A JURISPRUDENCE OF DOGMATISM: Religion, Rationality and the Case for Homosexual Rights

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I contend that arguments derived from religious beliefs are incompatible with Constitutional jurisprudence because such views are generally irrational, and consequently, judicially incontestable. Yet, due to the significance of religion in the lives of many citizens, such arguments have continually intruded into matters of law and public policy. This has been the case particularly regarding the issue of homosexual rights, where a religiously grounded animus has made it difficult for gay and lesbian persons to enjoy the full protection of law. Because religious arguments cannot be rationally justified they must be excluded from judicial analysis. I will further argue that once such arguments are excluded, there are persuasive moral reasons for courts to sanction same sex relationships, reasons which are implicit in the Constitutional right of self-definitional autonomy.
“Mystical truths by their very nature must be solely personal. They can have no possible external validation, nor can they produce any possible communication with those who do not share the particular mysticism. There is a fundamental flaw in all mysticisms. The mystic often seeks external support of his position, and in the process, denies his mysticism.”

Richard Hardison

“Vernunft ... ist die höchste Hur, die der Teufel hat”

Martin Luther

**Introduction**

Perhaps no single issue so illustrates the degree of separation between the naturalistic and religious worldview than homosexuality. For many religious persons, the very idea of homosexual conduct is offensive. Many religious groups have supported legislation to regulate homosexual behavior, going as far as to advocate the criminalization of same sex sexual relations. As a consequence, courts have had to address the very legality of homosexual conduct and the degree of civil rights protections accorded to persons who engage in such conduct. But are such issues appropriate for judicial consideration? Clearly, the history of statutory regulation concerning homosexual conduct suggests a longstanding bias against homosexuality. In such a political climate, it is not likely that the configuration of power can be shaped to favor the interests of gay and lesbian citizens. But of course, in a majoritarian society nothing can guarantee that everyone will benefit from any occurrent configuration of interests. But when is a bias so unwarranted that judicial intervention is appropriate to protect the interests of a vulnerable group? And what considerations should be determinative in this analysis?

It is well established that a State can act to protect the moral welfare of the community, and many laws restricting homosexual conduct are justified by invoking moral arguments. For example, homosexuality has been associated with personal lethality and the decline of the traditional family. But other arguments characterize homosexuality as being sinful, or against the

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1 Many philosophers distinguish the concept of *morality* from the concept of *ethics* (ethics being the broader term). It is useful to note that the term morality is derived from the Latin *moralitas* and the word ethics is derived from the Greek ἡθικὸς. Both terms refer to personal character or normative behavior. For the purpose of this essay I make no distinction but will use only the term *morality* for the sake of uniformity.
will of God. These arguments appear to be distinctly religious in nature. While the legal relevance of such arguments implicate several First Amendment issues, this essay will focus on the role of religion in questions of equal protection and fundamental rights. Most courts continue to evaluate cases involving the rights of homosexual persons under a rational basis standard of review, and consider traditional religious proscriptions on homosexual conduct to be rational in the context of such analysis. This has made a cogent resolution to the problem of homosexual rights impossible. In this essay I will argue that because religious arguments tend to be rationally incontestable, the inclusion of such arguments into judicial analysis has undermined the integrity of the rational basis standard of review. Generally, religious beliefs are revelatory and transcendental in nature, and are construed from a point of epistemological privilege. Thus, most religious traditions claim to be the truth-absolute and immutable. When religious believers argue against homosexuality, they do so on the basis of claims that cannot be rebutted by evidence and persuasion. Such claims cannot be proved to anyone who does not already accept the belief. I contend that “arguments” derived from religious beliefs should be completely excluded from legal analysis. In matters concerning equal protection and fundamental rights, judges must ensure that legislators hold an epistemologically adequate basis for their political decisions. This must entail that such judgments are fully independent of any transcendental commitments. I will first discuss the distinction between religious and moral arguments concerning homosexuality. I will then conclude that once religious claims are excluded from judicial consideration, there are persuasive moral reasons for courts to sanction same sex relationships, reasons which are implicit in the constitutional right of self definitional autonomy.

