Florida Law Review

Volume 57 | Issue 5 Article 3

December 2005

"Not the Law's Business": The Politics of Tolerance and the Enforcemetn of Morality

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"NOT THE LAW'S BUSINESS:"[1] THE POLITICS OF TOLERANCE AND THE ENFORCEMENT OF MORALITY

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1. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 48 (1963) [hereinafter WOLFENDEN REPORT].

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In order to appreciate the arguments offered by Professor Eskridge in his Dunwody Lecture, I think a review of the relevant entries in the ongoing discussion regarding the enforcement of morality would help us understand the context in which that debate takes place. That review also offers us a broader basis for thinking about these issues than the narrower focus, important as it is, on the continuing evolution of United States constitutional law. An exploration of the ideas on this subject of the foremost legal thinkers of the latter half of the twentieth century also provides a considerably broader context for our understanding than even the cultural history that Professor Eskridge clearly enjoys detailing.

More specifically, I believe that we must start with the Report of the Wolfenden Committee, because that is where the contemporary debate on the enforcement of morality begins. But that Report based its recommendations on the harm principle of John Stuart Mill, so that is actually the real beginning point. On the other hand, the Report did refocus academic attention on Mill once again and launched a broad colloquy on the question of harm. For Mill, that turns out to be the right to be left alone. John Kaplan argues that secondary harms have to be considered, but they would interfere with privacy only on the fringes. Lord Patrick Devlin's fear of societal disintegration makes him willing to breach that ideal, but only when he believes that society is threatened with disintegration. H.L.A. Hart criticizes Devlin and claims to defend Mill. But Hart's embrace of paternalism poses a threat to autonomy. Lon Fuller also criticizes Mill, but he produces a positive conception of freedom that advances the debate considerably.

I find the work of Emile Durkheim provocative, as well as that of some lesser known sociologists. Durkheim's fear of anomie justifies for him some inroads on privacy, but only because of the important public interest in maintaining social solidarity. In my own previous musings on this topic, I worry about the distinct challenges of a polycultural society, because of the threat to freedom posed by moral crusades that manufacture deviance and generate negative reciprocity. Instead, I advocate a pursuit of positive toleration as an indispensable ingredient in the healthy development of our society. But to start with the Wolfenden Committee, we must turn our attention back fifty years.

I. THE WOLFENDEN COMMITTEE CREATES A STIR

The 1950's is when the modern debate begins, specifically with the appointment of the Wolfenden Committee as an arm of the British

Parliament.[2] Its mandate was to study what revisions, if any, should be made to the criminal laws regulating sexual offenses.[3] They deliberated for several years and came back with a report in 1957.[4] Their recommendations included not criminalizing prostitution by individuals.[5] Procuring, maintaining a house of prostitution, and living from the earnings of prostitutes would remain criminal offenses.[6] However, the proposal that received by far the greatest public attention was the recommendation that homosexual activity between consenting adults no longer be a criminal offense.[7] Not surprisingly, that proposition attracted considerable debate.[8] The basis on which the Wolfenden Committee made its recommendations was, essentially, a restatement of the famed "harm" principle of John Stuart Mill.

A. *Mill's Harm Principle*

Although Mill was the leading Utilitarian philosopher of the latter part of the nineteenth century, his harm principle is undoubtedly his most famous statement. Moreover, he makes it in his least utilitarian, but best-known, work, the *Essay on Liberty*.[9] There, his defense of liberty is as uncompromising as he can make it. Consider the conviction he expresses on the subject:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That 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. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling

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2. *Id.* at 19.
3. *Id.*
4. *Id.* at 191.
5. *Id.* at para. 224.
6. *Id.* at 189-90.
7. *See id.* at 187.
8. *See, e.g.*, PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1972); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY (1967).
9. J.S. MILL, *Essay on Liberty, in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT (New American ed. 1951).

> him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.[10]

When we remember the nineteenth century context in which Mill wrote, the scope of his injunction becomes even broader than it seems now. At that time, if the poet wished the inspiration of opium or some other narcotic, he merely purchased it from his druggist. Such matters, and many others, were not regulated by law, let alone made criminal.[11] So Mill cannot have been arguing against legal regulations of paternalistic origin that would not come into being for a generation or more. In short, the legal environment in which Mill writes is quite libertarian by our present standards. Hence, although he opposes legal regulations on paternalistic grounds, he is even more concerned about improper social pressures. He argues against ostracizing someone simply because we believe her behavior is unwise. We can try to reason with a person, but it is wrong to gossip about or shun that person simply because we disapprove of his or her life-style. Social sanctions should not be employed against someone, unless her behavior actually harms someone else. Hence, unless we can show harm to others, as in the participation of non-adults, we would not be able to make a case that would satisfy Mill against consensual, adult homosexual behavior.

B. *Can Harms Be Indirect?*

The more challenging turn comes when we attempt to define what actually constitutes harm, at least as Mill would accept it. To begin, it seems clear that Mill would require that the harm be direct and tangible. One consequence of that view is that there is no place in his calculus for indirect harms. But can we categorically exclude them from relevance to public policy decisions? For example, the late John Kaplan of Stanford Law School argued that certain indirect harms could be relevant in framing legislation.[12] Kaplan names four, but they are really two pairs. These secondary harms are modeling/categorical imperative and public ward/non-support.[13]

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10. *Id.* at 73.
11. John Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065, 1072.
12. *Id.* at 1065.
13. *Id.* at 1066-67.

1. Modeling and the Categorical Imperative

The modeling harm would occur when a famous baseball player uses steroids. The harm results when millions of youngsters who wish to grow up to be like the star also turn to steroid use. The categorical imperative is similar. Based on Immanuel Kant's famous imperative, it commands that we should always will that everyone should act as we do.[14] We must always will that our actions be universalized. If one believes that a little cocaine is alright, then one should also believe that it would be good for all to behave in that same way. We may note an ambiguity in Kant's imperative in that it cuts differently depending upon how broadly or narrowly the 'universal' is stated. For example, if we say that one engaging in homosexual activity must will that everyone should do likewise, we would come to a negative conclusion. On the other hand, if we state the principle more broadly as in our will that adults should seek satisfying consensual sexual activity, then we would come to a different, and universalizable, conclusion.

2. Public Ward and Non-support

The public ward harm addresses the motorcycle rider who rides without a helmet and suffers severe brain damage in an accident. The public is left to provide for the care of the improvident but carefree cyclist; all taxpayers contribute to support that foolish act. The non-support harm is similar. Here focus turns to the inability of the brain-damaged cyclist to provide for those who are dependent upon him. The dependents, and the public who will be called upon to step into the breach, are harmed. Kaplan contends that all of these secondary harms may be relevant in formulating public policy.[15] All of them are examples of harms that would not be included in Mill's concept of direct harm. We would probably see no obvious application to the question of legitimizing homosexual behavior in these indirect harms. However, one objection might be based on the worry that homosexual couples are much less likely to have children, thereby placing a drain on the taxation and security systems that depend on the existence of succeeding generations.

C. *What Constitutes Harm Anyway?*

Moreover, limiting harm only to direct harms is not the only problem for Mill's simple principle. Even the concept of direct harm itself requires

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14. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 18 (Mary Gregor ed. & trans., 1997) (discussing the categorical imperative); IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 22 (Thomas Kingsmill Abbott trans., 1785) (same).

15. *See* Kaplan, *supra* note 12, at 1965-67.

further exploration to help us define what might actually constitute "harm." First, the concept of harm depends on social and cultural definitions. You cannot define theft without a concept of property, and we know that perceptions of property vary culturally.[16] Second, we cannot really justify classifying something as a harm unless we carry out an empirical study of the actual consequences.[17] Far too many restrictions of liberty have been justified on the grounds of imagined dire consequences, in the absence of any real information about the subject. Much twentieth century regulation was adopted without the benefit of any solid factual foundation. Emotion was frequently substituted as a motivation for law without any weighing of the costs and benefits of the proposal.[18] We now accept the adoption of Prohibition as one such large mistake. But far too much regulation was adopted on the basis of bias and prejudice against groups not considered within the mainstream of society. A major emphasis of Eskridge's argument is that legal restrictions on adult homosexual behavior provide a glaring example of exactly this kind of unjustified legislation.[19]

From the foregoing, we clearly see that Mill's harm principle has been routinely ignored in legislative deliberations. However strong Mill's expression of his convictions may have been, his ideas nevertheless remained merely a standard component of the undergraduate liberal arts reading canon for almost a century, until 1954. Then, for the first time, in the deliberations of the Wolfenden Committee, Mill's harm principle came to play a leading role in the formation of public policy. Consider the Committee's statement:

> [T]he function of the criminal law . . . is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

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16. *See* Ernest Nagel, *The Enforcement of Morals*, 28 THE HUMANIST, No. 3, 20-27 (May-June 1968), *reprinted in* ETHICS AND PUBLIC POLICY 265, 271 (T. Beauchamp ed., 1975).

17. *Id.* at 272.

18. *See, e.g.*, Kaplan, *supra* note 12, at 1068, 1071.

19. *See generally* William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1013 (2005) (arguing that "[t]he new politics was both aggressively negative, invoking themes of disgust and contagion, as well as surprisingly positive, realigning Protestants and Catholics, blacks and whites in a new identity

> It is not . . . the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.
>
> . . . .
>
> [A decisive reason for this limitation is] the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.[20]

I feel certain that Mill would have loved the phrase, "not the law's business." He could hardly have put the proposition more plainly himself.

