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ARTICLES

The Forbidden While Inescapable Law-Morality Relation

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In the middle of the twentieth century, the United States Supreme Court initiated a turn away from the law's inherent ordination to the objective moral order of the community. The Court thereafter promoted a replacement legal framework of agnostic proceduralism to facilitate and superintend the self-defining choices of individuals. This essay explores this sea change in outlook with particular critical attention to the Court's jurisprudence on sex and family regulations and on the freedom of speech. The essay then challenges the modern turn in the Court's jurisprudence and advocates the law's obligation to preserve its systemic moral coherence and thereby its continuing ability to serve its historic, vital purposes.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[1]
>
> —*West Virginia v. Barnette* (1943)

Professor Gerard Bradley observes that with the Supreme Court's famous "no-orthodoxy" declaration in *Barnette*, "though inert at first, a new way of mapping the world came to be."[2] Indeed, "the liberal 'procedural republic had arrived.'"[3] Its innovative take on American constitutional liberty has developed into a government posture feigning to stand for not much, substantively, while assiduously enforcing procedural standards that purport to leave most of that substance to individual choice. Arguably, the Mystery Passage in *Planned Parenthood v. Casey* ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life")[4] aimed to modernize the description of our constitutional "fixed star," helpfully clarifying an implication of mandatory state moral vacancy.

1 West Virginia v. Barnette, 319 U.S. 624, 642 (1943).

2 Gerard V. Bradley, *Missing Persons, Fugitive Families, and Big Brother*, in The Thriving Society: On the Social Conditions of Human Flourishing 165 (James R. Stoner, Jr. and Harold James eds., 2015).

3 *Id*. at164, quoting Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 54 (1996).

4 Planned Parenthood of Pa. v. Casey, 505 U.S. 833, 851 (1992).

The Supreme Court has aptly enlisted the Mystery Passage into rhetorical service in rulings condemning state laws against abortion and sodomy, as well as those codifying the definition of marriage, thereby showcasing, as Bradley describes, "the collapse of any tenable conception of a critically justified public morality in its jurisprudence, and elsewhere in constitutional law."[5] This collapse has delivered upheaval perhaps most prominently to family law and the free-speech arena. To these two affected realms this essay will give attention, considering how the Court's feigned privatization of morality is both incoherent and a deceit that effects an inversion of law and the society it pretends to liberate.

May Law Be Moral?

In view of long centuries of recognition in Anglo-American jurisprudence of state authority to legislate in furtherance of public morality, recent doubts as to this authority are curious. As for the traditional rule on morals regulation, the following nineteenth-century judicial description of states' police power authority is typical.

> [It is the] power to preserve the peace, promote good morals, restrain vice, and protect the property and health of the people. That the several State governments have exercised these and kindred powers to the very amplest extent, from the earliest period of their existence, is a matter of history.[6]

Indeed, "social organization" itself "requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[7] Such state authority represents "the very purpose and framework of organized society," one "fundamental and essential to government"; that is, "a necessary and inherent attribute of sovereignty" that "antedates all laws, and may be described as the assumption on which constitutions rest."[8] This venerable authority "never can be surrendered without imperiling the existence of civil society."[9]

Justice Harlan in his famous dissent in *Poe v. Ullman* was stating the settled obvious when observing that

5 Gerard V. Bradley, *Moral Truth and Constitutional Conservativism*, 81 La. L. Rev. 1317, 1323 (2021). The *Dobbs* majority opinion's criticism of the Mystery Passage was welcome, though directed to its terms and not its enacted legal-cultural monuments. "Nothing in this opinion should be understood to cast doubt on precedents" such as *Lawrence* and *Obergefell* "that do not concern abortion." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

6 State v. Searcy, 20 Mo. 489, 490 (1855).

7 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

8 State ex rel. George v. City Council of Aiken, 42 S.C. 222, 225–26 (1894).

9 *Id*. at 226.

> the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.[10]

Yet for some years the Supreme Court's take on whether moral judgment is a legitimate justification for legislative enactments, and for the law otherwise, has been uncertain. In various case opinions over the last several decades, the Court has cryptically (but not always cryptically) signaled that morality is now to be relieved of its venerable vocation as an explanatory feature and motive force in lawmaking. Considering the Court's discovery of constitutional liberties to contracept and abort and engage in sodomy and to access a same-sex civil marriage status, "'[t]he state's rightful concern for its people's moral welfare' has not only failed to limit the reach of substantive due process, but since *Lawrence v. Texas* and *Romer v. Evans*, the soundness of morality as a government interest, without more, has become increasingly dubious."[11]

In *Lawrence*, in ruling unconstitutional the Texas criminal prohibition on homosexual sodomy, the Court majority embraced the rule that Justice Stevens had proposed in his dissent from *Bowers v. Hardwick*: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]"[12] After acknowledging the centuries of moral judgment and "respect for the traditional family" that authorized proscriptions on homosexual conduct,[13] the Court majority nonetheless announced that those considerations could not authorize criminal prohibitions.[14] The Court

10 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting).

11 Y. Carson Zhou, *The Incest Horrible: Delimiting the* Lawrence v. Texas *Right to Sexual Autonomy*, 23 Mich. J. of Law and Gender 187, 189 (2016). As a result, Zhou argues that the fundamental right to sexual exploration the Court ratified in *Lawrence* also encompasses consensual adult incest. He further concludes that "[g]iven *Obergefell*'s extension of the right to marry to non-traditional couples who are entitled to equal dignity under the law, the invalidation of criminal incest legislation on the basis of the right to sexual intimacy would also necessitate the lifting of consanguinity barriers to marriage." *Id*. at 243.