While the founders and framers of the American Republic were almost universally religious, and nearly exclusively Christian, the context in which such religious values were held is poorly understood. The puritan founders of the American colonies desired to create theocratic states consonant with their own religious views. But the framers of the Republic rejected the concept of one Christian denomination functioning as an established national Church. Having removed themselves from the Holy Inquisition and religious wars of Europe, they believed that the primal, emotive force of religion had to be constrained by reason. These were, after all, men imbued with the works of the Enlightenment, and they constructed the foundation for the “wall of

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2 In fact, at the time of the first Continental Congress, nine of the thirteen original colonies supported their own official state religious denomination. DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789 (2000).
that helped insulate the political process from the powerfully irrational, emotional forces attendant to religious belief.

The framers’ commitment to the moral values of the Enlightenment—equality of treatment, a substantial realm of personal freedom immune from state intrusion, and toleration of divergent ideas and practices—is clearly present in the Declaration, Constitution, and Bill of Rights. Most importantly, the framers believed in the architectonic principle of all Enlightenment thinking: that human reason was the primary source of legitimacy in both politics and morality. Consequentially, they believed that all political and moral judgments must be rational and impartial in nature. In general, the meaning of the Constitution has been understood by the U.S. Supreme Court to be consonant with these foundational values. Laws must have a rational basis, and be applied without illegitimate bias or partiality. Legislative and judicial judgments must be made in the absence of strong emotional or psychological bias. It is often the case that individuals harbor a prejudice against other persons on the basis of non-reflective assumptions that cannot be tested against the facts of our experience. Such attitudes should not be attached to the instrumentality of law, as this would make the impartial application of law impossible. And impartiality is a necessary condition for equality, in both its procedural and substantive manifestations.

But when we examine the legislation that has proscribed homosexual conduct we find a record of blatant animus, and hostility directed at homosexual persons. Much of this animus is attendant to religious belief. It would seem that in the presence of an intractable and irrational hostility towards these persons the appropriateness of judicial protection would be clear. Unfortunately, this has not been the case. And the traditional opposition of some religious groups to homosexuality has been a significant reason why homosexuals have not been afforded the full protection of law.

The Case Against Homosexuality

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3 “Believing that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.” — Thomas Jefferson, *Letter to Danbury Baptists* (1802).
Is there a legitimate state interest in proscribing homosexual conduct? Because the police powers of states are construed broadly, great deference is given to state legislators when courts evaluate laws that burden private interests. While there is no fully articulated procedure or bright line rule to determine if a statutory classification deprives a person of a constitutionally protected interest, the U.S. Supreme Court has developed several tests to determine if a classification is unconstitutional. In most cases, the court applies a rational basis test to determine if a classification is constitutional. Under rational basis review, there is a strong presumption that a law is valid. In fact, only if a plaintiff can demonstrate that a law is patently arbitrary or irrational will that law be struck down. Alternatively, if the court finds that a law burdens a protected interest, or is made on the basis of a “suspect-classification” a “strict scrutiny” test is applied. In this case, far less deference is given and the state must demonstrate that it has a compelling interest at stake. In reviewing laws burdening homosexual conduct, courts have almost universally applied the rational basis test.

