, the Court reiterated that "[a]t the heart of liberty is the right to define one's own concept . . . of existence, of meaning."[123] These statements are strikingly similar to a description of stage five: "[T]he self 'escapes' from the 'herd mentality' of [stage four], and seeks truth and meaning in individualistic terms . . . ."[124]

Second, the *Lawrence* opinion consistently maintained *Romer*'s worldcentric reasoning in granting privacy to people without regard to sexual orientation.[125] The Court stated, for example, that "[p]ersons in a homosexual relationship may seek autonomy for [intimate and personal choices], just as heterosexual persons do."[126] This is "consistent with the norm that homosexuality is a tolerable sexual variation"[127] and in line with mainstream psychology's approach to sexual orientation—"that homosexuality, in itself,

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119. 539 U.S. 558 (2003).

120. Brief of Respondent at 4, *Lawrence*, 539 U.S. 550 (No. 02–102).

121. *Lawrence*, 539 U.S. at 567.

122. *Id.*

123. *Id.* at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)); *see also id.* at 578 ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.") (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

124. *Integral Psychology*, *supra* note 16, at 482; *see also infra* notes 141–143 and accompanying text.

125. *See* Marc Spindelman, *The Boundaries of Liberty after* Lawrence v. Texas*: Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619–32 (2004) (arguing that the *Lawrence* Court accepted the "like-straight" argument that "[g]ays are just like heterosexuals.").

126. *Lawrence*, 539 U.S. at 574; *see also id.* at 578 ("The case . . . involve[s] two adults who . . . engaged in sexual practices common to a homosexual lifestyle. . . . The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

127. Eskridge, *supra* note 57, at 1065.

[is] not a mental disorder."[128] Absent any demonstrable, scientific justification that this type of private conduct is more or less wrong or harmful depending on the sexual orientation of the actors, the Court found that Texas's law was based on stage four absolutism and sociocentrism—defining a social group by sexual orientation, with no stage five reasoning to support the distinction—and struck it down as unconstitutional.[129]

The Court summarized its holding with the quote that seemed to throw the entire spectrum of morals legislation into doubt: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[130] In developmental terms, however, it takes on a more benign form, consistent with decades of morals legislation jurisprudence: The fact that the governing majority in a State has viewed a particular practice as immoral via stage four reasoning is not a sufficient reason for upholding a law prohibiting the practice.[131]

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128. Jack Drescher et al., *Homosexuality, Gay and Lesbian Identities, and Homosexual Behavior*, *in* 1 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1936, 1941 (Benjamin J. Sadock & Virginia A. Sadock eds., 8th ed. 2005). This is yet another context that reveals the complex interaction between developmental stages. Stage five reasoning relies, in part, on "natural laws" that can be learned and mastered. *Integral Psychology*, *supra* note 16, at 482. Thus, someone using a mix of stage four and stage five reasoning might deduce that non-conformist homosexual conduct violates natural laws as deviant behavior. *See, e.g.*, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 7, 121 (1952) (designating homosexuality as "sexual deviation" and a "sociopathic personality disturbance"). Over time, however, this natural law rationale collapsed as stage five scientific reasoning broke away from stage four conformist reasoning. *See, e.g.*, William G. Herron & Mary Jane Herron, *The Complexity of Sexuality*, 78 PSYCH. REPORTS 129, 129–30 (1996) (reviewing relevant studies and concluding that the "interactive position"—positing "a genetic predisposition to sexual orientation that is environmentally activated"—is most probable). This idea is further bolstered by the influence of stage six relativism and tolerance. *See generally* Drescher et al., *supra*, at 1938–41, 1944–51 (detailing the history of psychiatric approaches to sexual orientation and summarizing recent research on the origins of homosexuality)

129. Notably, individuals and private "expressive associations" may still discriminate on the basis of sexual orientation. In *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), the Court held that a New Jersey law requiring the Boy Scouts to accept a gay scoutmaster unconstitutionally violated the group's First Amendment right to freedom of expressive association. *Id.* at 656. As Professor Huhn summarized:

> Under the First Amendment, people are free to condemn homosexual conduct . . . . Furthermore . . . as a matter of constitutional right, religious and expressive organizations will still be free to discriminate against homosexuals, and individuals will continue to have a constitutional right to discriminate against homosexuals when making their own "intimate and personal choices" such as whom to associate with on a personal basis.