12 Lawrence v. Texas, 539 U.S. 558, 577–78 (2003), quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

13 *Lawrence*, 539 U.S. at 571. The fact that the law's "respect for the traditional family" implies its opposition to nonmarital sexuality is a point that Justice Harlan acknowledged in his opinion in Poe v. Ullman, 367 U.S. 497, 552–53 (1961) (Harlan, J., dissenting). See *infra* at pp. 12–13 and note 68.

14 *Lawrence*, 539 U.S. at 571.

further described (albeit obscurely) a distance between its own work and that of morality: "Our obligation is to define the liberty of all, not to mandate our own moral code."[15]

Justice Scalia protested: "This effectively decrees the end of all morals legislation."[16] All state laws on family design and sexuality are based in "moral choices" and thus are, in principle, disqualified by the *Lawrence* majority's rationale.[17] He invoked the majority opinion in *Bowers* that "[t]he law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[18]

Accompanying the Court's apparent exile of morality from the category of legitimate government interests was an undertheorized description of moral judgment as irrational bias indistinguishable from culpable animus against other people. This "animus standard" got its start in the 1973 case of *United States Department of Agriculture v. Moreno*, in which the Court ruled that Congress may not limit food stamp eligibility to households of persons related by marriage or by blood when congressional purpose for that restriction was its aim not to subsidize hippy communes.[19] The Court's reason: "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[20] Later taking up this rationale from *Moreno*, the Court in *Romer v. Evans* (Justice Kennedy writing for the majority) condemned an amendment to Colorado's constitution that forbade state nondiscrimination protection on grounds of homosexual conduct and orientation.[21] The Court described the amendment as an unjustified act of "animus."[22]

Justice Kennedy brandished the animus cudgel again in his opinion for the majority in *United States v. Windsor*,[23] in which the Court ruled invalid Section 3 of the federal Defense of Marriage Act (DOMA) for its offense of defining marriage as a relation of husband and wife. While Kennedy reported that "[t]he stated purpose of [DOMA] was to promote an 'interest

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15 *Id*., quoting *Casey*, 505 U.S. at 850. It is not clear whom the Court conceived of as the adversary it was refuting, and who, we are to suppose, wished the Court to mandate *its own* moral code. Nevertheless, of course such a moral mandate is, in fact, what the Court imposed in *Lawrence*, as it had in *Casey*.

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

17 *Id.* at 590.

18 *Id.*, quoting *Bowers*, 478 U.S. at 196.

19 United States Dep't of Agric. v. Moreno, 413 U.S. 528, 543 (1973).

20 *Id.* at 534. The Court in *Moreno* noted (approvingly?) the district court's opinion refusing the argument that "the challenged classification might be justified as a means to foster 'morality.'" The district court had responded that "interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions." *Id*. at 537 n.7.

21 Romer v. Evans, 517 U.S 620 (1996).

22 *Id.* at 632.

23 United States v. Windsor, 570 U.S. 744 (2013).

in protecting the traditional moral teachings reflected in heterosexual-only marriage laws,'"[24] he translated those moral teachings through the *Moreno/Romer/Lawrence* prism that refracts them as a malicious intent to harm and humiliate. Congress, therefore, had "no legitimate purpose" for DOMA;[25] only "a bare ... desire to harm a politically unpopular group."[26]

Windsor thus indicted as mere spite the uninterrupted Anglo-American moral-anthropological standards grounding and embedded in marriage and family law. Michael McConnell summarized Kennedy's opinion curtly: "[The] claim of hateful motive was not a casual slip of Kennedy's pen. It is his sole argument against the statute."[27] McConnell thus labeled *Windsor* "adjudication by name-calling."[28] Steve Smith memorably described the brimming insults of Kennedy's opinion as "the sort of thing normally associated with irresponsible and scurrilous pseudonymous comments on marginal political blogs."[29]

Yet the die seemed to have been cast; morality is, in a way, illegal. (Justice Kennedy seemed also to suggest that it is immoral.) The perceived elimination of morality from permissible state lawmaking reasons (in the realm of sex and family, at least) was embraced enthusiastically by lower courts which, after *Windsor*, predictably ruled unconstitutional states' marriage laws. Illustrative was the federal district court in Utah's explanation for enjoining that state's law: "The Supreme Court's decision in *Lawrence* removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals."[30] A federal district court in Oklahoma similarly discerned that "[p]reclusion of 'moral disapproval' as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates," as upholding a moral view of marriage "is not a permissible justification" for law.[31] You don't need a weatherman to know which way the wind blows, the district court explained: "There is no precise

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24 *Id.* at 771.

25 *Id.* at 775.

26 *Id.* at 770. Justice Scalia collected certain examples from the litany of insults that the *Windsor* majority directed against the Congress enacting DOMA: "[T]he majority says that the supporters of this Act acted with *malice*—with the '*purpose*' ... 'to disparage and to injure' same-sex couples. It says that the motivation for DOMA was to 'demean,' ... to 'impose inequality,' ... to 'impose ... a stigma' ... to deny people 'equal dignity,' ... to brand gay people as 'unworthy,' ... and to '*humiliat[e]*' their children." *Id*. at 797 (Scalia, J., dissenting).

27 Michael W. McConnell, *2013 Supreme Court Roundup, Telling a Tale of Two Courts*, First Things (Oct. 2013), https://www.firstthings.com/article/2013/10/2013-supreme-court-roundup.