II. LORD DEVLIN'S FEAR OF SOCIAL CHANGE

The Report of the Wolfenden Committee generated considerable debate, initially in Britain, and subsequently in North America. The first notable entry in the debate came from a distinguished member of the English judiciary. Lord Patrick Devlin was invited by the British Academy to give the prestigious Maccabaean Lecture in Jurisprudence[21] not long after the Committee had released its report in 1957. He tells us that he initially set out to defend the recommendations of the Wolfenden Committee.[22] However, as he prepared his lecture and worked through his reasoning process, he came to the opposite conclusion.[23] He decided that he must oppose their proposals. His reasons for doing so are what interest us. He offers two grounds for rejecting their proposal.

A. *The "Conservative" Thesis*

The first need not detain us too long, because it proves too much. It has been referred to as the "conservative" thesis.[24] That thesis holds that any

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20. DEVLIN, *supra* note 8, at 2-3 (quoting Wolfendon Report, *supra* note 1, ¶ 14, 77).

21. *Id.* at 1-25.

22. *See* DEVLIN, *supra* note 8, at v.

23. *See* DEVLIN, *supra* note 8, at vii ("But study destroyed instead of confirming the simple faith in which I had begun my task; and the Maccabean Lecture . . . is a statement of the reasons which persuaded me that I was wrong.").

24. *Id.* at 17.

society has the right to conserve its own traditions, to preserve the practices that are distinctive to its culture.[25] At first glance, the idea seems unobjectionable. Some British authors, such as Basil Mitchell, have used it as a basis to justify the tutorial method of instruction at Oxford.[26] The argument was also used to support continuation of the strict Sunday blue-laws in predominantly Methodist Wales.[27] The problem, however, is that the conservative thesis would also justify continuation of human sacrifice by the Aztecs, for example—a practice they considered fundamental to the preservation of their culture and even of the physical world.[28] The conservative thesis would also justify the preservation of the institution of slavery in the antebellum South. Although disgusting to us, slavery constituted a distinctive and central feature of that society, as the leading apologist for the Old South, John C. Calhoun, made very clear.[29] The thesis could also be deployed in defense of such stomach-churning violations of fundamental human rights as female genital mutilation, a practice considered centrally important in some subcultures.[30] As Eskridge makes clear, the conservative argument has been employed widely and frequently in attempts to justify discrimination against homosexuals.[31] Hence, the conservative thesis, although promising at first blush, simply paints with far too broad a brush to be of any use as a principle.

B. *The Social Disintegration Thesis*

Devlin's second justification, on the other hand, is more interesting and clearly seems to be his favorite. The social disintegration thesis holds that a society must preserve its fundamental morality in order not to disintegrate.[32] We can imagine the power of this idea to the British schoolboy who labored through Gibbon's *The Decline and Fall of the*

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25. DEVLIN, *supra* note 8, at 11.

26. MITCHELL, *supra* note 8, at 31-32.

27. *Id.* at 34-35.

28. *See* P.J. Gladnick, Aztec Human Sacrifice (2002), http://nv.essortment.com/aztecsacrifice_raif.htm.

29. John C. Calhoun, *Disquisition on Government*, *in* 1 THE WORKS OF JOHN C. CALHOUN 52-59 (R.K. Cralle ed., 1851).

30. *See* World Health Organization, Female Genital Mutilation, Fact Sheet No. 241 (June 2000), http://www.who.int/mediacentre/factsheets/fs241/en/index.html.

31. *See generally* Eskridge, *supra* note 19, at 1013 (discussing the Save Our Children campaign that interpreted the Constitution as allowing "the state to exclude and suppress people (homosexuals) who flaunted their disgusting practices and threatened to pollute the body politick").

32. DEVLIN, *supra* note 8, at 10 ("[W]ithout shared ideas on politics, morals, and ethics no society can exist . . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; . . . the society will disintegrate."); *see also id.* at 13-

Roman Empire.[33] Imagine then the emotional force of that idea to someone who has watched as the once globally-extensive British Empire has been reduced to those modest islands just across *Le Canal Anglais* (the English Channel) from the European Continent. Clearly, the prospect of disintegration holds considerable emotional power for Devlin.

How would Lord Devlin put his thesis into practice? As a judge, he thinks in terms of juries. So, if he can take twelve average citizens and get them to agree unanimously that a certain practice is so disgusting that it is beyond the bounds of tolerance, then he is prepared to use the law with gusto to shore up that particular strand of morality. He visualizes his average citizen as "the man in the Clapham omnibus."[34] Clapham is a working class suburb of London, and the omnibus is simply the typical English double-decker public bus. We would express the same idea by talking about 'Joe Six-pack' or 'Bubba.' He believes that any proposition they can agree on unanimously should be outlawed.[35] In this way, he believes that he can identify those aspects of morality that are so fundamental to the character of the society that the law must support them in order to ward off disintegration. At the time of his lecture, Devlin believed that adult homosexuality was sufficiently disgusting that the practice was beyond toleration.[36]

Moreover, Devlin believes that a society has a right to shore up its morality in the same way that it is justified in punishing treason.[37] Treason tries to bring down the established government. Undermining fundamental morality similarly eats away at the foundations of society. As Devlin himself says:

> If society has a right to make a judgment and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.[38]

However, many critics of Devlin's position have pointed out that treason is a very direct attack on the established government. In contrast, the erosion of any particular strand of morality is likely to be an indicator of change within the society. But to stretch from that recognition to the conclusion that the society itself is being destroyed by the erosion of some

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33. EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (2003).

34. DEVLIN, *supra* note 8, at 15.

35. *See* Leonard Birmingham et al., Letters to the Editor, *Law on Homosexuals*, TIMES (London), May 11, 1965, at 13 [hereinafter *Law on Homosexuals*].

36. DEVLIN, *supra* note 8, at 17-18.

37. *Id.* at 13.

38. *Id.* at 13-14.

particular aspect of morality is a giant step even for a Gulliver, and much too great a leap to be credible.

III. EVALUATING DEVLIN'S POSITION

Devlin's critics have also voiced strident objections to his fundamental proposition that the erosion of morality becomes the disintegration of society. All of them concede that some kind of generally accepted morality is an essential glue of any society. But they cannot accept the proposition that the destruction of any specific canon of morality could cause the disintegration of society. One of Devlin's harshest critics, Professor H.L.A. Hart, expressed his disagreement with Devlin's central view by contending that it was "absurd":

> [T]o move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence.[39]

Ernest Nagel expresses a similar view:

> [I]t is quite plausible to hold that human societies would be impossible without the existence of a community of such general moral ideas. . . . But however this may be, and assuming that the notion of what it is for a society to be destroyed has been clarified, neither logic nor history appears to support the supposition that the violation of any *specific* moral standards prescribed by public morality may threaten the life of a social order.[40]

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39. HART, *supra* note 8, at 51-52.

40. Nagel, *supra* note 16, at 275.

In short, Devlin faces a fundamental challenge. He must show us how a social order may be destroyed by the failure to enforce particular moral standards. Moreover, he faces the especially difficult task of demonstrating to us how we must select those moral standards that are essential to the preservation of society.

On the other hand, we should hasten to correct a widespread misinterpretation of Devlin's position. Many wrongly conclude that Devlin is opposed to social change of any kind. That is not the case; his position is more subtle than that. When the recommendations of the Wolfenden Committee finally came before the British Parliament some nine years after the Report had first been issued, Lord Devlin announced a change in his position.[41] He had not changed his mind about his philosophy; he concluded that his method now dictated a different conclusion.[42] In Britain, as in most of the world, the political system is one of parliamentary responsibility or unitary government. Put simply, that means that the party with the most representatives in the legislature forms the government and selects the Prime Minister.[43] If the party in power fails to support its government by refusing to adopt legislation submitted by it, a vote of no confidence is called for.[44] New elections would then be held within a very short time. The prospect of such early elections is typically a sufficient sanction to maintain party discipline.[45] Normally, representatives in the legislature who are members of the party in power really have very little discretion with respect to whether they will support the government's legislative recommendations.

An important, but very occasional, exception to this general practice occurs when the government announces a free vote. In such a case, representatives will have to decide on the basis of their own conscience.[46] Clearly, in such instances, members of parliament would be open to persuasive arguments. The government of the day announced that the Wolfenden Committee recommendations would be the subject of a free vote.[47] That meant that leading citizens might suggest the better course of

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41. *See Law on Homosexuals*, *supra* note 35, at 13.

42. *See id.*

43. *See, e.g.*, A-Z of Parliament, BBC News, http://news.bbc.co.uk/1/hi/uk_ politics/a-z_of_parliament/p-q/82559.stm (last visited Sept. 19, 2005).

44. *See, e.g.*, The United Kingdom Parliament, Government and Opposition, http://www.parliament.uk/works/pagovopp.cfm (last visited Sept. 19, 2005).

45. *See id.*

46. *See, e.g.*, *Prime Minister* (May 21, 1998), http://news.bbc.co.uk/1/hi/uk_politics/a-z_of_parliament/p-q/82559.stm.

47. Speaking more technically, the government did not introduce the bill and did not take a position on it. The Literary Enyclopedia, The Sexual Offences Act (1967), http://www.litencyc.com/php/stopics.php?rec=true&UID=1383 (last visited Sept. 18, 2005) ("In May 1965, Lord Arran introduced a bill to the House of Lords proposing the decriminalization of consensual homosexual

action. In England, the time-honored manner of announcing such a position is in a letter to *The Times* (London). Lord Devlin, joined by other law Lords, did exactly that.[48] In the letter, he announced that he now supported adoption of the Wolfenden Committee recommendations. Why? Because he no longer believed that consensual sexual contact between adult homosexuals met his standard of beyond toleration. When he delivered his lecture initially, he believed that was the case. But public attitudes had shifted sufficiently in the interim to lead him to believe that criminalizing homosexual conduct could no longer be justified on that ground. This example shows us that Devlin is not unalterably opposed to social change.[49] We could characterize his view instead as wishing to keep his foot firmly on the brake so as to keep the pace of social change as slow as possible.