Huhn, *supra* note 13, at 93.

This is still consistent with Wilber's developmental approach, in which "[t]he health of the entire spiral is the prime directive." TOE, *supra* note 13, at 56 (emphasis omitted). Each stage is "*an absolutely necessary and desirable element* of the overall spiral." *Id.* at 56; *see also id.* at 162 n.4. Freedom of association as guaranteed by the First Amendment is one way in which stage four, a necessary element of the developmental spiral, may find expression.

130. *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

131. In fact, at least two systems—Ronald Inglehart's and Paul Ray and Sherry Ruth Anderson's—apply the term "traditional" to the stage that correlates with Spiral Dynamics stage four. *See supra* note 33; *cf.* Eskridge, *supra* note 57, at 1084–85 (arguing that the Supreme Court's morals

G. *The Emergence of Stage Six*

Elements of recent Supreme Court decisions suggest that stage six reasoning and increasingly worldcentric values are beginning to enter into the Court's reasoning. In *Palmore v. Sidoti*,[132] the Court found that the social stigma attaching to mixed-race families could not constitutionally justify removing an infant from its natural mother. The Court acknowledged that racial prejudice, a manifestation of stage four ethnocentrism, may have profound objective, scientifically demonstrable effects.[133] Stage five reasoning takes such effects into account.[134] Stage five reasoning, however, also begins to emphasize worldcentric values,[135] supplanting stage four's sociocentrism, and worldcentrism carries even greater emphasis in stage six reasoning.[136] Thus in *Palmore*, though demonstrable harms brought about by society's ethnocentrism supported the state's action, the Court found that stage five and six worldcentric ideals took precedence over stage five demonstrable harms.[137]

Likewise, in the context of gender, it is not always apparent whether a law that benefits women is justified by stage four sociocentrism, by stage five rationality, or by stage six egalitarianism, diversity, and antihierarchical values.[138] The Court has generally upheld "laws benefiting women when the Court believes the state was motivated by remedial justifications rather than archaic stereotypes,"[139] but the constitutionality of laws motivated by remedial justifications suggests that the Court is giving precedence to stage six's egalitarianism and diversity over stage five's reliance on merit.[140]

Privacy, which weighed heavily in *Lawrence*, is also not an idea that falls neatly along developmental lines. Increased emphasis on privacy concerns, though, suggests that stage six reasoning is at work. Privacy concerns first become meaningful in stage five reasoning, with that stage's emphasis on individuality and autonomy.[141] Privacy concerns are even more important in

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legislation jurisprudence is that of a modern society, as defined by Max Weber, rather than that of a premodern or "traditionalist" society).

132. 466 U.S. 429, 434 (1984).

133. *Id.* at 434.

134. *See supra* notes 35–36 and accompanying text.

135. *See supra* note 36 and accompanying text.

136. *See supra* note 27.

137. Though beyond the scope of this Note, the Court's affirmative action jurisprudence reveals a similarly complex—if not more complex—interaction between developmental stages. *See, e.g.*, *Sex, Ecology, Spirituality*, *supra* note 20, at 765 n.13.

138. *See* TOE, *supra* note 13, at 9–11. Consider, for example, the issue of the role of women in the military, where traditional stereotypes and social norms, demonstrable physical differences, and emerging emphasis on diversity and egalitarianism converge and clash. *See supra* note 75.

139. FARBER ET AL., *supra* note 70, at 348.

140. *See supra* notes 48–56 and accompanying text.

141. *Integral Psychology*, *supra* note 16, at 482.

stage six reasoning, as postconventional values carry even greater weight.[142] Different individuals using stage five or stage six moral reasoning may put more or less emphasis on personal or collective social or cultural ends,[143] affecting the relative importance of privacy concerns in moral reasoning, but the Court's increasing emphasis on privacy may further signal that stage six reasoning is entering morals legislation jurisprudence.