While sodomy laws in the United States have been strongly linked to religious prohibitions against non-reproductive sex, many have argued that there are sufficient, non-religious

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4To begin, it must be noted that the very concept of “homosexuality,” is problematic. The idea that human sexuality can be neatly bifurcated into two exclusive spheres of orientation is rooted in our immediate, rather than our pre-modern, past. Such analysis ignores the fact that our pre-modern ancestors understanding of human sexuality is inassimilable to our contemporary categories of sexual orientation. Yet much legal reasoning begins with the assumption that history provides a clear foundation for the recognition that sexual identity is rigidly affixed to the biological sex of the sexual partners. Such analysis then generally proceeds to the traditional social disapprobation of “homosexual” conduct. But this is a faulty and misleading reading of history. The term “homosexual,” originated in the late nineteenth century and was a product of the medicalization of human sexuality. Homosexuality was equated with “sexual inversion” and “deviance.” The term also had a peculiar fascination for Victorians obsessed with religion and sexual purity. Not only is this a conceptual distortion, but it ignores the fact that history is not very instructive regarding the “traditional” disapprobation of such conduct. It is well established, for example, that the Classical Greeks, often referred to by the framers of our republic as the progenitors of democracy and constitutional governance, considered sexual relationships between men to be “natural, decent, and in certain contexts, honorable.” See DAVID M. HALPERIN ONE HUNDRED YEARS OF HOMOSEXUALITY (1989).

5 Slaughter-House Cases, 83 U.S. 36 (1873).


8 There is no bright line rule which can be applied uniformly to determine membership in a “suspect class.” The California Supreme Court in the RE: Marriage Cases has defined a suspect class as (1) an obviously distinguishable minority, (2) subject to a history of discrimination, (3) that is so politically powerless as to be in need of special assistance. Other courts have insisted on “immutability” as a necessary condition for inclusion to the class. To this date, the U.S. Supreme Court has only granted such review only to classifications made on the basis of race, national origin and alienage. Homosexuals have never been given suspect class status in a U.S. Supreme Court decision.

9 A noted example is from the Book of Leviticus: “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood [shall be] upon them.” Leviticus 20:13. In the New Testament, the Book of Romans says, “God gave them over to degrading passions; for their women exchanged the natural function for that which is unnatural, and in the same way also the men abandoned the
arguments to justify the legal prohibition on homosexual conduct under a rational basis review. Yet upon evaluation, the major non-religious arguments against same sex sexual relationships appear substantively unpersuasive, even spurious. Are any of these arguments substantial enough to justify denying to homosexual persons the full benefit and protection of law?

Non-religious arguments against homosexuality are generally asserted on the basis that such conduct is either harmful, unnatural, or both. Arguments based on the purported harm of homosexual conduct claim that “undesirable traits” are disproportionately associated with homosexuality; that homosexuality is associated with personal lethality; that homosexuality leads to the breakdown of the family unit; and that homosexuals are associated with disproportionately high rates of suicide and depression. Arguments based upon the purported “unnaturalness” of homosexuality claim that homosexuality is offensive; is not observed in other animal species; that homosexuality defies the traditional norms of human societies; that homosexuality does not proceed from innate desires; and that homosexual acts violate the natural functions of the human reproductive organs. It follows, according to proponents of these arguments, that discrimination against homosexuals is not a kind of animus, but rather a rational response to a societal threat. As Paul Cameron, the Chairman of the Family Research institute states:

“No known human society has ever granted equal status to homo and heterosexuality… At the risk of seeming rather out of step with the academic community, no new information has surfaced that would lead me to discount the social policies of the past. On the contrary, the policies of the past in regard to homosexuality appear generally wise, and considerable discrimination against homosexuality and for heterosexuality, marriage and parenthood appears needful for the social good.10

But it is not difficult to rebut these objections. James Corvino, among others, has repeatedly demonstrated the speciousness of these claims.11 The purported unnaturalness of homosexuality, for example, has been a central tenant in the argument for its prohibition. But “unnaturalness” is a nearly incomprehensible concept. With regard to human behavior, what is the distinction between a “natural” and “unnatural” act? For human beings, where does nature end and culture begin? Often “unnatural” simply connotes offense or disgust. By this account, what is disgusting

natural function of the women and burned in their desire toward one another, men with men committing indecent acts and receiving in their own persons the due penalty of their error.” Romans 1:24-27.