IV. HART'S AMBIGUOUS DEFENSE OF MILL

We must now turn to a consideration of the strident criticisms of Devlin's argument offered by Professor H.L.A. Hart. Hart was Professor of Jurisprudence in Oxford from 1953 to 1968, joining the law teaching staff at Oxford after World War II.[50] After having been admitted to practice as a Barrister, he served during the War in MI-5.[51] After that experience, he returned to the academic world for the remainder of his career.[52] In 1962, he was invited to offer a series of lectures at Stanford,[53] which were subsequently published as *Law, Liberty, and Morality*.[54] In those lectures, Hart unleashed his vigorous criticisms of Devlin's position.[55] Moreover, he also purported to defend Mill's harm principle, at least with regard to "the enforcement of morality."[56] He took these positions on the basis of several arguments. One of these I have set out in the text above: that it is illogical to equate the change of any particular strand of morality with the destruction of the entire society.[57]

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sex. The bill was passed in June 1966. Labour M. P. Leo Abse introduced an identical bill to the House of Commons the same month, and the bill was passed in December 1966.").

48. *Law on Homosexuals*, *supra* note 35, at 13.

49. *See* DEVLIN, *supra* note 8, at 18.

50. NICOLA LACEY, A LIFE OF H.L.A. HART, THE NIGHTMARE AND THE NOBLE DREAM 119, 156, 297 (2004).

51. *Id.* at 84.

52. *Id.* at 119.

53. HART, *supra* note 8.

54. *See* HART, *supra* note 8.

55. *See supra* note 39 and accompanying text.

56. HART, *supra* note 8, at 5.

57. *See supra* note 39 and accompanying text.

Beyond that, he applies a distinction first offered in his previous work, *The Concept of Law*.[58] The distinction is between positive morality and critical morality.[59] In actuality, the distinction is not original; instead it restates the distinction John Austin made between positive morality and the principles of legislation.[60] For Austin, the principles of legislation are the precepts of utility which ought to guide the making of laws. Positive morality, on the other hand, is the morality actually found in a society. In contrast, critical morality is morality as it has been vetted by philosophers: an ideal morality.

As it happens, ideal morality for both Austin and Hart is utilitarian philosophy. Both took the attitude that the morality of society deserves no particular respect in itself. Unlike William Blackstone, they have no special regard for tradition. Instead, they believe that social morality should be scrutinized on the basis of the principles of utility to determine whether it warrants any respect.[61] Only if it meets that critical standard does it deserve to be given normative standing. Hart applies that distinction to Devlin's position, concluding that Devlin has gone down the wrong path by honoring anything that happens to be a part of positive morality.[62] Only critical morality, in Hart's mind, could warrant any possible respect by the law. We could not justifiably enforce morality that merely passes the irrational test of Devlin's indignation and disgust.

Critical morality, however, turns out to be a less than satisfactory answer to the quest for a set of standards that the law can justifiably enforce. As Ernest Nagel observes with respect to Hart's affection for critical morality:

> It is plain, however, that many systems of critical morality have been developed, and that their conceptions of what is to men's best interests do not always agree. There is certainly no consensus even among deeply reflective men as to which system of critical morality is the most adequate one, so that legal paternalists are likely to differ among themselves . . . .[63]

Nagel's critique turns our attention to Hart's purported defense of Mill's harm principle. I label it "purported" because Hart carves out two very large exceptions to the general principle of harm: paternalism[64] and

58. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).
59. *See id.* at 180-85.
60. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 112 (1954).
61. *Id.* at 3.
62. HART, *supra* note 8, at 23-24.
63. Nagel, *supra* note 16, at 281.
64. HART, *supra* note 8, at 30-34.

nuisance.[65] Most observers have noted that with a defender such as Hart, Mill really needs no enemies. Why? On closer examination, the two exceptions appear well-prepared to swallow up the entire principle.[66] By nuisance, he means, not noxious odors, but a legal nuisance, such as bigamy. Bigamy creates a nuisance by clouding all kinds of legal questions such as inheritance, custody of children, ownership of assets, and the rights of the next of kin to make medical and after-death determinations.

However, paternalism is the eight-hundred pound gorilla. What can we imagine that could not be prohibited on grounds of paternalism? And how can an exception for paternalism possibly be consistent with Mill's harm principle? There may be much that is indeterminate in what exactly constitutes harm. But one plank of Mill's platform seems crystal clear: his complete and utter rejection of paternalism. Recall once again what Mill has to say on the subject:

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[67]

How, reading these lines, can we possibly say that paternalism could be consistent with the harm principle? Indeed, once we start examining the extensive list of behaviors that Hart thinks could justifiably be regulated by government, it becomes difficult to imagine what activity might possibly be immune from the government's interference. One might be forgiven for reaching the conclusion that only homosexual behavior seems to be exempt from the reach of government's hand. That result may not be entirely accidental. Nicola Lacey's recent biography includes an examination of Professor Hart's famously "ambiguous sexual identity."[68] Clearly, that particular issue was highly important to Hart. But surely, we might hope for a broader swath of liberty to be protected by any purported defender of Mill's harm principle.

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65. *Id.* at 38-43.

66. *See* Nagel, *supra* note 16, at 280-81; MARTIN P. GOLDING, PHILOSOPHY OF LAW 60-61 (1975). *But see* Gerald Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 125-26 (Wasserstrom ed., 1971) (arguing that Mill himself conceded the necessity for paternalism in some situations).

67. MILL, *supra* note 9, at 73.

68. LACEY, *supra* note 50, at 74; *see also* David Pannick, *The Troubled Life of a Tormented Man and Brilliant Legal Philosopher*, TIMES (London) Mar. 22, 2005, *available at* http://www.timesonline.co.uk/article/0,,8163-1532391,00.html.

V. FULLER'S ANALYSIS OF FREEDOM

In my own view, Lon Fuller, the late Carter Professor of Jurisprudence at Harvard Law School, provides a superior, yet widely neglected, analysis of Mill's attempt to defend freedom.[69] His important contribution has not been considered as part of this debate, partly because Fuller published it prior to the report of the Wolfenden Committee, and partly because Fuller made his contribution part of a larger and more complex system of thinking about law. Actually, I find it somewhat surprising that Hart at least did not bring this distinction into play, because he would certainly have been familiar with the version published two years after Fuller's by Hart's Oxford colleague Isaiah Berlin.[70]

Fuller distinguishes between freedom from and freedom to.[71] Freedom from is the absence of constraint: the undergraduate's ideal of drinking all night and having no one who must be answered to. Freedom to, in contrast, is empowerment: providing the capacity to carry out the actions you desire. Freedom from is liberating in a negative sense; freedom to is liberating in a positive sense. Freedom to, however, is qualified in that you must comply with the requirements set down in the relevant matrix of facilitation to succeed in achieving your purpose. Unlike Mill, Fuller perceives that meaningful individual freedom requires that "decisions that are made for the individual must be congruent with, and form a suitable framework for, his own decisions."[72]

Mill asks how we can free human beings from the constraints imposed by society and law. In contrast, Fuller asks: "How can the freedom of human beings be affected or advanced by social arrangements, that is, by laws, customs, institutions, or other forms of social order that can be changed or preserved by purposive human actions?"[73] The mention of purpose, of course, raises one of Fuller's favorite subjects. He found behaviorist views totally unacceptable for the simple reason that behaviorists cannot account for purpose.[74] Purpose does not exist in the behaviorist universe. Fuller loved to skewer his Harvard colleague, the famed behaviorist B.F. Skinner.[75] Skinner modernized behaviorism by

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69. Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955). Fuller's essay was first presented as a paper at a Conference on Jurisprudence and Politics at the University of Chicago Law School in April 1954. *See id.* at 1305.

70. Isaiah Berlin, *Two Concepts of Liberty*, *in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118-72 (1969). The essay was delivered as Berlin's Inaugural Lecture at Oxford in October 1958 and was originally published that year by the Clarendon Press.

71. Fuller, *supra* note 69, at 1313.

72. *Id.* at 1314.

73. *Id.* at 1309.

74. *Id.* at 1308.

75. *Id.* at 1308 n.2.

adding to it the concept of operant conditioning—simply put, positive incentives.[76] Using his methods, he taught chickens to dance and pigeons to hit a ping pong ball with their beaks.[77] He assumed that they had no purpose in doing so; he was simply conditioning them. Of course, the observer could rightly wonder if the animal was not pursuing its purpose to seek food.[78] After all, food rewards were the positive conditioning Skinner was using.[79]

Fuller, by contrast, assumes that we all have purposes.[80] The question then becomes: How is it possible to help you achieve your purposes? Would freedom from be more useful in that regard than freedom to? In some cases, freedom from might be more helpful in realizing our goals. But, for the most part, we will need freedom to in order to reach any goal that involves more than the absence of interference. Fuller argues that there must be some "appropriate form of order that will carry the effects of the individual decision over into the processes of society", and "a congenial environment of rules and decisions."[81] These concepts are an important addition to our analytical arsenal, and I shall return to them later in our discussion.

VI. DURKHEIM'S FEAR OF ANOMIE

Before doing so, however, we must address a nagging question that remains even after considering all of the many criticisms of Devlin's position: Can there be some relationship between maintaining the morality of a society and protecting it from disintegration? To explore that issue further, we must turn to the work of the French philosopher and sociologist Emile Durkheim. Durkheim was born and raised in a tiny Ashkenazim village in rural France.[82] From this small, tightly knit environment, he came to Paris in the 1890's.[83] He proceeded in short order to produce two very thick books.