These examples are not nearly conclusive, of course. Development moves slowly, and it will be many more decades before we can say with any certainty that the Court has embraced stage six values. But these examples, together with the stage four/stage five pattern already outlined, suggest that developmentalism may indeed be a useful descriptive tool in this area.

II. THE RESPONSE: ADVANTAGES OF A DEVELOPMENTAL APPROACH AND PARALLELS WITH OTHER REACTIONS TO *LAWRENCE*

The developmental understanding of constitutional review of morals legislation described in Part I is little more than a mental exercise unless it has some advantage over other approaches. This Part argues that a developmental approach, as a descriptive matter, contains important truths missing from other responses to *Lawrence*. Section II.A argues that a developmental approach is largely consistent with the most common responses to *Lawrence*, but yields significant advantages as well. Section II.B examines the most significant advantage of a developmental approach, arguing that it lends reliability and determinability to the use of evolving standards in constitutional review of morals legislation while still maintaining primary state control over public health, safety, and morals.

A. *Responses to* Lawrence

As described in the Introduction, the academic responses to *Lawrence* have taken a number of forms. Three of the most common have been: (1) criticism—unelected judges replaced Texas's moral decision with their own; (2) disbelief—widespread moral disapproval may still provide a legitimate state interest; and (3) approval—morality alone no longer provides a sufficient basis for law. Sections II.A.1, 2, and 3 discuss each of these responses in turn, arguing that each contains an element of truth that the a developmental approach includes and expands upon.

1. *Criticism*

One common response to *Lawrence* has been criticism that the Supreme Court merely replaced a state legislature's moral decision with its own. As

142. *See* TOE, *supra* note 13, at 15 ("[Stage six] sanctions for truth and goodness are established largely by individual preferences (as long as the individual is not harming others). . . . 'You do your thing, I do mine' is a popular summary of this stance.").

143. *See, e.g.*, TOE, *supra* note 13, at 166–168 n.7.

one commentator put it: "The real issue for the Court seems to be its disagreement with the particular morals chosen by Texas."[144] Criticisms in the popular press of "activist" adjudicating followed suit.[145]

In the context of a developmental approach, this criticism is partially true. The Court disagreed with Texas's absolutist and sociocentric stage four reasoning and, absent a stage five justification, struck down the resulting legislation as unconstitutional. As detailed in Part I, however, this is consistent with the great weight of morals legislation jurisprudence over the past half-century; *Lawrence* is simply the most recent example of the Supreme Court's adherence to stage five moral reasoning.

2. *Disbelief*

A second common response has been to hold on to the belief that widespread moral disapproval may still justify a law, despite the Supreme Court's apparent rejection of this justification. For example, one commentator suggested: "[W]here moral disapproval is of long enough standing and still widely agreed upon by most Americans, the Court would be unlikely to overturn a law reflecting such disapproval . . . ."[146] The underlying sentiment appears to be that the reach of *Lawrence* will be limited in the years to come.

Again, this statement is partially true in the context of a developmental approach. Importantly, though, a developmental approach squares it with *Lawrence* and recent morals legislation jurisprudence. A significant portion of the population operates primarily from stage five.[147] Agreement by the vast majority on moral disapproval of a certain practice likely signals that a sizable portion of those operating at stage five also disapproves. For example, since the vast majority of people support a ban on murder, there is quite likely a

144. Blazier, *supra* note 5, at 38; *see also supra* note 5 and accompanying text. Of course, there are other criticisms of *Lawrence* outside the scope of this Note. *See, e.g.*, Lund & McGinnis, *supra* note 5, at 1557 (criticizing *Lawrence*'s reliance on "the most anticonstitutional branch of constitutional law: substantive due process," a "tissue of sophistries embroidered with a bit of sophomoric philosophizing," and an "undisciplined approach to law"); Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 411, 413 (2004) (arguing that the Court's reliance on substantive due process rather than equal protection constituted a "major failure").