10 Paul Cameron, A Case Against Homosexuality, 4 HUM. LIFE REV. 17 (1978).
11 I have summarized the following arguments (concerning the unnaturalness and purported harms of homosexuality) from a much more persuasive and comprehensive account of these issues in Why Tommy and Jim Should Have Sex by James Corvino (1997).
is unnatural. And it is true that many people find homosexuality disgusting and repulsive. But does that mean that homosexual acts are wrong? The imputation of unnaturalness is that of a transgression or a kind of moral wrongness. But in the case of homosexuality this does not follow. I might be offended by people who eat insects or dig through the trash to collect aluminum cans. But does that mean that such people are morally wrong or perverse? Of course not. Another claim is that if an act is unusual or occurs infrequently, is it unnatural. But if this were the case then it would be unnatural, and thus immoral, to speak Esperanto or be ambidextrous. Perhaps what is “unnatural” is conceptually delimited by observation of behavior in other animal species? But if this were true, then homosexuality would be accepted as commonplace while wearing clothing would not. Perhaps it is the case that homosexual sex is unnatural because it cannot result in procreation? And, after all, human sexual organs appear to be naturally purposed for reproduction. But many humans cannot reproduce, or do not want to reproduce, and still find activities which involve the reproductive organs to be physically, and even existentially, gratifying. Are such behaviors, even if strictly heterosexual, unnatural? Further, human sexual organs, like every other human organ, can be used in a variety of different manners and implicate multiple purposes and practices. While it is true, for example, that the “natural purpose” of the mouth is for eating (as it marks the entrance to the alimentary canal) it appears to function equally well for talking and even kissing. Even if one could argue coherently that these other functions were secondary or tertiary, can they be considered unnatural?

Other objections against homosexual conduct involve the purported harms that such conduct is associated with. Numerous studies have been cited correlating high rates of sexually transmitted diseases— including H.I.V.— with homosexuality. Other studies have linked depression, suicide, and promiscuity with the “homosexual lifestyle.” Even if we assume, arguendo, that such correlations are sound, would they prove that homosexual conduct was immoral? I do not believe so. While it is may be true that homosexual sex can place one at risk for a sexually transmitted disease, this is true of heterosexual sex as well. The determinative factor is not related to the sex of the potential partner, but rather that specific partner’s health. Homosexual sex between healthy partners is, from a public health perspective, more desirable than heterosexual sex where one partner is infected.12 It is certainly possible to articulate a

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12 According to many epidemiological studies, the incidence of sexually transmitted diseases is actually lower among lesbians than any other group. It is interesting that most arguments citing alleged claims of abnormal homosexual promiscuity and disease transmission generally exclude reference to lesbian or bisexual women.
cogent argument against risky sexual behavior. But it is not reasonable to restrict such an analysis to homosexual relationships alone. As regarding rates of depression, suicide and promiscuity, such social harms are best addressed by alleviating the blatant animus directed at homosexuality and cultivating the legal, economic and social support for stable, long term homosexual family relationships. The challenges that such relationships pose are difficult enough without the additional burden of having to sustain them in an environment of unrelenting hostility.

These arguments are not generally promulgated in the academy, for obvious reasons. Most of these claims are so insufficiently supported that it is rare to hear such arguments in a public forum of any kind. Yet many courts and legislatures manage to justify the categorical exclusion of homosexuals from many areas of social life on the “rational” basis of “traditional morality.” But this is highly problematic in both the context of statutory interpretation and judicial reasoning because it is not always clear what assumptions and epistemic foundations arguments invoking tradition and public morality ultimately rely upon. Upon a close analysis, many of these “moral” arguments can often be revealed to be pretence for religious authority. In fact, often transcendental motivations are so obfuscated by references to other values that such motivations are unclear even to their legislative and judicial apologists. This is a significant distinction in the context of rational basis analysis, because many of the laws prohibiting same-sex sexual conduct are in fact motivated by religious conceptions of sexual normality, rather than any secular moral consideration.