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76. *See* Robert C.L. Moffat, *The Indispensable Role of Independent Ethical Judgment*, 21 FLA. L. REV. 477, 481 (1969).

77. *Id.*

78. *Id.*

79. *See generally* B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 59-69 (1953) (on rewards and operant conditioning); *see also* Moffat, *supra* note 76, at 481.

80. *See* Fuller, *supra* note 69, at 1307.

81. *Id.* at 1314.

82. *See* LEWIS COSER, MASTERS OF SOCIOLOGICAL THOUGHT 161-62 (1971); ROBERT ALUM JONES, EMILE DURKHEIM: AN INTRODUCTION TO FOUR MAJOR WORKS 12-23 (1986).

83. *See* JONES, *supra* note 82, at 12-23.

A. *Suicide as Social Pathology*

The first was a study of suicide.[84] Although that may sound somewhat morbid, a very practical reason for his choice of subject was simply that suicide was the sort of social pathology about which the government kept the best statistics. Durkheim wanted to do a statistical analysis comparing the rate of incidence of the social problem on the basis of demographic variables to see what variation there might be between different groups.[85] He discovered that Protestants were more likely to commit suicide than Roman Catholics.[86] Married persons are less prone to suicide than single persons.[87] Members of small families are less protected from suicide than members of large families.[88] Widowers are more likely to die at their own hand than men whose wives are still living.[89]

As a sociologist, he wanted to test the thesis that greater social cohesion would reduce the probability of the occurrence of social pathological events, such as suicide, crime, and juvenile delinquency. Durkheim believed that if people were part of a community with strong social bonds, if they experienced social cohesion, they would be less subject to the dangers of anomie.[90] People who lived without the strong bonds of social morality to bind them to the group, who experienced the anarchy of normlessness, would be more subject to the temptations of social deviation.[91] By contrast, persons who experienced strong cohesion would be less likely to stray from societal norms.[92] Social cohesion is produced by adherence to the morality of society, by which Durkheim means the collective conscience.[93] He tells us:

> The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the *collective* or *common conscience*. No doubt, it has not a specific organ as a substratum; it is, by definition, diffuse in every reach of society. Nevertheless, it has specific characteristics which make it a distinct reality. It is, in effect, independent of the particular conditions in which individuals are placed; they

84. EMILE DURKHEIM, SUICIDE (George Simpson ed., J.A. Spaulding & G. Simpson trans., 1987).
85. *Id.* at 51.
86. *Id.* at 260.
87. *Id.* at 259.
88. *Id.*
89. *Id.* at 262.
90. *See id.* at 248-52.
91. *See id.*
92. *See id.*
93. *See id.*

> pass on and it remains . . . . Moreover, it does not change with each generation, but, on the contrary, it connects successive generations with one another. It is, thus, an entirely different thing from particular consciences, although it can be realized only through them.[94]

Durkheim believed that members of society generally desire to be good and that we feel better about ourselves when we feel a part of the collective morality.[95] Here, as with Edmund Burke, we receive a classic picture of an organic view of society, in which society is greater than the mere sum of the individuals within it at any given time. Recall Burke's famous exhortation on that subject:

> Society is indeed a contract . . . . It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.[96]

Moreover, individuals participating in such a society not only feel good about themselves and their social place, but perceive themselves as more than a solitary individual. With the benefit of that perspective, Durkheim spotted an entirely different function of the criminal law. We generally view the purpose of the law as to punish the offender. Although that is obviously the case, Durkheim saw a larger, but more subtle, purpose of the criminal law as reaffirming for good citizens that they embrace the correct values. Criminal law reinforces for all of us that we are doing what is right, by punishing those who do wrong. In this way, criminal law strengthens the social cohesion of the moral members of society.

B. *Finding Organic Solidarity*

Durkheim's second work is *The Division of Labor in Society*.[97] Here Durkheim examines social solidarity in more detail. Already convinced of

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94. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79-80 (George Simpson trans., 1960).

95. EMILE DURKHEIM, SOCIOLOGY AND PHILOSOPHY 36 (D.F. Pocock trans., 1953) ("The élan, even the enthusiasm, with which we perform a moral act takes us outside ourselves and above our nature. . . .").

96. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

97. See DURKHEIM, *supra* note 94.

its vital importance, he now seeks to find how it can be replicated in the modern world. From personal experience, he knew the strong solidarity of village life.[98] There, everybody knew everyone else's business, and most villagers were able to perform most of the tasks of everyday life. Durkheim classified that sort of solidarity as mechanical solidarity, on the theory that the solidarity was based on mutual similarity: the attraction of likenesses.[99] We look alike. We think alike because we share the same culture. We feel comfortable together because of our similarities.[100]

Durkheim's challenge was to figure out how to translate that strong, but primitive, solidarity to the apparent normlessness and anonymity of city life. He thought he discovered the secret in the division of labor, which could provide a basis for a superior form of cohesion: organic solidarity.[101] With his organic view of society, organic solidarity would clearly be preferable. In the village, people performed many tasks. In the city, people specialized. In the city, people no longer bother to bake their own bread; they go to the *boulangerie* for a fresh *baguette* or *bateau*. Then, they stop next door at the *fromagerie* for some *camembert* to go with the bread. Perhaps they stop at the *charcuterie* for some *saucisse* or *salade*. A *pain de raisin* from the *patisserie* would make a nice dessert. All that remains to complete the perfect picnic is a nice bottle from the *chez de vins*. In the city, everyone specializes; this is the division of labor. Durkheim's vision of the organic society is realized in the interdependence brought about by the division of labor.[102] Each part is dependent on every other part, and the sum of all the parts is greater than the individual parts merely added together.[103] Each part is useless by itself; it becomes viable only in conjunction with all the others.[104] That is Durkheim's thesis of organic solidarity.[105]

For much of the remainder of his life, Durkheim tried to invent institutions that could bring organic solidarity to realization[106] in the common conscience. He found that it was not an easy task.[107] Pretty clearly, we are in fact dependent on the multiple specializations of others. But does that interdependence generate solidarity? Frustration and anxiety seem to be much more frequent products of our mutual dependence than

98. *See supra* note 82.
99. DURKHEIM, *supra* note 94, at 70-110.
100. *Id.*
101. *Id.* at 111-32.
102. *See id.*
103. *See id.*
104. *See id.*
105. *Id.* at 111-32.
106. *See infra* note 107.
107. *See* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 117-18 (George E. G. Catlin ed., S.A. Solovay & J.H. Mueller trans., 1950).

solidarity. In Europe, many public industries have been taken over by government.[108] Union members in such industries may be prohibited from striking.[109] If, for example, the electrical workers have a grievance with the government, they may simply shut off all electrical power during prime television viewing time. Citizens are reminded of their dependence, but appreciation of solidarity is far from their minds. Perhaps, we can understand then why Durkheim, though he struggled mightily, never really came up with a formula that brought organic solidarity to life.

Moreover, we have discovered in recent years that Durkheim's dismissal of mechanical solidarity as primitive was markedly premature. Primitive it may be, but human society seems to exhibit a distinct preference for mechanical solidarity. Mechanical solidarity has erupted with violent results in Bosnia, in Kosovo, in Central Asia, in Indonesia, in many parts of Africa, in several countries of Central America, in Malaysia, and in the Philippines.[110] Clearly, mechanical solidarity poses a present and paramount challenge to our efforts to find avenues toward peace in the world.

VII. UNDERSTANDING THE POLYCULTURAL SOCIETY

Should we therefore declare Durkheim's Herculean efforts a failure? Although he was unable to find a solution to the challenge he identified, I believe that he correctly identified the problem. And the challenge he saw is this: How can you generate social cohesion in modern society? Modern society is different from the traditional village world. It differs not only in its anonymity, in the richness of its urban texture, but also in that it includes a multiplicity of subcultures. In previous writing, I labeled such a society polycultural.[111] At that time, the term multicultural had not been coined. Fortuitously, I did not choose that term. The reason is that polycultural includes all of the subcultures of the society. On the other hand, multicultural is limited to those subcultures on the politically correct approved list. A very simple test distinguishes the unapproved subcultures. If it is socially acceptable to tell jokes about a group, they cannot be on the approved list. Rednecks would be a current example. Jokes about them would not be generally considered a social *faux pas*. Presumably, cavemen

108. *See, e.g.*, Robert Moffat, *Democracy and Socialism: Freedom and Equality in the Welfare State*, *in* CONTEMPORARY CONCEPTIONS OF LAW 307, 307-09, 315-17 (P. Trappe ed., 1983); *see also* IAN MACNEIL, THE NEW SOCIAL CONTRACT 104-08 (1980).

109. MOFFAT, *supra* note 108, at 307.

110. *See, e.g.*, MONICA DUFFY TOFT, THE GEOGRAPHY OF ETHNIC VIOLENCE; IDENTITY, INTERESTS, AND THE INDIVISIBILITY OF TERRITORY 1, 5, 17, 77, 79, 127, 130-31 (2003).