145. *See, e.g.*, Steve Barrett, Opinion, *Attacks on Marriage Must Halt*, CHATTANOOGA TIMES FREE PRESS, Oct. 15, 2003, at B7; *Focus on the Family's Dobson Decries 'Concerted Effort to Drive God Out of the Public Square'; Urges Stand Against Judicial Tyranny*, U.S. NEWSWIRE, Sept. 17, 2003, *available at* http://releases.usnewswire.com/GetRelease.asp?id=20888; M.D. Harmon, *Defend Marriage by Passing the Federal Marriage Amendment*, PORTLAND PRESS HERALD, July 21, 2003, at 9A.

146. McDonnell, *supra* note 6, at 348; *see also supra* note 6 and accompanying text.

147. *Integral Psychology*, *supra* note 16, at 482 (estimating that 30% of the population operates from stage five); *cf.* INGLEHART, *supra* note 17, at 38 tbl. 2–3 (finding that "materialists" comprised 31% of the U.S. population in 1972–73).

stage five justification for banning murder.[148] This is not to say that the Supreme Court should rely on opinion polls to come to its decisions. Rather, if the vast majority of Americans disapproves of a certain practice, the government can likely use stage five reasoning to justify a law banning the practice. Simply by continuing to uphold laws justified by stage five reasoning, the Supreme Court will likely not overturn laws reflecting moral disapproval widely agreed upon by most Americans.

3. *Approval*

The most common academic response to *Lawrence* has been to take the Court's opinion at face value and abandon the idea that morality alone provides a sufficient basis for law. This has primarily taken two forms. Some scholars have strictly adhered to John Stuart Mill's harm principle (the "Millian approach"),[149] arguing that preventing harm to others is the only constitutional justification for morals legislation.[150] Others have incorporated aspects of the harm principle without fully embracing it, arguing that morals legislation must be justified by demonstrable harm, but not necessarily harm to others (the "broader empirical approach").[151]

These approaches also contain important partial truths embodied in the developmental approach. Under a scheme regulated by the harm principle, the government is only able to step in to prevent harm to others. This is consistent with the stage five drive to "seek[] truth and meaning in individualistic terms" without interference from the government or any social group.[152] And if a government applies the harm principle without regard to social distinctions, as its advocates presumably intend, it is consistent with stage five worldcentric values.

The Millian approach, however, has two major weaknesses. First, even its proponents admit that it does not accurately reflect the current state of the law, only where they believe the law is headed.[153] It cannot easily account for the constitutionality of bans on assisted suicide[154] or the presumed

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148. Note, however, that what qualifies as "murder" depends, in part, on one's stage of moral development. *See* Kohlberg & Elfenbein, *supra* note 25 (describing stage-dependent approaches to capital punishment).

149. *See supra* note 7.

150. *See, e.g.*, Burgess-Jackson, *supra* note 8, at 415; Dubber, *supra* note 8, at 568.

151. *See, e.g.*, Goldberg, *supra* note 8, at 1310; Nan D. Hunter, *The Boundaries of Liberty After* Lawrence v. Texas*: Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1531 (2004).

152. *Integral Psychology*, *supra* note 16, at 482. Notice also that the harm principle is an almost perfect expression of stage six moral reasoning: "[Stage six] sanctions for truth and goodness are established largely by individual preferences (as long as the individual is not harming others)." TOE, *supra* note 13, at 15.

153. *See, e.g.*, Burgess-Jackson, *supra* note 8, at 415 ("It is not clear whether legal paternalism remains a valid ground of criminal prohibition, since that was not at issue in [*Lawrence*]. But the clear movement is toward Millian liberalism.").

154. *See* Dubber, *supra* note 8, at 570; *see also* Washington v. Glucksberg, 521 U.S. 702 (1997).

validity of, for example, helmet laws or prohibitions on private drug use.[155] Second, it is impossible to define what is or is not a harm without moral judgment.[156] The Millian approach invokes the harm principle while leaving "harm" mysteriously undefined.