28 *Id.*

29 Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. Davis L. Rev. 675, 677 (2014).

30 Kitchen v. Herbert, 961 F.Supp.2d 1181, 1204 (D. Utah 2013).

31 Bishop v. United States ex rel. Holder, 962 F.Supp.2d 1252, 1290 (N.D. Okla. 2014).

legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one."[32]

A marriage-law-enjoining district court in Wisconsin also caught Justice Kennedy's gist and outlined the updated and morally empty family-law adjudication method:

> This case is not about whether marriages between same-sex couples are consistent or inconsistent with the teachings of a particular religion, whether such marriages are moral or immoral or whether they are something that should be encouraged or discouraged. It is not even about whether the plaintiffs in this case are as capable as opposite sex couples of maintaining a committed and loving relationship or raising a family together. Quite simply, this case is about liberty and equality, the two cornerstones of the rights protected by the United States Constitution.[33]

Upon evacuation from law of moral duty and sensibility (as well as religion, tradition, custom, dictionary entries, and legal history),[34] the slender remainder of legally permissible counsel on state family policy seems to have fallen to social-science data compilers. In the marriage field, the data employed has focused on matters including the prospects for children raised in marital homes as compared and contrasted to those in homes of same-sex partners. The federal district court enjoining the Ohio marriage law reported that "the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples."[35] A district court in Michigan summoned expert testimony announcing equivalence in parenting competence between same-sex and mother-father couples, as well as equivalent developmental outcomes for children in these two contexts.[36] Specifically, the court cited a study that "children raised by heterosexual married couples are less than one percent less likely to be held back in school than children raised by same-sex couples,"[37]

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32 *Id*. at 1296. After *Lawrence* and *Windsor*, Neil Siegel wrote that "it is not evident what legitimate, let alone important, interest states can have in prohibiting same-sex couples from marrying when the Court has taken off the table both moral opposition to homosexuality ... and the constitutive conviction that marriage is inherently an opposite-sex institution." Neil Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. of Legal Analysis 87, 112 (2014).

33 Wolf v. Walker, 986 F.Supp.2d 982, 987 (W.D. Wisc. 2014).

34 "The mere fact that the prior law, history, tradition, the dictionary and the Bible have defined a term does not give that definition a rational basis, it merely states what has been." Golinski v. United States Office of Personnel Management, 824 F.Supp. 2d 968, 999 (N.D. Cal. 2012).

35 Henry v. Himes, 14 F.Supp.3d 1036, 1056 (S.D. Ohio 2014), citing Obergefell v. Wymyslo, 962 F.Supp.2d 968, 994 n.20 (S.D. Ohio 2013).

36 DeBoer v. Snyder, 973 F. Supp. 2d 757, 761 (E.D. Mich. 2014).

37 *Id*. at 762 n.3.

while also finding there to be no credible evidence of difference in high school graduation rates between Canadian children raised in marital homes versus those raised in homes of same-sex couples.[38]

One could doubt that human societies universally and throughout recorded history have acknowledged conjugal marriage due to their anticipation of its utility in yielding marginally higher graduation rates for twenty-first-century North American students. But the now-prevailing aversion to moral discourse (and philosophical engagement more broadly) on family and sexuality manifests in a resort to empirical tabulations having nothing to do with the motive and meaning of the natural institution and venerable laws at issue.[39] The coin of the litigation realm has been empirical measurement, as if it were the ideal form of justification. More than the law is afflicted with this tendency, of course. Cardinal Ratzinger indicted the "purely functional rationality" plaguing the West, which "implie[s] a disorder of the moral conscience altogether new for cultures existing up to now, as it deems rational only that which can be proved with experiments."[40]

Here we might recall the Supreme Court's illustrative performance in *Brown v. Entertainment Merchants Association*[41]—"the violent video games case"—involving a challenge to a California law that forbade sale or rental to minors of video games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner deviant, morbid, and patently offensive.[42] Justice Scalia, writing for the majority, recited the rule establishing that the message, ideas, subject matter, and content of expressive displays (such as that of the games to which the California statute had given its regulatory attention) are in fact outside the range of the law's permissible attention.[43] Only an "actual problem" may be countenanced by state law—and even then, only if the state can fetch empirical proof that the material it regulates is the cause of that problem.[44]

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38 *Id*. at 767–68.

39 Bradley urges that "there is no good reason to exclude from the proper grounds for lawmaking under our Constitution the *philosophical* truth about what marriage is and the *moral* truth that it is the normative context for having sex and for having kids." Bradley, *supra* note 5 at 1355 n.137. As to the marriage-policy argument based on the "best atmosphere" for raising children, that "focuses on sundry indicia of nonmoral competence and well-being, such as academic achievement, truancy rates, reported self-esteem, and ability to make friends," these, while "good things, ... are not, however, measures of human flourishing in any morally significant sense." *Id*. at 1356.

40 Cardinal Ratzinger, Lecture at the Convent of Saint Scholastica, Subiaco, Italy (July 29, 2005), https:///www.catholiceducation.org/en/culture/catholic-contributions/cardinal-ratzinger-on-europe-s-crisis-of-culture.html. Ratzinger continued: "In a world based on calculation, it is the calculation of consequences that determines what must or must not be considered moral. And thus the category of the good ... disappears. Nothing is good or bad in itself, everything depends on the consequences that an action allows one to foresee." *Id.* Harold Berman has highlighted the seventeenth century's momentous Galilean-Cartesian scientific revolution, in which "[t]ruth was identified with what the mind can weigh, measure, and count," in which the "Aristotelian conception of a purpose and organic universe was rejected in favor of a morally neutral and mechanical universe." Harold J. Berman, Law and Revolution II 267 (2003).