111. *See* Robert C.L. Moffat, *Consent and the Criminal Law*, in *Consent: Concept, Capacity, Conditions, and Constraints* (L.T. Sargent ed.), *in* BEIHEFT NF 12, ARCHIV FÜR RECHTS-UND

are not on the list either, since GEICO uses them as foils in their current advertising campaign.[112]

A. *Symbolic Crusades*

However, from a polycultural standpoint, we cannot afford to exclude any subcultures from the need for participation in the larger social cohesion. To make our social cohesion as effective as we can, we must make it as all-inclusive as we can. To exclude a subculture is to promote social alienation, social distance. Modern societies have been much more proficient at alienation than at inclusive cohesion. A good example of that process in action is the adoption of Prohibition in the United States. Joseph Gusfield's careful analysis of that chapter in our history concluded that it was a "symbolic crusade."[113] A powerful coalition of rural, Republican, Midwestern Protestants combined to stigmatize the values of urban, Democratic, Roman Catholics as illegal and therefore immoral. The motivating force that Gusfield identifies behind this movement is the desire of the older groups of immigrants from Northern Europe to reinforce by law both their political power and the rightness of their views in the face of the political competition of the newly arriving groups from Ireland and Southern Europe.[114] As Eskridge details, the campaigns to stigmatize homosexuals have been similarly motivated.[115] One payoff for the successful majority is the reaffirmation of the rightness of their views. But that stigmatization creates social distance and alienation. As Eskridge correctly observes, alienation is deadly to a pluralist democratic society: "Alienation of many groups brings the polity down."[116] Social cohesion is strengthened *only* in the subcultures on both sides of the divide. But in the society as a whole, cohesion is weakened.

B. *Amplifying Deviance*

Another concept that I find helpful in this exploration comes from the English criminologist Leslie Wilkins.[117] The name he gives his contribution is a pure sociologism. Nonetheless, I find it to be quite a

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112. *See, e.g.*, Seth Stevenson, *The Brilliance of Geico's "Tiny House,"* SLATE, July 25, 2005 http://www.slate.msn.com/id/2123285/?nav=navoa (describing a Geico advertising campaign indicating that Geico.com is so easy that even a caveman can use it).

113. *See generally* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963) (Gusfield uses symbolic both in the sense of interactional sociology and in its common meaning of standing for an agenda, both hidden and disclosed).

114. *Id.* at 7-8, 22, 123, 155-56, 196.

115. Eskridge, *supra* note 19, at 1050-51.

116. *Id.* at 1050.

117. LESLIE T. WILKINS, SOCIAL DEVIANCE 20-24 (1965).

useful tool. His warning is against the danger of what he calls the "deviation-amplifying [feedback] system."[118] Though a mouthful, hidden behind all that jargon is the idea that when we label the values of a particular subgroup as bad, we run a serious risk of generating backlash.[119] The very act of labeling may cause the group to hold their values even more determinedly than ever.[120] Moreover, when we arouse backlash, we may be tempted unwisely to crack down even harder on the 'wrongdoers' to try to make them conform.[121] The government may strengthen the already existing sanctions for noncompliance.[122] If the disaffected groups do not share the values of the dominant society, the law will be to them purely an expression of force without any foundation in a perceived moral obligation. Enforcement of the law under such conditions tends to be more selective, to rely on the use of informants, and to lapse into other unsavory practices that cast aspersions on the integrity of the legal process.[123] As we slide down this slippery slope into legal immorality, Wilkins' feedback system warns us that we also run the risk of increasing the probability of deviant behavior. The consequence that interests me most, however, for purposes of the present discussion, is that social distance of the disaffected group will be increased and whatever social cohesion existed previously will be eroded.

To take an example from the Prohibition era, we can imagine the rural Protestants in the Midwest saying to the recently arrived Italian family, "Your values are immoral, and now we have established that they are also illegal, because you despicable people have wine with your meals." The new immigrants may react by saying that they have always done that, and, though they hadn't really thought about it too much previously, they now realize, as they do think about it, that wine with dinner is a very important part of their culture. They may assert that the practice is more important to them than they had realized. In that way, by embracing the stigmatized value more strongly, their deviance is amplified by the symbolic disapproval expressed by the intolerant majority. Why, they would ask, should those narrow-minded bigots out on the farm dictate to us what our lifestyle should be?

Homosexuals ask the same question. When we, as a society, label a behavior of the subculture immoral and criminal, we run the risk that the

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118. *Id.* at 91.
119. *Id.* at 91-92.
120. *Id.* at 92.
121. *Id.*
122. *Id.*
123. For a more extensive treatment of this point, see Robert C.L. Moffat, *Obligation to Obey the Law: Substance and Procedure in the Thought of Lon Fuller*, 1 INT'L J. APPLIED PHIL. 33, 38

subculture will embrace the value even more strongly than they did before. That may even be the case with some homosexuals, and others may develop very strong suspicions of government in general. For example, the noted libertarian philosopher John Hospers' bitter hostility toward government in general may have been motivated by what he perceived as government persecution of homosexuals.[124] In any event, the bottom line is that the subgroup experiences greater social distance, and the social cohesion of the overall society is reduced. Social solidarity is lost. The subgroup is alienated from society. The subculture is distanced further from society rather than becoming more integrated into it.

Of course, backlash may work in the opposite direction as well. A noteworthy example is provided by the ruling of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health,*[125] which held that the Massachusetts Constitution required that same-sex couples must be allowed to marry.[126] We would be guilty of gross understatement if we declared that the ruling attracted merely glaring publicity and aroused only widespread protest. Indeed, constitutional referenda prohibiting same-sex marriage were presented to the voters in eleven states during the 2004 election.[127] The constitutional amendments passed in every case.[128] In several cases, the amendments were so broad as to outlaw mere civil unions.[129] In at least one case, the amendment was so broad that it outlawed existing legal powers previously available to unmarried couples.[130]

We may observe in passing that the phenomenon of the referendum provides an unusual opportunity for groups that feel alienated from the legislative process. If the legislature allows a practice such as gay marriage that you find distasteful, you may still reelect your representatives because you like other things they have voted for or because you appreciate appropriations they have obtained that benefit the district in which you live. But a referendum permits the expression of opinion on one isolated issue; it is a dream come true for the single-issue voter. Expression of disagreement with a particular practice is facilitated by the availability of

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124. *See, e.g.*, John Hospers, *The Nature of the State*, in *"Minimal Government" in Theory and Practice: A MINTAPHIL III* (Robert Moffat ed., 1978), *in* 59 THE PERSONALIST 321, 389-404 (John Hospers ed., 1978) (noting that politicians often use governmental power for oppression or other undemocratic ends).

125. 798 N.E.2d 941 (Mass. 2003).

126. *Id.* at 968.

127. *See, e.g.*, Jonathan Rauch, *Saying No to 'I Do,'* WALL ST. J., Dec. 27, 2004, at A8 (noting the struggle facing proponents of gay marriage).

128. *Id.*

129. *Id.*

130. *Id.*

the referendum process, and we have witnessed extensive use of it on the issue of gay marriage.

Apart from demonstrating the very real fact of backlash, the results of these referenda also demonstrate a common confusion between the religious and civil institutions that we refer to as marriage. Good reason for that confusion exists in the historical heritage of all family law including inheritance, because it was originally in the hands of the church. Such matters were governed by Canon Law and were within the exclusive jurisdiction of the ecclesiastical courts.[131] In Western society, however, those functions have been separated for some time, although religious institutions in many jurisdictions are still authorized to act as proxies for the state by accepting the vows, recording the signatures of the parties and the witnesses, and submitting the paperwork to the state for inclusion in the official records so as to make it a legal document.[132]

One possible approach might be to make a clearer segregation of the civil and religious functions. Such a strategy would take advantage of the fact that public opinion seems to favor civil unions, but not gay marriage. Could we make it clear that the state authorizes only civil unions with all of the legal rights and responsibilities attendant to that intimate relationship? The institution of marriage would then be left to the exclusive province of the religious institutions. Would that solution be an effective compromise? The hurdle seems to be the substantial emotional energy that is attached to the symbol of marriage on both sides of the issue. We have already taken note of the backlash against gay marriage expressed in the sometimes rather aggressive rejection enshrined in the various referenda adopted in a number of states. The other side of that coin is the strong desire frequently expressed by gay persons not to be relegated to what they perceive as second-class status. The legal benefits of marriage are desirable, but they crave the implicit social approval of the complete label. With such deeply entrenched emotions on both sides, avoiding backlash seems elusive.

Yet another recent example of backlash is provided by the widespread reaction to the recent ruling of the United States Supreme Court in *Kelo v. City of New London*.[133] That case expanded the permissible uses by local government of eminent domain to aid private businesses.[134] The public response was vehement and far-reaching.[135] The immediate outcry of protest has resulted in many large, socially worthwhile projects being

131. *See, e.g.*, G. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 231-32 (2d ed. 1946).

132. *See, e.g.*, FLA. STAT. § 741.07 (2005).

133. 125 S. Ct. 2655 (2005).

134. *Id.* at 2668.

135. Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20.

dropped for fear of adverse publicity.[136] Moreover, many bills have been introduced at both the state and federal levels that would significantly curb the use of the eminent domain power by local governments.[137] As is often the case with backlash, the pendulum is in danger of swinging too far in the other direction.

C. *The Pitfalls of Negative Reciprocity*

The foregoing instances of backlash also serve as examples of what I have termed "negative reciprocity."[138] Yes, alienation erodes allegiance to the society at large. But, more dire consequences often ensue. Hence, alienation from the larger culture does not tell the entire story of the perils for society. More extreme alienation may erupt into cycles of negative reciprocity. We can see the escalation of 'tit-for-tat' violence in many of the ethnic and religious conflicts around the globe. In our own case of Prohibition, organized crime received a huge boost, not just from the skyrocketing demand for goods that had been unwisely declared contraband, but also from the acquiescence of communities alienated from the culture at large by that symbolic crusade.[139]

Similarly, we could note the alienation from society indicated by the hostility of some homosexual political action groups, such as ActUp, in the vituperation of their reactions to the perceived failure of the government to devote sufficient resources to AIDS research.[140] As it happens, much medical research money was diverted from cancer research to research on the HIV virus,[141] but the perception of some in the gay community was that perceived inaction expressed social hostility to their lifestyle.[142] In all of

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136. *See infra* note 137.

137. Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Projects*, WALL ST. J., Aug. 3, 2005, at B1.

138. I first developed this notion in the Steintrager Lecture at Wake Forest University. *See* Robert C.L. Moffat, Negative Reciprocities and Neglected Responsibilities: A Requiem for Rights?, The James A. Steintrager Lecture in Political Philosophy and Jurisprudence at Wake Forest University 15 (Sept. 22, 1994) (transcript on file at the University of Florida Levin College of Law Legal Information Center). I have since discovered that the concept has been widely employed in the field of game theory in advanced economics. *See, e.g.*, Daniel Friedman & Nirvikar Singh, *Negative Reciprocity: The Coevolution of Memes and Genes* (University of California Santa Cruz Economics Department, Working Paper Series 1028, 2003), *available at* http://econwpa.wustl.edu:80/eps/game/papers/0412/0412003.pdf.

139. *See, e.g.*, JOHN LANDESCO, ORGANIZED CRIME IN CHICAGO 189-221 (1929).

140. Bruce Lambert, *3,000 Assailing Policy on AIDS Ring City Hall*, N.Y. TIMES, Mar. 29, 1989, at B3.

141. *The AIDS Political Machine: By Demanding Enormous Research Funds and Questionable Drugs, Have Activists Distorted the Response to the Epidemic?*, TIME, Jan. 22, 1990 (discussing that money targeted to AIDS reduces funding for cancer research).

142. John S. James, *New Threats to AIDS Research Funding AIDS*, 97 TREATMENT NEWS, Feb. 16, 1990, *available at* http://www.aids.org/atn/a097-05.html.

these cases, the undesirable consequences of alienation from society occur almost effortlessly. As I observed in earlier work:

> When political positions are presented as claims of right buttressed by ideologies so dogmatic that other possibilities cannot be recognized as having potential legitimacy, we can understand why our present trend toward reduced civility in political and cultural discourse seems inevitable.[143]

Reestablishing any degree of social integration of the alienated groups into society is much more difficult. In short, how can we put the warring subcultural genies back into the bottle of social integration?

In several of my earlier writings on this theme, I floated the idea of encouraging positive toleration.[144] Obviously, I was caught up in a moment of uncharacteristic optimism. At that time, I proposed that we embrace as a principal and fundamental value of our polycultural society, not merely the toleration as Professor Eskridge proposes,[145] but the celebration of the distinctive characteristics of our many subcultures. How feasible is such a utopian ideal? Clearly, overcoming the natural biases born of our innate mechanical solidarity constitutes a substantial challenge for any society. Importantly, Professor Eskridge does make clear, however, that his "Constitution of Tolerance" is a two-way street, in which both sides must pay heed to the sensibilities of the other.[146] On the other hand, we face a significant challenge in drawing the line beyond which we do not demand that we extend our tolerance. Some subgroups would necessarily fall outside of the pale of acceptance: child molesters, for example. But, we could not exclude all criminals as a class, because that would assume the wisdom of all existing criminal laws, including those for which no genuine justification actually exists.

VIII. DESPERATELY SEEKING TOLERATION: FREEDOM AND RECIPROCITY

The pursuit of positive toleration, however, turns out to be even more complex than it might appear at first glance. Such an investigation requires an exploration of the meaning of freedom, of the relevance of the means-ends relationship, and of the significance of positive reciprocity. As it happens, Lon Fuller's analysis, set out previously, provides a most useful

143. Robert C.L. Moffat, *Rights and New Fundamentalisms: New Essays in Toleration*, BEIHEFT 19 RECHTSTHEORIE 55, 56 (Eugene E. Dais et al. eds., 1998).

144. *See* Moffat, *supra* note 111, at 154-56.

145. Eskridge, *supra* note 19, at 1051.

146. *Id.*

understanding of the problem. To begin, we need to apply his distinction between freedom from and freedom to in analyzing the present issues.

A. *Freedom*

Let us take as a case study the question of the marriage of same-sex couples. At least since *Lawrence v. Texas*,[147] such couples presumably assume that they are free from the interference of law in their intimate relationships. Hence, they enjoy *freedom from* interference with regard to expression of their sexual preferences. But with the two exceptions noted above, they do not have the *freedom to* marry. From their vantage point, the lack of freedom to leaves them at a significant disadvantage compared to the rest of society.

Interestingly enough, the Supreme Judicial Court of Massachusetts itself employed Fuller's distinction in *Goodridge*, in which it ruled that homosexual couples must be allowed to marry: "[I]ndividual liberty and equality safeguards . . . protect both 'freedom from' unwarranted government intrusion into protected spheres of life and 'freedom to' partake in benefits created by the State for the common good. Both freedoms are involved [in the issue of same-sex marriage.]"[148] How dispositive of the issue should we take the court's analysis to be?

One question we might ask is: How much practical difference would marriage make to gay couples, other than the joy of acquiring the coveted symbolic label? Putting the symbol aside for the moment, marriage carries with it a significant basket of rights, privileges, and responsibilities. For the most part, this basket would come with the availability of a civil union. They would have rights to marital property, inheritance rights, insurance coverage, social security benefits, tax advantages, and authority to make medical decisions and after death decisions for the partner. Altogether this basket of legal powers and privileges sounds pretty significant. Civil unions, then, constitute a quite significant package of *freedoms to*.

Although a fair number of these legal rights and privileges can be acquired by executing a variety of sometimes complex legal documents, the process is laborious and expensive. Interestingly enough, in Scandinavia, where marriage between opposite sex couples has become increasingly rare, some couples are choosing after a number of years and several children together to get married.[149] When they look into it, they

147. 539 U.S. 558 (2003) (holding that the Texas statute criminalizing same-sex sexual activity was unconstitutional as it applied to adult males having consensual sex in their home).

148. Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 959 (Mass. 2003) (citations omitted).

149. Noelle Knox, *Nordic Family Ties Don't Mean Tying the Knot*, USA TODAY, Dec. 15, 2004, *available at* http://www.usatoday.com/news/world/2004-12-15-marriage_x.htm. Ms. Knox reports that inheritance rights do make a difference in the decision: "That's why Espen Aasen and

discover that marriage is a much simpler procedure than trying to execute all of the legal documents necessary to acquire all of the rights and privileges they desire. So, after several children and many years together, they may just go ahead and get married because it turns out to be much easier that way.[150] Similarly, civil unions greatly simplify an otherwise much more complicated legal situation for same sex couples who wish to give legal status to their mutual commitment.

B. *Means and Ends*

In comparing civil unions and outright gay marriage, however, examining the relationship between means and ends will also aid our understanding of the issues. In that regard, Fuller also found Mill's view of the means-end relation to be inadequate.[151] On the relation between means and ends, Mill took the conventional Utilitarian view:

> All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient. When we engage in a pursuit, a clear and precise conception of what we are pursuing would seem to be the first thing we need, instead of the last we are to look forward to.[152]

Fuller, echoing his exposition of freedom to, saw Mill's perspective as naïve:

> Mill seemed strangely blind to the fact that in all significant areas of human action formal arrangements are required to make choice effective. The choices a man can make without requiring collaborative social effort for their realization are trivial. Our more important choices are meaningless if there is no way of carrying them over into the larger social order on which we are dependent for almost all our satisfactions. But,

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Trine Anker got married four years ago. They had been living together for 10 years and had two children. Then, they bought a book on how to draw up a partnership contract, which many couples do to protect their assets in case of a breakup. In the end, they decided it was easier to get married." *Id. See* Noelle Knox, *Religion Takes a Back Seat in Western Europe*, USA TODAY, Aug. 11, 2005, at 1A; Stanley Kurtz, *Unhealthy Half Truths, Scandinavian Marriage Is Dying*, NATIONAL REVIEW ONLINE, May 25, 2004, http://nationalreview.com/Kurtz/Kurtz200405250927.asp; Cheryl Wetzstein, *Scandinavian Marriage Scorned as Model for U.S.*, WASH. TIMES, Mar. 10, 2004, at 1.

150. *See id.*

151. Lon Fuller, *Means and Ends*, *in* THE PRINCIPLES OF SOCIAL ORDER 47, 50 (Kenneth Winston ed., 1981).

152. J.S. MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 2 (New American ed. 1951).

> to give social effect to individual choice, some formal arrangement, some form of social order, is necessary.[153]

Not only is consideration of means as important as choosing ends, but our deliberations are aided by a calculation both of means-cost and means-surplus.[154] For example, in choosing between a policy of civil unions or same-sex marriage, we should take into consideration the backlash against gay marriage as a means-cost. Civil unions, on the other hand, would provide a means-surplus, in which the societal balance sheet is aided by a reduction in negative reciprocity and by the positive contribution to social cohesion.[155] Ironically, Fuller's methodology accounts for the consequences of social policy much more comprehensively than does Mill's utilitarianism.

C. *Reciprocity and Toleration*

Additionally, we must attend to Fuller's analysis of reciprocity because that also provides insight into the issue. Reciprocity for Fuller is a justifiable reliance that arises from expectancies growing out of patterns of behavior.[156] His approach would echo Blackstone's respect for tradition,[157] rather than Austin's disregard of it.[158] Fuller also took note that reciprocity was achieved optimally when three preconditions were present.[159] The equivalence of the exchange, the voluntariness of the bargain, and the reversibility of the roles in the relationship all served to enhance the strength of the obligation that was perceived to arise from the reciprocity.[160] Applying these analytical tools to the question of tolerating gay relationships as contrasted with legalizing same-sex marriage leads to some interesting conclusions.