The broader empirical approach improves on the first weakness, but not the second. By arguing that states must appeal to an "empirical or otherwise demonstrable harm[]"[157] or an "objective, material referent"[158] in order to justify morals legislation, but not necessarily a harm with respect to a third party, this approach can account for the constitutionality of certain laws inconsistent with the harm principle. Still, these "demonstrable harms" go undefined. One scholar puts this problem in focus, but without offering a solution:

> Consider . . . the use of race discrimination to sustain apartheid [and] the facilitation of murder to preserve a family's honor . . . . By some, these actions are considered to be profound harms that endanger both individuals and society; to others, these same acts are essential to preserving individual and societal well-being.[159]

Even in the broader empirical approach, moral judgment retains a powerful role.

A developmental approach includes all aspects of the broader empirical approach, but also begins to tackle the task of defining harms. Stage five objective, experimental, scientific moral reasoning is synonymous with an appeal to "demonstrable harms" or "objective, material referents." But the developmental approach goes further, using postconventional and worldcentric values to help define "demonstrable harm."[160] Judges may properly consider the ethnocentric use of race discrimination to sustain apartheid and the facilitation of murder to preserve a family's honor as harms violating stage five worldcentric values, though lower-stage reasoning might justify such actions as promoting individual, ethnic, or narrow societal well-being.[161] In this way, a developmental approach includes the important truths of the other approaches and adds a level of descriptive insight that the other approaches cannot offer.

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155. *See* Lund & McGinnis, *supra* note 5, at 1585.

156. *See supra* note 10 and accompanying text.

157. Goldberg, *supra* note 8, at 1240.

158. Hunter, *supra* note 151, at 1531.

159. Goldberg, *supra* note 8, at 1303.

160. *See, e.g.*, *Integral Psychology*, *supra* note 16, at 547–48 ("[T]he stream of moral development . . . includes not only principles of moral judgment (Kohlberg) and care (Gilligan)—or how one reaches a moral decision—but also moral span, or those deemed worthy of being included in the decision in the first place."); *cf.* Weinstein & DeMarco, *supra* note 10, at 458 ("For rational-basis review, we submit, not only does one need a rational relation between the law and the state's interest (in having the law), one needs to have an argument showing that the interest of the state is legitimate, which should be interpreted at least in part as saying that one must have a plausible argument for the *moral interest* and thereby the law.").

161. *See* BECK & COWAN, *supra* note 20, at 208, 212–13; TOE, *supra* note 13, at 120.

B. *Evolving Objective Standards*

Though many scholars speak fondly of an evolving interpretation of the Constitution,[162] the backlash against this approach has grown in recent years. One common objection is that there is no "guiding principle" with which to order an evolving interpretation of the Constitution, and constitutional interpretation thus devolves into personal preference.[163] The evolving Constitution, then, is "relative and discretionary to the sitting bench."[164]

A developmental approach renders this criticism largely ineffective, at least in the context of morals legislation. Even more striking, a developmental approach does not just suggest a principle that would lend guidance to constitutional interpretation if adopted by the Supreme Court. Rather, it suggests that such a principle *already* underlies the Supreme Court's recent morals legislation jurisprudence. Judges interpret constitutional ideas that do not lend themselves to easy definition—in terms such as "liberty" and "freedom" and phrases such as "equal protection" and "due process"—with an eye towards fairness, justice, and cultural values.[165] These ideas carry fundamentally different meanings at different developmental stages, stages that all people grow through—including those that carry the title of "judge" or "justice".[166] But most judges consciously restrain themselves from forcing their personal views on society.[167] Instead, as described in Part I, the implicit focus is the stage structure and reasoning, rather than the content, of a particular law or policy. In this way, judges can—and do—apply evolving standards in a relatively objective manner, reflecting the universal and invariant nature of developmental stages.[168] This is much more than "relative and discretionary to the sitting bench."