41 Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011).

42 *Id*. at 789.

43 *Id*. at 791.

44 *Id.* at 799.

As the legislature is foreclosed to act on the moral concern that children gazing upon and ruminating sexual assault, torture, killing, and mayhem—during their virtual carrying out of those acts—is itself corrupting (that is, an actual problem) and not best pursued by young minds during their formative years (at least apart from parental awareness and authorization), just what an *actual* "actual problem" might be, and how it could be known as such, is not clear. It seems, though, that the actual problem must causally derive from the child's constitutionally protected indulgence in the regulated video games. California would need to produce a study proving something like an uptick in delinquency from this game play.

Such causation was manifestly beyond reach of proof. A couple years before, while in a more sensible frame of mind, Justice Scalia had written for the Court majority in *FCC v. Fox Television Stations* that

> [t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.[45]

Quite right. But we should notice that this observation only addresses itself to the absurdity in requiring such an empirical study to begin with. A yet further challenge lies in the likely impossibility of isolating and controlling for all causal factors that could contribute to any cognizably negative outcomes in the first place. And even then, assuming proof of causation can be shown, what precisely is the standard of evaluation enabling the legislature to know which "effects" are relevantly problematic and thus to be selected for proving *as* an effect? And how does that evaluation differ, in a constitutionally relevant way, from the forbidden one that would adjudge problematic the soul stain from juvenile participation in virtual forms of vicious crime sprees?[46]

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45 FCC v. Fox Television Stations, 556 U.S. 502, 519 (2009).

46 Justice Scalia derided Justice Alito for his concurring opinion with its quaint suggestion that the law could concern itself with children's participation in video games of "astounding" violence in which "[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces," and whose form of play also is directed to ethnic cleansing of minorities. *Brown*, 564 U.S. at 798–99. He continued that "Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription." *Id*. at 799. Here Scalia tilts at an imaginary foe summoned from case law shibboleth: dread states legislating against isolated *ideas* that have no effect on anyone. But in the actual, nonimaginary circumstance that Justice Alito discussed and California regulated, Justice Scalia's tidy case law categorizing of child-directed video bloodbaths as inert "speech" (or "ideas") seems a strained artifice. In any event, if the moral harm visited upon a child from enacting and observing his own violent, gory, racist impositions upon virtual people is itself immune to legislative critique or attention (of even the light-touch kind that California attempted), it is not plain what alternative form of analysis would permit the allegedly "objective effects" to be critiqued, so as to serve as the basis for the very same regulation. In both cases, a deplored moral effect is what would motivate the regulation.

A comparably confounding condition is in play in discussions in the (largely abandoned) field of pornography regulation. In the nature of the case, apart from the employ of moral-philosophical judgment, its demerits are largely incalculable.[47] Rochelle Gurstein describes the scientist-eluding nature of conclusions in this field, as registered by political philosopher and attorney Harry Clor:

> [T]o Clor, the dangers posed by obscenity, though dire, were too elusive to be captured by the gross measurements of social scientists.... [H]e observed, "The most socially significant issues concern the more subtle and long-term influences of obscenity upon mind and character—its moral effects. Obscenity can contribute to the debasement of moral standards and ultimately of character." And, he thought, one could "become desensitized" when "assaulted by prurient and lurid impressions." Both fueling and accompanying this desensitization was the weakening of the faculties that decide how the world should look—taste and judgment.[48]

Clor's is a foreign dialect within the Procedural Republic. Jean Bethke Elshtain, for one, has lamented our decrepit condition in such a society, as "we are deeded a rather impoverished language with which to confront issues such as pornography: individualism, privacy, harm (or no-harm, as the case may be)."[49] Impoverished yet censorious: "To try to inject community, or the common good, or even shared public reason into the discussion is to court charges of censorship, moralistic prudery, and all the rest."[50]

Gerard Bradley points to Justice Souter's concurring opinion in *Barnes v. Glen Theatre* as a representative enactment of the sidestep of moral discourse, relying (supposedly) on something else.[51] In *Barnes*, Justice Souter joined the Court's judgment upholding the Indiana law prohibiting public nudity, applied in that case to nude dancing at South Bend's Kitty Kat Lounge. He explained that his vote for the Court's judgment rested "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments."[52] That is, nude dancing itself is not the legitimate concern of the State of Indiana, but the fact that *when* nudity

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47 As to the kind and significance of porn-use harms, see, generally, Social Costs of Pornography: A Collection of Papers (James R. Stoner, Jr. and Donna M. Hughes eds., 2010).

48 Rochelle Gurstein, The Repeal of Reticence 300–01 (1996), quoting Harry M. Clor, Obscenity and Public Morality 167, 174, 171 (1969).

49 Jean Bethke Elshtain, *Foreword*, Social Costs of Pornography ix, *supra* note 47.

50 *Id*.

51 Bradley, *The Moral Bases for Legal Regulation of Pornography*, *supra* note 47 at 203–04, citing Barnes v. Glen Theatre, 501 U.S. 560, 581 (Souter, J., concurring) (1991).