To do so, we must first pay attention to the well-established tradition that marriage in Western society is a contract between one man and one woman. Moreover, that tradition is highly normative in character. Heterosexual marriage is no mere societal habit; society at large perceives that arrangement as the only defensible version of the institution.[161] In

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153. Fuller, *supra* note 69, at 1312.

154. Fuller, *supra* note 151, at 56-58.

155. *See* John Culhane & Stacey Sobel, *The Gay Marriage Backlash and its Spillover Effects: Lessons From a (Slightly) "Blue State,"* 40 TULSA L. REV. 443, 448-49 (2005).

156. LON FULLER, THE MORALITY OF LAW 19-20 (rev. ed. 1969).

157. SIR WILLIAM BLACKSTONE, KNT., 1 COMMENTARIES ON THE LAWS OF ENGLAND 69-70 (1st American ed. 1771).

158. *See* Austin, *supra* note 60, at 30.

159. *See* Fuller, *supra* note 156, at 20, 23.

160. *See id.*

161. *See supra* note 127.

contrast, the latter part of the twentieth century in Western society has been characterized by the sexual revolution in which the view has become widely adopted that what someone does in the bedroom with another consenting adult is the business of absolutely no one else. Hence, we are not surprised at the acceptance of decisions like *Lawrence v. Texas*,[162] that make the bedrooms of homosexuals off-limits to the law.[163] That degree of toleration, however, does not at all extend to gay marriage.[164] On that issue, the normative expectancies founded on well-established tradition trump impulses of toleration.

To explore Fuller's preconditions of optimum reciprocity, we must attempt to define the comparative bargains. The first bargain could be viewed as an agreement not to interfere in the private expression of sexual preferences by consenting adults. The second bargain would be an agreement that we will allow any two (or more?) consenting adults to enter into a marriage. Both bargains appear superficially to satisfy the criterion of equivalence. However, societal tradition upsets the apparent balance, as the latter bargain is a direct affront to expectations while the former bargain requires only the absence of interference by the state. Similarly, voluntariness might seem apparently present for both bargains, but the positive action of the state in the face of established social practice would arouse considerable dissent to the claim of voluntariness. Again, the absence of state action will find a general acquiescence based on a mutual acceptance of the right to be left alone.

By the same token, reversibility favors government inaction. The populace is for the greater part comfortable with the notion: "If you don't bother us, we won't bother you." But when the question posed is whether governmental power should be used in an affirmative way to extend an institution widely perceived as confined to opposite-sex couples to same-sex couples, reversibility comes to a screeching halt. Most heterosexuals cannot ever imagine having a homosexual orientation.[165] Similarly, most gay persons do not wish to imagine being straight.[166] The possibility of

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162. 539 U.S. 558 (2003).

163. *See id.* at 578.

164. Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J. L. & PUB. POL'Y 229, 231-34 (2004).

165. *Cf.* G.M. Herek, *Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 149-69 (G.M. Herek & K.T. Berrill eds., 1992); *see also* Dale Carpenter, *Heart of Darkness*, BAY AREA REPORTER, June 23, 2005, *reprinted in* The Independent Gay Forum, http://www.indegayforum.org/authors/carpenter/carpenter69.html (discussing anti-gay attitudes).

166. There are of course the exceptions of bisexual persons and of those who "convert" to the orientation. *See* Richard Bevan, Gay Today, Hasbian Tomorrow, Sept. 6, 2004, http://www.rainbownetwork.com/Features/detail.asp?iData=21550&iCat=105&iChannel=25&n

reversibility is remote. Applying Fuller's preconditions for the optimum realization of reciprocity helps us understand the rather broad gulf between popular support for toleration of gays and the emotion behind the rejection of gay marriage. As Eskridge concludes: "The politics of tolerance strongly counsels that the Court do nothing [toward creating a constitutional right to gay marriage] for the time being."[167]

IX. WHERE IS THE JUDICIAL PARADIGM HEADED?

Professor Eskridge makes several references to the evolution of constitutional law on this subject in terms that suggest paradigm theory. Specifically, he refers to a particular interpretation of the Constitution reaching its "zenith"[168] and similarly, "the apex of its triumph."[169] The use of these metaphors invites speculation regarding the prospects for the United States Supreme Court to follow the Massachusetts case in applying equal protection doctrine to create a right to same-sex marriage.

Clearly, a move from the prohibition of state interference in purely private adult activities, represented by *Lawrence*, to a judicial requirement that states must officially recognize and accept same-sex marriage, as in *Goodridge*, should be viewed as a paradigm shift.[170] A shift to a paradigm of mandatory recognition by states of a positive right to marriage by any two consenting adults should occur only under circumstances in which the existing paradigm of non-interference has come to be viewed as unsatisfactory. An example of such a paradigm shift would be the sort of change illustrated by the breakdown in persuasiveness of the "separate but equal" rule of *Plessy v. Ferguson*[171] and its replacement in *Brown v. Board of Education*[172] with a new paradigm of equal protection.

Under what conditions do such paradigm shifts occur?

> New paradigms arise in response to dissatisfaction with the existing paradigm. Several factors are potentially responsible for such change: 1) the inconsistency of the old paradigm's rationale with the rationales of other rule paradigms; 2) the perceived unfairness of the existing rationale of the paradigm; and/or 3) the failure of the social definition of the situation

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167. Eskridge, *supra* note 19, at 1058.

168. *Id.* at 1041.

169. *Id.* at 1042.

170. *See generally* Robert C.L. Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 FLA. L. REV. 297, 324-26 (1985) (on paradigm theory).

171. 163 U.S. 537, 550-51 (1896).

172. 347 U.S. 483, 493 (1954).

assumed by the rule to meet presently accepted standards of morality.[173]

The application of these tests can be illustrated by the *Plessy/Brown* paradigm shift. When *Brown* supplanted the rule of *Plessy*, each of the above factors was involved: inconsistency with the rationale of other rule/paradigms, perceived unfairness of the rationale of "separate but equal," and perceived failure of the social situation of blacks as defined by the rule to match the existing standards of morality.[174] The perceived unfairness of the rationale of *Plessy* is shown by the failure of the Court to apply it purposefully for such a long period prior to *Brown*. Likewise, the language of those cases shows that the Court had become increasingly uncomfortable with the implicit expression of moral approval for a caste system in American society.[175] Finally, in its treatment of racial equality in the restrictive covenant cases[176] and in the voting rights cases,[177] the Court had been applying rules whose rationale could be made consistent with the rationale of "separate but equal" only with great strain and discomfort.[178]

Application of these tests to the issue of gay marriage does not yield results that suggest an imminent paradigm shift in the direction of mandatory state recognition. Rather, strained constitutional analysis would be required to make a persuasive argument that refusal by a state to adopt same-sex marriage is inconsistent with the rationales of the jurisprudence of other equal protection decisions. Certainly, great difficulty would be encountered in arguing that there is widespread unfairness perceived in the existing rationale of 'live, and let be' of *Lawrence*.[179] The social definition of the situation assumed by *Lawrence* would have to be stated as the bedroom activities of consenting adults are, as the Wolfenden Committee said, "not the law's business."[180] That rationale appears rather clearly to reflect the presently accepted standards of societal morality. To sum up, the foundation for a paradigm

173. Moffat, *supra* note 170, at 339.

174. *See id.*

175. *See id.*

176. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that the state court's enforcement of racially restrictive covenants would be a violation of equal protection).

177. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that restrictive covenants based on race are illegal on equal protection grounds); Smith v. Allwright, 321 U.S. 649, 664-65 (1944) (holding that a primary voting scheme violated minority voting rights); United States v. Classic, 313 U.S. 299, 327-29 (1941) (holding that criminal sanctions for violating racial restrictions in primary voting were illegal).

178. Moffat, *supra* note 170, at 339.

179. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

180. WOLFENDEN REPORT, *supra* note 13, at 48.

shift has not yet been put in place. Prospects for such a shift seem somewhat remote.

Our understanding can be aided by contrasting an earlier, but related, paradigm shift. *Bowers v. Hardwick*[181] had sustained a Georgia statute that criminalized consensual adult homosexual activity in private.[182] The paradigm shift from that case to *Lawrence* seems reasonably predictable. *Bowers* always seemed uncomfortable side by side with other liberty and equal protection cases. From the beginning, the case was widely excoriated for the unfairness of its treatment of members of society who had as much a right to be let alone as all the rest of us.[183] Finally, the social definition of the situation of consenting adult homosexuals was clearly perceived as undeserving of legal stigmatization.[184] Hence, their treatment under *Bowers* was clearly perceived both as unfair and as inconsistent with contemporary moral standards. For all these reasons, the demise of *Bowers* in *Lawrence* should not have come as much of a shock.

X. CONCLUDING UNSCIENTIFIC POSTSCRIPT[185]

The foregoing treatment, I believe, makes clear the central importance of moral argument, both in its academic form, and in the popular form. Especially when the balance of popular opinion can shift with the slightest breeze, caution seems to be essential. As Oliver Wendell Holmes warned over a century ago, "[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."[186] I believe that those words of warning must be taken to heart, especially by the academic community. During my academic career, I have noticed that

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181. 478 U.S. 186 (1986).

182. *Id.* at 196.