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162. *See, e.g.*, Eskridge, *supra* note 57, at 1048–51 (arguing that changed circumstances and legitimacy in the eyes of an evolving citizenship require an evolving interpretation); James E. Fleming, *The Scholarship of Frank I. Michelman:* Lawrence*'s Republic*, 39 TULSA L. REV. 563, 571–72 (2004) (arguing that the *Lawrence* opinion takes a jurisgenerative approach to tradition as evolving consensus); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04 (1985) (arguing that the framers intended that the Constitution be interpreted in the common law tradition).

163. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 44–45 (1997).

164. Jessica J. Sage, Comment, *Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession*, 31 FLA. ST. U.L. REV. 707, 735 (2004); *see also supra* notes 144–145 and accompanying text.

165. *Cf.* Michaelson, *supra* note 46, at 1616 ("Law, in evaluating these scientific and social-scientific claims, is not 'intruding' upon some sort of autonomous zone of societal debate, moral theory or scientific fact. Rather, law acts as the appropriate mediator between 'moral' claims which depend in part on sociology, physiology, and other disciplines for their support, and whose theoretical underpinnings may trigger constitutional questions.").

166. *See, e.g.*, *supra* notes 28–36 and accompanying text.

167. McDonnell, *supra* note 6, at 355; *see also* Levine, *supra* note 12, at 17–19 ("[Morality, justice, and fairness] should not merely be based on the personal moral code of the judge, but rather the historically enduring standards of righteous conduct and principles of justice that reflect the best in our national character.").

168. *Supra* Part I; *supra* notes 15–17 and accompanying text.

Moreover, a developmental approach keeps judges in an ostensibly judicial role, leaving primary control of the police power to the states. Traditionally, courts have defined the police power of the states as "the authority to provide for the public health, safety, and morals."[169] A developmental approach yields a more accurate definition of the modern police power: the authority to provide for the public health, safety, and morals via stage five reasoning.[170] Following the pattern described in Part I, judges strike down state actions as unconstitutional only when they violate constitutional principles interpreted through stage five structures. Within stage five reasoning and structures, states have wide latitude to set their own policies and preferences.

Of course, if developmental models can describe constitutional review of morals legislation, as suggested by the pattern in Part I, a developmental approach demands more than static reliance on stage five reasoning. A developmental approach requires us to acknowledge that our modern understanding of the meaning of justice, freedom, due process, and equal protection is not absolute, but filtered through stage-specific structures and reasoning. Stage six reasoning may have already entered into the Supreme Court's reasoning[171] and scholars have already suggested tests that rest on core stage six values,[172] or even higher stage reasoning.[173] Assuming that the developmental approach provides an accurate description, there will remain a place for lawyers and judges to consider evolving standards and shared cultural values in determining the constitutionality of morals legislation in light of open-ended constitutional clauses[174]—and they can continue to do so without resorting to purely personal views and beliefs.

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169. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion).

170. This is subject to other constitutional restrictions, of course. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939) ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.")

At least one other scholar has described this stage four/stage five distinction, though not in explicitly developmental terms. Professor William Eskridge made the distinction along Max Weber's descriptions of premodern and modern societies, Eskridge, *supra* note 57, at 1084–85, which Wilber argues correspond to pre-stage five and stage five, respectively. TOE, *supra* note 13, at 69, 133; *see also* HABERMAS, *supra* note 16, at 158 (describing "The Modern Age" as embodying "postconventionally structured domains of action" and "general, formal, and rationalized law").

171. *See supra* Section I.G.

172. *See* Eskridge, *supra* note 57, at 1025–26 (arguing that the "jurisprudence of tolerance" justifies the *Lawrence* Court's reasoning).

173. *See* TOE, *supra* note 13, at 56, 165 n.6 (describing the "prime directive" as "[t]he health of the entire spiral"—in other words, all stages of development—a test consistent with stage seven or eight (emphasis omitted)); *see also Sex, Ecology, Spirituality*, *supra* note 20, at 640 n.23, 651 n.59, 761 n.13 (describing the "Basic Moral Intuition" and its application along multiple stages of development).

174. *See* Post, *supra* note 12, at 8 ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture."); Levine, *supra* note 12, at 17–18, 20–25 (arguing that judges should continue to consider morality, justice, and fairness in the judicial process, within the constraints of the common law tradition).