52 *Barnes*, 501 U.S. at 582 (Souter, J., concurring).

establishments (let's call them) are in operation, the areas around them become seedy, with localized increases in "prostitution, assaults, and other criminal activity."[53]

So the reasonably anticipated arrival of unseemly "secondary effect" neighborhood conditions is a legitimating reason for state regulation of the primary conduct that appears to invite that secondary effect.[54] Here again, if moral judgment does not authorize regulation of lewd conduct, on what grounds may Indiana concern itself with such conduct's "secondary effects" that would authorize regulation of lewd conduct? Why, for instance, may the state worry over an increase in prostitution? From Justice Souter's proposal we should conclude that any perceived moral demerit in the commercial sex trade is not a legitimate justification for Indiana's concern or regulation. Instead, we may presume (by transposition) that prostitution qualifies as a legally cognizable "secondary effect" only if that secondary effect is reasonably presumed to cause a tertiary effect (such as diminished property values, perhaps). This tertiary effect, of course, only would be a cause for legitimate state worry if it could be shown to cause a quaternary effect, on, for instance, community property investment. And so on, in infinite regress.

Of course, Justice Souter did not put his argument in this way, even if his proposal does imply it. Instead, the secondary effect he deems worthy is simply (if impliedly) stipulated to be a *harm*, thereby readily identifiable as such apart from a moral judgment. "Harm analysis," though, does not in fact present an alternative to moral evaluation; it depends in fact on the very thing it purports to be replacing. What constitutes "harm" worthy of legal cognizance is answered only in terms of the very ethical norms whose alleged disqualification calls forth this supposed alternative discourse.[55]

The flight from moral judgment on matters sexual likewise characterizes the Supreme Court's pornography case law—both in the Court's thwarting legislative regulation of smut, as well as in the Court's own practiced refusal to reveal moral insight about the pornography whose proliferation its jurisprudence has enabled. As Bradley summarizes, since the 1957 *Roth* case, the Supreme Court "has not produced a cogent moral justification for it; that is, the Court has not articulated, much less defended, any claim about what is wrong with obscenity."[56]

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53 *Id.* at 583.

54 Justice Souter would relieve the state of having to conduct empirical studies of this correlation as a precondition of its authority to legislate on these grounds. It is enough, he suggested, to know that Seattle and other cities have documented the correlation. *Id.* at 584–85.

55 For an insightful critique of the incapable nature of traditional harm-principle analysis, see Steven D. Smith, *The Hollowness of the Harm Principle* (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=591327.

56 Bradley, *supra* note 47 at 208 (emphasis removed).

On the other hand, the Court does not hesitate to celebrate the (moral?) virtue of the morally agnostic proceduralism of its speech-clause jurisprudence. For example, its pornography rulings have been, as Bradley observes, "suffused with high hosannas to the inestimable role that 'freedom of expression' plays in the good life of man and in a democracy."[57] This unqualified praise for free expression is the tell; the Court's account of free speech itself disqualifies legislative (and its own) moral judgments on the content of what is classified as protected First Amendment "speech." Bradley describes the result: "There isn't any corresponding testimony to the moral harm that obscenity visits upon its consumers," nor a "parallel witness to the inestimable role that a decent regard for public morality plays in the good life of the human person, and of that person's democracy."[58] The Supreme Court, he points out, has not even permitted itself to condemn the visual intake of child pornography; the Court discovers harm only in the exploitative use of children in the *making* of child porn, not in the material itself.[59]

Philosopher Gerhart Niemeyer has argued that the twentieth-century development of the doctrine of free speech has, by describing falsely our law and political standards, evacuated the moral concepts and regulatory options formerly relied on to maintain the health of our social order.[60] The characteristic feature of this aberrant speech doctrine is in its "refusal to allow value distinctions between various types of ideas to have influence on the public treatment of utterances."[61] As such, "[t]he notion that there are ideas which maintain and nourish the community and others which disrupt and dissolve it is explicitly rejected,"[62] thereby training the community into the conviction that moral criteria for community life cannot be known and thus need not be cultivated.[63] Niemeyer considers:

> Could the doctrine of free speech be defended on the ground that a regime of official impartiality is the best contribution to the triumph of the good? It seems that such a defense could be valid only if one assumes either that the state has no positive function in the struggle between good and evil, or else that

57 *Id.*

58 *Id*.

59 Bradley, *supra* note 47 at 205 (discussing *Osborne v. Ohio*, 495 U.S. 103 (1990)).

60 Gerhart Niemeyer, *A Reappraisal of the Doctrine of Free Speech*, 25 Thought: Fordham Univ. Quarterly 251 (1950).

61 *Id*.

62 *Id*. at 259.

63 *Id.* at 268.

> truth in these matters is so uncertain that no government can do anything but repeat Pilate's query, "What is truth?," thereby washing its hands of the problem.[64]

Niemeyer rejects both options, condemning the extant doctrine of free speech for its "destruction of the moral basis of society."[65] "[A] firm official stand for what is known as right, true, and good is required if an awareness of the moral nature of political community is to return."[66]

The Networked Nature of Law's Moral Coherence and the Obligation to Preserve It

Contemporary constitutional case law notwithstanding, the law's relation to and interdependence with morality is inexorable and continuous throughout its features and operation. As such, the law-morality relation has any number of expressions and thus avenues for fruitful consideration. Among these are the law's pursuit of justice for the individual person, its safeguarding the integrity of vital social institutions that influence community character, and its preservation of its own moral coherence on which depends its ability to serve its venerable priorities.[67] Consideration of the last of these will occupy the remainder of this essay.