**Religious and Moral Reasoning Distinguished**

This confusion is not all that surprising, as for most people, religion and morality are indistinguishable. And it is the case historically, that all major religions have endorsed some attendant moral principles. In fact many theologians have argued that the only legitimate basis for moral conduct is that such conduct is commanded by God. Some go so far as to assert that anything commanded by God is a *prima facia* moral imperative. According to this view, moral and religious commands are conceptually indistinguishable. But this is a troubling assertion, as acts which appear to be fundamentally immoral- such as human slavery, female genital mutilation or a terrorist bombing- might be justified if they are legitimately believed to be

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13 This view is usually referred to as the “Divine Command Theory.” Problems with the theory have been noted as at least as far back as Plato’s *Euthyphro.*
commanded by God. But at a purely conceptual level of analysis, religious and moral justifications can be clearly distinguished. In general, moral imperatives concern the nature and scope of obligations human beings have to other humans. Religious imperatives concern the nature and scope of human obligations to a deity, or deities. Not surprisingly, moral and religious obligations can, and do, conflict.

While theologians and philosophers have done a great deal to mystify the concept of morality, contemporary work in evolutionary biology and anthropology are beginning to provide a credible account of how normative judgments function in primate groups, and analogously, in human societies. Moral obligations are conditioned by the pressures of socialization, the harshness of nature and the relative conditions of scarcity and plenty. These, as well as other relevant prudential considerations can be rationalized, observed, and at least to some extent, quantified. "Moral" judgments not only facilitate social harmony but are the antecedent conditions for cooperative action of any kind. Such findings are consonant with the purported universality of moral acts. After all, it is impossible to conceive of a social group acting cooperatively unless certain behaviors (e.g. murder, lying, fraud, etc.) are prohibited.\textsuperscript{14}

Religion, in contrast, is derived from belief in something sacred and transcendental; the acknowledgement and worship of a god, gods or other supernatural beings; ritual acts associated with sacred and profane objects; moral codes believed to have a sacred or supernatural basis; feelings of awe, reverence and adoration; a social group bound together by the communication with the supernatural.\textsuperscript{15} Religion has been described variously as the “state of being grasped by

\footnotesize{\textsuperscript{14} It should also be noted that some research in cultural anthropology and evolutionary biology has suggested that religion has contributed to our social/biological development by encouraging humans to act cooperatively in large, complex groups. But even if plausible, this observation is not a defense of religion, \textit{per se}, but rather an explanatory hypothesis concerning the evolutionary function of religious phenomena. While this view erases the conceptual distinction between morality and religion it also strips religion of any transcendental content. See Michael Shermer’s, \textit{Why Are We Moral: The Evolutionary Origins of Morality} (2004) and Lewis Wolpert’s \textit{Six Impossible Things Before Breakfast}, The \textit{Evolutionary Origins of Belief}, (2006).