This is not to say that applying a developmental test to constitutional review of morals legislation is easy—if nothing else, the journey from *Bowers* to *Lawrence* proves that it is anything but. This is also not to say that developmentalism can ever completely determine the constitutionality of morals legislation—at the very least, there may be independent constitutional bars to otherwise justifiable legislation,[175] and even authorities in developmentalism acknowledge that other important factors influence moral decisions.[176] It is to say that a developmental understanding, as a descriptive matter, yields important insights into constitutional review of morals legislation—insights missing from the current discussion.[177]

III. THE OUTLOOK: UNSETTLED QUESTIONS CONCERNING THE CONSTITUTIONALITY OF MORALS LEGISLATION

This Part concludes this Note with an eye towards potential challenges to morals legislation in the years and decades to come. This Part applies a developmental framework to three examples of morals legislation that Justice Scalia called into question in his *Lawrence* dissent.[178] Section III.A predicts that the Court will likely find laws against fornication unconstitutional, Section III.B argues that the Court will likely find that bans on bestiality pass developmental and constitutional scrutiny, and Section III.C argues that a Court applying stage five moral reasoning will also uphold laws against prostitution, though applying stage six reasoning may yield less support.

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175. For example, a law banning all firearms might be justified on stage five empirical evidence and logical proof, but the Second Amendment provides a constitutional bar to such a law.

176. *See, e.g.*, SHAFFER, *supra* note 17, at 337 ("[B]ecause Kohlberg concentrated so heavily on moral reasoning, we must rely on other perspectives to help us to understand how moral affect and moral behavior develop, and how thought, emotions, and behavior interact . . . ."); TOE, *supra* note 13, at 53–54 (detailing at least eight major elements of an "integral model"); *see also* HABERMAS, *supra* note 16, at 168–69 ("World views . . . are highly complex formations that are determined by cognitive, linguistic, and moral-practical forms of consciousness; the composition and the interplay of the structures is not fixed once and for all."); Kohlberg, *Current Statement*, *supra* note 23, at 485–86 ("[M]oral stages [are] part of a general cognitive-developmental approach to an evolving unitary self oriented to a unitary social world.").

177. Even acknowledging the developmental pattern and framework, one can still argue whether the courts should be involved in moral decisions at all, or whether courts should give changing interpretations of unclear constitutional terms and phrases any weight at all, as normative matters. These arguments are outside the scope of this Note.

178. *See Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . . .").

A. *Fornication*

For present purposes, fornication is sexual intercourse between two unmarried consenting adults.[179] Under this definition, the only factor that distinguishes fornication from permissible marital sexual intercourse is that the two actors are not married. Assuming that a state could not bar marital sexual intercourse without violating established privacy rights,[180] laws against fornication cannot pass a stage five test unless demonstrable evidence or logical proof supports protecting different degrees of privacy based on marital status.

If the Supreme Court continues to apply stage five reasoning, it will likely find that the marital status distinction does not support upholding the law. The most common asserted reasons for laws against fornication—to prevent unwanted pregnancies and ensure proper child rearing—will likely fail because there is only a tenuous connection between the marital status of sexual partners and poor child rearing or unwanted pregnancies.[181] And the Supreme Court has already addressed the marital status distinction with worldcentric reasoning, in *Eisenstadt v. Baird*:[182]

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[183]

Differences in marital status do not support granting different degrees of privacy concerning contraception, and the tenuous connections between differences in marital status and unwanted pregnancies or poor child rearing do not support a change in this reasoning in the context of sexual intercourse.

The key point here, though, is that if the Court continues to apply stage five reasoning, its focus will be on whether the connections between differences in marital status and unwanted pregnancies or poor child rearing are strong enough, weighed against privacy rights, to support laws against

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179. *See, e.g.*, GA. CODE § 16-6-18 (2004) ("An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person . . . ."); MINN. STAT. § 609.34 (2005) ("When any man and single woman have sexual intercourse with each other, each is guilty of fornication . . . .").

180. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577–78 (2003); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that a law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy).

181. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1669–70 (1991) (detailing how fornication statutes underinclusively and overinclusively protect against unwanted pregnancies and poor child rearing and concluding "fornication statutes are not sufficiently tailored to these interests to pass constitutional muster").

182. 405 U.S. 438 (1972).

183. *Id.* at 453; *see also* Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 281–82 (2004).

fornication. Stage four absolutist moral principles of right and wrong will not enter into the analysis.

B. *Bestiality*

Stage five reasoning may support the constitutionality of bans on bestiality. Some people argue that "forced sex by a human with an animal constitutes human imposition upon the animal"[184] and extend the protections against this conduct afforded to people under the law to animals as well, using broad worldcentric reasoning that sweeps animals together with people into the collection of beings for which they consider what is "right and fair."[185] Further, an ever-growing body of scholarship links bestiality to sexual assault on children or sexual assault generally.[186] One may accept these rationales to justify a ban on bestiality and need not rely on absolutist moral principles of right and wrong. Again, the focus will be on the strength of these connections, not on stage four right/wrong absolutism.

C. *Prostitution*

Stage five reasoning can also support laws banning prostitution. Generally, two categories of demonstrable facts support such bans. First, evidence shows that prostitution has harmful secondary effects similar to those cited in the adult entertainment cases, such as increased crime and loss of sales for surrounding businesses.[187] Second, some evidence suggests that prostitution contributes to the spread of disease.[188]

As postconventional values and privacy become more central to moral reasoning with stage six,[189] however, this evidence might no longer be enough to justify all applications of laws banning prostitution. While demonstrable facts might still support restrictions on public prostitution, increased emphasis on values such as privacy, relativism, and tolerance may

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184. Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 173 (2003); *cf.* Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1025–36 (1986) (discussing justifications for laws protecting animal rights); *Sex, Ecology, Spirituality*, *supra* note 20, at 763 n.13 (discussing animal rights and moral development).

185. *See supra* note 23.

186. *See* Eskridge, *supra* note 57, at 1085 & n.217.

187. *See, e.g.*, Loewy, *supra* note 184, at 171; David J. Cieslak, *End to Prostitution Urged During Evening Vigil*, ARIZ. REPUBLIC, Oct. 6, 2003, at 6B; Cindy Schroeder, *Proposal: Regulate Sex-Oriented Businesses*, CINCINNATI ENQUIRER, Aug. 25, 1999, at 1B.

188. *See, e.g.*, Loewy, *supra* note 184, at 171; Edward V. Morse et al., *Behavioral Factors Affecting HIV Prevention for Adolescent and Young Adult IDUs*, J. ASS'N NURSES AIDS CARE, May/June 1998, at 77, 80, 84. *But see* Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 252 (2002) ("With criminal law as a means of preventing HIV, we can say that the trial is not over, but the case looks weak.").

189. *See supra* notes 124, 152.

weigh against laws applied against private acts of prostitution between consenting adults.[190]

All in all, it appears that *Lawrence* and continued reliance on stage five reasoning will not spell the end to morals legislation. Justice Scalia's dire prediction was an exaggeration.

CONCLUSION

Ongoing research in psychology suggests that structures of moral development are constantly at work, so much so that it is almost impossible to see the world beyond one's own developmental structure. When judges apply changing cultural values and ideas like fairness and justice to open-ended constitutional ideas like equal protection, due process, liberty, and freedom, they invariably work within developmental structures. It would seem to be no accident, then, that the Supreme Court's recent morals legislation jurisprudence can be organized relatively neatly along developmental lines.

Moreover, the developmental piece is sorely missing from the morals legislation puzzle. While a developmental approach cannot account for every detail of the Supreme Court's jurisprudence on morals legislation, it contains important truths not included in other approaches. Most importantly, it lends a measure of predictability and reliability to the use of evolving standards in constitutional interpretation, an idea widely championed but poorly understood. Practitioners and judges alike can only benefit from a solid understanding of moral development in defending their clients and deciding their cases as law and society continue to evolve in the years to come.

190. *See, e.g.*, Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 129, 131–32 (1999).