Individual moral precepts, properly understood, are not isolated standards but members of an encompassing totality that honors human meaning. In the same way the law's individual standards exist as networked parts of the harmonious whole they together serve and sustain. For certain discrete provisions of law to be eliminated or inverted into their contradiction would place in doubt or peril the larger whole that these provisions previously represented and instantiated. The law's regulatory omissions, or its inversions of central precepts (such as those implicating the sanctity of conjugal marriage, for instance), compromise the law's systemic unity and coherence.

In Justice Harlan's dissent in *Poe v. Ullman*, he described the "laws regarding marriage" as anchoring and revealing the family design and its moral logic; these laws identify positively "both when the sexual powers may be used and the legal and societal context in which children are born and brought

64 *Id.* at 272.

65 *Id*.

66 *Id*. at 273. Niemeyer's call for a moral return is consistent with the historic common-law and founding-era approach to speech regulation. *See*, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246 (2017).

67 The Supreme Court in Washington v. Glucksberg, 521 U.S. 702 (1997), denied a claimed constitutional right to "physician-assisted suicide," finding "unquestionably important and legitimate" government interests to the contrary. *Id.* at 735. Included among these government interests were the categories just mentioned: moral concerns for individuals, the community, and the integrity of the law itself. Specifically, the Court recited government interest in (1) protecting the young, persons with mental disorders, and other vulnerable individuals from being pressured into suicide, *id.* at 730–31, 731–32; (2) safeguarding the "integrity and ethics" of the medical profession, *id.* at 731; (3) refusing legal standards whose operation could compromise enforcement of values the law otherwise prizes. *Id.* at 728–29, 732–33.

up."[68] Shoring up this social institution are the "laws forbidding adultery, fornication and homosexual practices," for marriage's normative standard implies prohibitions on deviations from it; these laws "express the negative of the proposition, confining sexuality to lawful marriage."[69] Together these "form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis"[70]—a notoriously unheeded admonition.[71]

Making a point similar to Harlan's was Lord Devlin in his famed 1959 Maccabean lecture, in which he observed that marriage is a structural feature of our social order and serves as "the basis of a moral code which condemns fornication and adultery."[72] Marriage, as a benchmark of our public morality, would be "gravely threatened" if persons in the society were free to make "individual judgments" on sexual behaviors like adultery.[73] Being a defining feature of our humanity and thus an eminently public community institution, marriage depends on the law to maintain a chaste public ecology and thereby marriage's public intelligibility, apart from which it is imperiled. Jay Michaelson has pointed out that "even if virtues and sins are private, the public polity is in large part defined by its stance in relation to them," and that "public legal positions and institutions [themselves] create moral facts."[74] Hardly credible is the now-orthodox idea that sexual conduct is an exclusively private matter: "If heterosexual families have public functions, then to suggest that homosexuality is purely a private affair is incoherent."[75]

In 1888, the Supreme Court in *Maynard v. Hill* connected marriage's pinnacle moral and social importance with its legislative protection. Marriage, "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[76] French philosopher Pierre Manent describes marriage's radically legal import as follows:

> One of the most essential laws is that which, as it were, holds together the difference of the sexes with the differences of generations. The other sex is the strange proximity of that which is furthest away; the other generation is the strange

68 *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

69 *Id*. (emphasis added).

70 *Id.*

71 Bradley summarized the tectonic shift: "*Lawrence* installed consent as the principle of constitutional sexual morality, finally replacing (in constitutional law) marriage as that principle." Bradley, *supra* note 5 at 1363.

72 Sir Patrick Devlin, The Enforcement of Morals 10 ([1970] 2009).

73 *Id*. at 10.

74 Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 Mich. J. Gender & L. 41, 87 (2008).

75 *Id*. at 88.

76 *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

> distance of what is nearest. No human being can by himself regulate this distance or this proximity. To try to do so is to enter into a vertigo, a loss of the self from which there is no return. This is why laws of marriage and of filiation in a way make up the original laws of the human world.[77]

Borrowing a suggestive insight from Jeremy Waldron, we might usefully describe the anthropologically momentous institution and relation of husband and wife as an archetype in our law. By *archetype* Waldron means "a particular provision in a system of norms which has a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law."[78] As such, "in some sense, *other law* depends on its integrity."[79]

Accordingly, the *renunciation* of a legal archetype (such as marriage, on our proposal) would also renounce the principles the archetype incorporated and held in place as authoritative conceptual polestars superintending the relevant areas of law. These principles no longer have their authority. Thus our ability to make effective arguments rooted in the formerly governing principles vanishes.[80] Conversely, those ideas that the former archetype, during its reign, had disqualified and thus kept beyond the gates (so to speak) now have entrance to rampage through the affected area of law, overhauling former standards and replacing them with rival precepts. Indeed, they are veritably required to do so, in view of the vacuum left by the dethroned predecessor.

For again, the law is not a series of solitary posits directed at isolated circumstances, having no common root and conceptual interaction within itself. Rather, the law is a mutually informing whole with an effectual imperative toward unity among its parts. This, indeed, is one of the defining characteristics of Western law—and certainly of the Anglo-American common law tradition, with its emphasis on reason, doctrinal unity, precedent, and historical consistency.[81] Hence contestation over applications and extensions of the law presupposes this conceptually networked unity of law, and advocates proceed by putting forward arguments that are analogous to, and reliant upon, principles that are already established in the law as authoritative.[82]

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77 Pierre Manent, Natural Law and Human Rights 122–23 (2020).

78 Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Columbia L. Rev. 1681, 1723 (2005).