\textsuperscript{15} Paul Edwards, \textit{Macmillan’s Encyclopedia of Philosophy} (1967). A strictly legal definition of religion has been difficult to codify. Courts in the United States, including the Supreme Court, originally relied upon traditional theistic definitions of religion, defining it in terms of obligations imposed by the reverence for God’s being and character. \textit{Davis v. Beason}, 133 US 333 (1890). In \textit{United States v. Ballard}, 322 U.S. 78 (1944), Justice Douglas embraced a much broader definition: "the right to maintain theories of life and of death and the hereafter which are rank heresy to followers of orthodox faiths . . ." In \textit{Fellowship of Humanity v. County of Alameda}, 153 Cal. App. 2d 673 (1957), the court discussed a four part test: "(1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief." In \textit{Malnak v. Yogi}, 440 F. Supp. 1284 (D.N.J. 1977), a Third Circuit decision, Judge Adams, declining to emphasize the subjective characterizations of religious belief, articulated a three part analysis: religion must deal with basic}
an ultimate concern;”¹⁶ a ritual and myth that “mobilizes supernatural powers for the purpose of achieving or preventing transformations of state in man or nature;”¹⁷ the “sigh of the oppressed creature;”¹⁸ and an “oceanic feeling of connectedness.”¹⁹ Because God is often conceptualized as being omnipotent, omniscient and eternal, there is a radical alterity between God and his creation. While other kinds of normative judgments are conditioned by reason and nature, divine commands are epistemologically inscrutable. As a consequence, the spheres of moral and religious obligation are exclusive. In this sense, the divine law is set apart from human morality or human law. As Kierkegaard suggested, there is no necessary connection between moral and religious obligations. They are distinct in kind. God may command us to act towards others in ways that are beneficial or malevolent. We may be called to love and provide for others need, but we can also be called to Moriah, child in hand, or to the walls of Jericho as an instrument of divine retribution.

Thus religion and morality are situated within radically different worldviews. The term "worldview" is derived from the German word "weltanschauung." A worldview is one’s fundamental perception and explanation of existence. It encompasses questions of epistemology and metaphysics, asking who we are, why are we here, what kind of things can be known, what kinds of things exist in the world, where are we going in life and the kind of obligations we owe to others. It also encompasses the question of our place in the universe respective to a divine creator. Most philosophers hold that worldviews can be divided into two distinct outlooks.²⁰ On the one hand there is naturalism. Naturalists hold that reality, or at least what can be known about reality, is demarcated by reason and sense experience. We can only derive knowledge from what we experience, or infer from experience. The natural world exhausts all possible meaning. According to this view life is finite- humans are subject to all the natural laws governing bodies, and ultimately suffer entropy and death. On the other hand, there is transcendentalism. Transcendentalists maintain that we can have knowledge not only from the senses, but also in

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²⁰ N i l i l i s m is often characterized as a third kind of worldview. This seems problematic, however, as the nihilism denies that there is any meaning in the world. As such, nihilism does not contain any positive content and cannot be articulated as a worldview for our purposes.
other ways—ways that transcend sense experience and reason. There is a world beyond the world of the senses and the natural world of experience. Further, this transcendent world is far more important that the world revealed by he senses. According to most transcendentalists, the “real” world is eternal, fixed, unchanging, and usually, uncorrupted by ignorance or sin. All major religions are encompassed by this transcendental worldview. These two worldviews encompass the questions of most importance regarding the nature of reality; the existence of god and the soul; the possibility of life after death; the nature of freedom, political association and agency.

Foundationally, the naturalistic and transcendental worldview might be viewed as being equally rational. That is, regarding questions of ultimate concern, questions concerning the origin and nature of the universe itself, there are no more compelling reasons to recommend one view over the other. And admittedly, both views assume much more about the universe that either could possibly prove by any criteria of evaluation. But there is a crucial difference that is relevant to legal analysis. It is impossible to subject transcendent arguments to any kind of general rational justification. In epistemology, the accepted criteria to have knowledge is as follows: that for any given proposition \( p \) 1) \( p \) must be true 2) I must believe \( p \) to be true, and 3) I must be justified in believing \( p \) to be true. For most philosophers, justification entails providing sufficient evidence for \( p \). But it is not very clear what just what could count as sufficient evidence for any transcendental belief. Such beliefs are not self-evident, nor are any propositions involving supernatural entities empirically verifiable. Entities such as god, the soul, angels, demons etc., by definition, are not accessible via the senses. There may never be sufficient evidence to support the existence of such entities.