183. *See* WILLIAM ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 156-73 (1999); *see also* Randy Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, CATO SUPREME COURT REVIEW 21-41 (2002-2003). It is also worth taking note that "[b]etween 1980 and 2002, courts in ten states—Arkansas, Georgia, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, and Tennessee—ruled their state's anti-gay sex laws to be unsonstitutional." B.A. Robinson, Criminalizing Same-Sex Behavior, Dec. 13, 2005, http://www.religioustolerance.org/hom_laws3.htm. These results on the state level indicate a weakening in whatever persuasive power *Bowers* might be deemed to have had; *see* Moffat, *supra* note 170, at 314-16 (discussing the role of persuasive argument generally), 326-29 (analyzing the loss of persuasive power of *Betts v. Brady*).

184. Prior to Lawrence, support for legalization of same-sex relations had reached 60% pro and 35% con. However, some degree of backlash in response to that case resulted in a fall off to a slight plurality of only 48% to 46%. Susan Page, *Poll Shows Backlash on Gay Issues*, USA TODAY, July 28, 2003.

185. With abject apologies to one of my heroes, Søren Kierkegaard. *See* Søren Kierkegaard, CONCLUDING UNSCIENTIFIC POSTSCRIPT TO PHILOSOPHICAL FRAGMENTS (Howard V. Hong & Edna H. Hong eds. & trans., 1992).

186. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

most of the ideas advanced by my colleagues have had no impact on the real world. In most cases, I have considered that fact something for which we should offer heartfelt thanks. However, ideas sometimes do make a difference in the world at large, and sometimes those ideas can be world-altering in their effects.[187] For that reason, we should attempt to be judicious in our academic judgments, however uncommon that may be in the contemporary academic scene.

For the greater part, Professor Eskridge's lecture presents a well-modulated analysis of the legal treatment of homosexuals, arriving at a balanced position quite similar to the conclusions I have reached in this Commentary. Obviously, I am very clear in seeing that his analysis must be correct. However, I was both shocked and dismayed to arrive at the concluding paragraph of his fine essay in which he appears to equate the opponents of gay marriage with the few members of the National Guard Military Police who abused prisoners at Abu Ghraib.[188] Would it be lacking in politesse to observe that such an approach may not be the most successful manner in which to win friends and influence people, especially in the 'Red' states?

It may be helpful in this context to review some of the points of the present essay. John Stuart Mill's harm principle really amounts to the right to be left alone. Even the secondary harms delineated by John Kaplan do not abridge that fundamental value. Devlin's fear of societal disintegration makes him willing to breach that ideal, but only in the most extreme circumstances. Hart's paternalism poses a threat to it, but that threat finds its basis in the elitism of Hart's recognition of critical morality as the exclusive justification for public policy. Durkheim's fear of anomie would allow him to approve inroads on privacy, but only in the overweening public interest in maintaining social solidarity. Placing our quest in the context of the polycultural society, we noticed the threat to individual autonomy posed by moral crusades that manufacture deviance at the cost of social alienation and in the face of escalating negative reciprocity. This odyssey led us to explore the central importance of mutual positive

187. One of many examples would be the role of ideas in how Poland became enslaved and how, in turn, the nation regained its freedom. *See* Robert C.L. Moffat, *How Law Can Pave the Road to Perpetual Peace*, in KANT AND THE PROBLEMS OF THE CONTEMPORARY WORLD (Justyna Miklaszewska ed., forthcoming 2005).

188. The version of Professor Eskridge's article to which this section of the Commentary responds contained specific references to Abu Ghraib. William N. Eskridge, Jr., Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion 55 (Sept. 12, 2005) (unpublished manuscript, on file with author) [hereinafter Eskridge, unpublished manuscript] (penultimate version of Eskridge, *supra* note 19). Professor Eskridge omitted these references in the published version of his article. *See* Eskridge, *supra* note 19, at 1062-64. I also welcome the softening, to a degree, of his rhetoric linking gay toleration to our attitudes regarding terrorism. The spirit, however, of the penultimate version still needs to be confronted.

toleration as an indispensable ingredient in the success and progress of our society. We took note of Professor Eskridge's important affirmation that toleration is a two-way street and that "[a]lienation of many groups brings the polity down."[189]

How in the context of that celebration of tolerance are we to view his allegations of "unspeakable physical abuse"[190] of prisoners as evidence of "a politics of dehumanization"?[191] I took earlier note of the rampaging problems born of mechanical solidarity that plague so many parts of the world. There is much more than enough dehumanization to go around. But to focus exclusively on ordinary Americans who wish to be vigilant against the hydra-headed terrorist threat as the embodiment of hate and suspicion is as one-sided as Anita Bryant's vituperation against homosexuals.[192]

If we wish to bridge the divide that alienation threatens, we cannot embrace either one side or the other in the culture wars. For many who live in the Northeast, the arrogant, cynical, condescending, sometimes coherent ramblings of columnist Frank Rich of the New York Times may be gospel. His irredentism, however, does not play well in Peoria. Regrettably, we find an excess of smug self-satisfaction on both sides of the cultural divide. To embrace either is to fail in our quest for positive toleration.[193] If Professor Eskridge seeks tolerance of homosexuals only from those who believe that the extremism of militant Islamic fundamentalists is caused only by policies of the West in general and the United States in particular, then he is merely preaching to the choir. To avoid making his contribution a waste of good paper, he must avoid the dueling demonizations that tempt him so gravely.

What, in my view, would a more balanced perspective look like? That most Americans fear further terrorist efforts is undeniable. Have they overreacted? In some respects, possibly. But Muslims have not been rounded up and placed in internment camps. They have not been expelled from the country. The United States forces in Iraq have avoided the massive retaliation to which a less well-disciplined force would be sorely tempted. Are the actions at Abu Ghraib deplorable? Of course. But to equate those behaviors with homicide-bombings, with the frenetic display of burned and mutilated corpses by hooded villains, with the practice of human sacrifice in the throat-cuttings of innocent non-combatants is to become blind to what is "unspeakable." In such a warped view, we have surely lost our moral compass completely. We should be greatly saddened

189. Eskridge, *supra* note 19, at 1050.
190. Eskridge, unpublished manuscript, *supra* note 188, at 55 (discussing Abu Ghraib).
191. *Id.* (same).
192. Eskridge, *supra* note 19, at 1015-16.
193. See Moffat, *supra* note 43.

at the tragic debasement of a great religion by practitioners who are untrue to its most fundamental tenets and who take no pride in the preservation by Islam of much great learning from antiquity during the abysmal void in the West during the long Dark Ages. But, we can refuse to remain vigilant toward the threat the terrorists make of returning the entire world to those Dark Ages only at our peril.

Who should bear the responsibility for the deplorable actions at Abu Ghraib? The errant reservists would be appropriate guests on the Jerry Springer show. They have and are being punished.[194] But we should not forget that one reason that all members of our armed services may not be of the high quality we would prefer is that we have decided through cowardly inaction that the burden of service should not be shared equitably among the members of our society. The refusal to consider a draft is one indicator. Less obvious is the utterly shameful refusal of many of our premier institutions of higher learning, such as Harvard and Yale, to include ROTC programs in their curricula.[195] Many of those who might voluntarily choose to serve their country are excluded from the opportunity to pursue that career choice. Given the hypocrisy and mendacity of our arrogant elitism, we should be surprised that those who serve their country are of the high quality they generally are.

Perhaps all of this exploration is useful in reminding us how large a task it is to practice the politics of tolerance. I am afraid that Professor Eskridge sadly misses the mark when he identifies toleration of gays with opposition to the combat of terrorism.[196] Frank Rich would undoubtedly agree with his view.[197] But, although he would be unhappy to hear it, Rich is, after all, merely a journalist.[198] Those of us in the academic community

194. For a discussion of Lyndie England, see *Army Private is Convicted in Abu Ghraib Abuse Case*, ASSOCIATED PRESS, Sept. 26, 2005; David S. Cloud, *Private Gets 3 Years for Iraq Prison Abuse*, N.Y. TIMES, Sept. 28, 2005, at A20; Mark Gongloff, *England Convicted of Abu Ghraib Abuse*, WSJ ONLINE, Sept. 26, 2005. For a discussion of Charles Graner, see Kate Zernike, *The Reach of War: The Verdict; U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at A1.

195. At elite institutions such as Harvard, Yale, and Columbia, students wishing to participate in ROTC must travel to a neighboring less elite campus (such as the University of Connecticut or Fordham) to do so. *See, e.g.*, Nicholas Confessore, *Offering R.O.T.C a Truce; Uniforms Losing Stigma on Elite Campuses*, N.Y. TIMES, May 1, 2005, at A39; *ROTC Resurgent*, HARVARD MAGAZINE, May-June 2002; Adam G. Mehes, What Happened to the ROTC at Yale?, http://www.yale.edu/lt/archives/v9n2/v9n2elihu.htm.

196. Eskridge, unpublished manuscript, *supra* note 188, at 55.

197. *See* Frank Rich, *Falluja Floods the Superdome*, N.Y. TIMES, Sept. 4, 2005, § 4, at 10; Frank Rich, *It Was the Porn That Made Them Do It*, N.Y. TIMES, May 30, 2004, § 2, at 1; Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004, § 2, at 1.

198. Robert C.L. Moffat, *Mustering the Moxie to Master the Media Mess: Some Introductory Comments in the Quest for Media Responsibility*, 9 U. FLA. J.L. & PUB. POL'Y 137-49 (1998)

should strive to meet a considerably higher standard of discourse. Thus, I would much prefer that we remember instead Professor Eskridge's worthy injunction that "[a]lienation of many groups brings the polity down."[199] Overcoming alienation to achieve positive toleration is surely a worthy goal for our society on which all persons of good will should unite.