79 *Id.* at 1734.

80 *See id.* at 1738.

81 See, e.g., Harold Berman and William Greiner, The Nature and Functions of Law 36 (1972); T. R. S. Allan, *Law as a Branch of Morality: The Unity of Practice and Principle*, 65 American J. of Jurisp. 1 (2020).

82 Waldron states that "the life of the law depends, in large part, on argumentation.... In law, we do not just argue pragmatically for what we think is the best result; we argue by analogy with results already established, or we argue for general propositions on the basis of existing decisions that already appear to embody them." Waldron, *supra* note 78 at 1736.

When the Supreme Court majority in *Obergefell v. Hodges* redefined civil marriage into a nonprocreative and same-sex relation and status, it thereby renounced marriage's form and meaning, transmogrifying it into its antithesis.[83] The paradigm institution of our relationality, of our nuptial calling, of love manifest and revealed in generation, was jurisprudentially described and converted into a psychologically affirming tool and right of fruitless individuality.[84] Upon the repudiation of the formerly universal legal norm of marriage, it appears untenable for the law to sustain through time the public place and meaning of all of the components and derivatives of family aspect and relationship. Once the marital center is dissolved, its adjacencies are set adrift from its defining and orienting authority. New definitions for each component become necessary and inevitable.

For instance, since (as the argument goes) categorically nonprocreative relationships now represent the paradigm or central case of marriage and family in our governing constitutional law, it is urged that the collection and gathering of children unto such relationships from sources outside the relationship is likewise normative or paradigmatic of family.[85] With procreative relationality disqualified from defining the norms of marriage and family, the parent-child relation is redefined away from an embodied and immediate kinship bond into a management status of functional organization initiated by various technical methods or legal custody transfers. Thus conjugal relation itself is reclassified into but one more method from the menu of legally equivalent functional means for obtaining children.

Douglas NeJaime therefore explains that marriage redefinition invites not only elimination of the mother-father combination as the exclusive parental offices, but by eliminating biology and gender as salient considerations it also removes the idea or limit of two persons and erases the requirement that such parents are or have ever been in intimate relationship to begin with.[86] Likewise, the Revised Uniform Parentage Act (UPA) of 2017 (now enacted in eight states)[87] eliminates and replaces most all historic family law standards that depend on or imply the idea that male and female, mother and father are

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83 Obergefell v. Hodges, 575 U.S. 994 (2015).

84 Bradley describes the *Obergefell* opinion as one "whose justificatory passages were Mystery Passage all the way down," in which marriage was a "salve for the sores of self-definition by dead reckoning. [As *Obergefell* put forth:] 'Marriage responds to the universal fear that a lonely person might call out only to find no one there.'" Bradley, *supra* note 5 at 1428, quoting *Obergefell*, 576 U.S. at 667.

85 *See* Jeff Shafer, Obergefell *and the Right to Other People's Children*, First Things (Sept. 21, 2017), https://www.firstthings.com/web-exclusives/2017/09/obergefell-and-the-right-to-other-peoples-children.

86 Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harvard L. Rev. 1185, 1191, 1263–64 (2016); see also Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J. F. 589, 595 (2018) ("Recent Supreme Court decisions suggest that gender- and sexuality-based parentage rules are not only unjust but also unconstitutional.").

87 At the time of this writing, the Uniform Law Commission reports enactment of the UPA 2017 in eight states with a bill proposing its enactment introduced in one more. https://www.uniformlaws.org/committees/community-home?communitykey=c4f37d2d-4d20-4be0-8256-22dd73af068f.

meaningful categories or relations for children or are relevant or instructive for law. Courtney Joslin (reporter for the Uniform Law Commission on the UPA 2017 project), describes that

> [t]he prior versions of the Act distinguished between paternity and maternity and created different mechanisms for establishing each one. Not only did this distinction erect different rules for men and women, but it also reinforced the notion that some inherent difference exists between mothers and fathers. In contrast, the UPA (2017) takes the position that under most of the rules for establishing parentage, an individual's gender is not relevant.[88]

Accordingly, "by opening up additional methods of establishing parentage to all individuals ... the Act also works to break[] down the persistent legal and social distinctions between mothers and fathers."[89] The 2017 Act "does not require intended parents of children born through ART or surrogacy to have a genetic connection to the resulting child," but rather establishes parentage "entirely by virtue of conduct. Genetic connection is simply not relevant to establishing the parentage of intended parents under these articles."[90]

Similarly, courts across the country have ratified the making and custodial possession of children through contractual-technological means in which adult filial relation to the child is made nothing in order to accommodate common child custody by same-sex couples. These courts have ruled this sort of child-distribution regime as implied in and required by the Supreme Court's imposition of a new gay paradigm of family.[91] Pressing the implications from another angle, Professor Courtney Cahill explains that *Obergefell* likewise entails a redefinition of incest. Now that categorically nonprocreative same-sex relationships paradigmatically represent marriage, kinship is excluded as a defining feature of family relationality and thus can no longer be the standard by which incest is defined.[92] Cahill summarizes: "[T]he marriage equality precedent paves the way for disestablishing not just traditional marriage but also the traditional family."[93] To which we should add, it disestablishes human meaning *tout court*.

88 Joslin, *supra* note 86 at 606.

89 *Id.* at 607.

90 *Id*. at 607–08.

91 *See* Jeff Shafer, *Producing the "Global Baby,"* Humanum Review (July 23, 2023), https://humanumreview.com/articles/producing-the-global-baby (presenting illustrative court decisions).

92 Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. Davis L. Rev. 183 (2015).

93 *Id*. at 248–49.

The foregoing examples illustrate both the tight U-turn (in principle, if not yet fully in deed) that is the marriage archetype replacement, and the overhaul entailed once this replacement would consolidate its control over the dissident policy fragments surviving from the former corpus of family law, which was grounded in the normativity of conjugal marriage and procreative descent. For law now to reduce maternity and paternity to mere manufacturing inputs vacant of personal meaning and responsibility, and to classify the child as a raw datum—ontologically isolated, without a family history and without a certain home (rather, assigned one upon the happenstance of a managerial adult choice), all so that adults so desiring may lay claim to a child—upends a great deal more than historic custody rules. For the law to discard the truth of the humanly defining relationality of the child to his forebears in turn deprives law and society of the public premises that make it possible (for instance) to recognize and lament the pitiable plight of orphans, to know that adoption mitigates a grievous loss, to justly condemn deadbeat dads, and otherwise to recognize a beauty and responsibility of care and support by a (correspondingly rights-bearing) father and mother in view of their generative relation to their child. Each of the foregoing concerns is sensible only if the child is, *ab initio*, in a fixed relation that carries meaning and duties.

But these losses are just for starters. By redefining persons as radically isolated, blank, and fungible, the New Order disqualifies not just the anthropology of yesteryear but the civilization that is inseparable from it. That sort of loss has quite some bearing on law's self-conception and how it addresses us.

It is, accordingly, an aspect of law's moral responsibility to maintain its own coherence and doctrinal unity both by preserving internal to itself its carefully virtuous orienting standards, and by foreclosing certain malevolent practices present in society whose tolerated continuance would sow chaos into the community and disrupt its orienting self-understanding—a chaos that in turn would, in time, threaten the health of the law itself, which would thereafter repay harm to the community, and so on, in mutual returns. Threats to community order are to be kept at bay by law. Legal standards pertaining to sex, reproduction, the natural family, and its relations are not optional. They are obligatory in the composition of the just public order as well as in the preservation of law itself as intelligibly directed to the common good of a community of familial persons.[94]

It is here that we can appreciate Bradley's insistence on the centrality for law of the question of *the person*. It is, he says, "the foundational question about justice that every legal system faces: *whom* is the law *for*? That question is

94 See Manent, *supra* note 77. For this reason Friedrich Stahl urged that the law is responsible to protect the divinely established vocations and institutions within and comprising the community, not in order to compel virtuous perfections or attainments within each one, but rather "to preserve its most outlying boundaries, only enough to preserve the concept, to keep its opposite from manifesting itself." Friedrich Stahl, Principles of Law 20 (Ruben Alvarado trans., 2007).

prior and paramount to the question, *what* should the law *be*?"[95] The morally bereft government of the Mystery Passage, feigning a noncommittal stance on human meaning by "privatizing" the matter, in fact has installed a public orientating paradigm that redefines all of us in false terms portending severe consequences. When social isolation and fragmentation rather than natural harmonious relation is our native character and condition, all subsequent relations then can only be contingent: merely chosen or compelled, and free of natural meaning. The social order itself is then only an artificial entity, an act of either choice or coercion, rather than of reason and truth.

Conclusion

Justice Alito's opinion for the majority in *Dobbs v. Jackson Women's Health Organization* can be read as rehabilitating the reputation and standing of moral judgment in its central role in lawmaking. The majority opinion began by observing that "[a]bortion presents a profound moral issue,"[96] and thereafter treated that moral issue as focal to state legislatures' regulation on the matter.[97] The majority itself engaged in moral reasoning as it critiqued the inadequacies of *Roe*'s vaunted viability standard.[98] The *Dobbs* opinion concluded by "end[ing] ... where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion."[99] At least in this context, the Court now acknowledges that the moral and the legislated are rightly wed. However modest, this is a welcome gesture in the direction of repair.

And we, too, might end where we began—with the *Barnette* case. In his dissent in *Barnette*, Justice Frankfurter expressed the concern that when we process every question of public significance through the peculiar formulae of constitutional rights, other forms of evaluation atrophy. "Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom."[100] Or better put with the

95 Bradley, *supra* note 5 at 1328.

96 *Dobbs*, 142 S. Ct. at 2240.

97 Abortion "has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless." *Id.* at 2258. "The Court [in *Roe*] usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people" (in context, meaning the people's legislatures). *Id.* at 2236. The majority's opinion emphasized that the distinguishing feature of abortion in contrast to the cases on which *Roe* and *Casey* had relied is that abortion, in destroying a life, implicates a "critical moral question," which energizes its legal status. *Id.*

98 *Id.* at 2268–70, discussing viability's dependence on the "quality of available medical facilities," which the Court dismissed as a morally (and thus legally) significant consideration.

99 *Id.* at 2284.

100 *Barnette*, 319 U.S. at 670 (Frankfurter, J., dissenting).

benefit of hindsight, the constitutionalism of the Procedural Republic, distilled and directed by the Mystery Passage, scandalizes the very notion of wisdom, along with moral truth, while replacing them.

Bradley has opined that "[o]ur nation has passed a 'tipping point' where damage control is not enough"; indeed, such damage control "is tantamount to a slow-walking surrender."[101] Compliance with the methods of the Procedural Republic will not do. He counsels that "the only promising path for conservatives to take is one lit by moral truth."[102]

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101 Bradley, *supra* note 5 at 1327.

102 *Id.* at 1371.