21I am being generous to the transcendentalist in regard to the ultimate scrutability of the universe. It might be the case that neither transcendentalism nor naturalism can provide a defensible answer to the question of existence. But even if such questions lie beyond the explanatory power of science, we have no good reason to believe that the transcendentalist possesses any expertise that the scientist lacks. As Richard Dawkins says in *The God Delusion*: “why do we insist on asking the chaplain about cosmology, why not ask the gardener or the chef?” Further, if issues of universal cosmology are raised in the context of probability, rather than what can be known with ultimate certainty, the plausibility of the transcendentalist view diminishes precipitously. After all, which is more likely: that an all powerful but completely non-empirical being generated the material world in a manner which contravenes every observable fact know to contemporary science, or that the observable order and regulatory laws of the universe can be retrodicted back to the point of their origin?

22 Roderick Chisholm, "Knowledge as Justified True Belief" *The Foundations of Knowing* (1982). It should be noted that some theologians have advocated “process reliabilism” as an alternative to this traditional view of justification. See also Alvin Goldman’s essay “A Causal Theory of Knowing” *Journal of Philosophy*, v. 64 (1967).

23 Alvin Plantinga and other transcendentalist philosophers have argued that it might still be rational to believe in god or other non-material entities without sufficient evidence. Plantinga points out that many of our beliefs, such as the belief that other persons have consciousness, are neither self-evident nor derived empirically. See Plantinga’s *God and Other Minds: A Study of the Rational Justification of Belief in God* (1967) and *Warranted Christian Belief*
Thus, we can see that the distinctions between naturalistic and religious beliefs are substantial and profound. First, many religious claims are not subject to falsification. That is, such claims are compatible with any possible set of observations. Take for example, the claim of God’s purported omnibenevolence. This claim is not asserted in a way which is predictive or testable, because there is no conceivable evidence which would be dispositive to the claim. In contrast, according to naturalism many things cannot count for knowledge because they are clearly understood to be wrong. To a great extent, the naturalist worldview is self corrective. Ideas must conform to our past experience, and be predictive of future experience, or they will be abandoned. The history of natural science is a strewn with the detritus of broken ideas. Aristotelian physics, the Ptolemaic universe, the phlogiston theory, the miasma theory of disease, the theory of luminiferous ether, and phrenology- have all been abandoned in favor of more coherent and predictive theoretical ideas. Religion, in comparison, appears intellectually static. In what way can a prophet be wrong? How can beliefs based on mystical revelation be said to be mistaken? There are many religions each of which is based upon a competing transcendental vision or revelation. At least some of these claims are incommensurable with each another. Which of these claims is genuine? Perhaps there are compelling reasons to be a theist. One may think of the remarkable grandeur of the world, and be awed by its majestic wonder. Or perhaps one may have an intolerable apprehension of meaninglessness and absurdity of a godless existence. Or one might experience an immediate awareness of god’s presence in their life. But because religious beliefs are compatible with any observable state of affairs in the world there is no way to determine when they are accurate or inaccurate, correct or incorrect. This makes them impossible to criticize, and as a consequence these beliefs are ultimately incontestable. If a belief is not required to conform to the facts derived from experience in any meaningful way, or required to make substantive predictions about future outcomes, then such a belief could assert anything no matter how ridiculous. Astrology, tarot reading, and fortune telling are all examples of beliefs which, like religion, resist falsification. Naturalistic beliefs, in contrast, are not only falsifiable in principle, but are subject to a clear, cogent and developed method of adjudication.
for determining their validity. Even if we could assert that there are mistaken beliefs in religion, the criteria applied to adjudicate error would be radically different from a science, sociology, law or politics derived from naturalistic assumptions.27

This brings us to the question at the heart of this essay: What is the proper response when transcendental ideas are injected into such public controversies as homosexuality? How could the believer know if they were mistaken about such issues? And on what basis can the non believer object to claims of revelation or scriptural authority? We always face the problem of adjudicating between alternative courses of conduct. Hence our reasons must be evaluated somehow, by some criteria, and with some recognizable method of assent. This fact is inescapable. The question then is really how to distinguish and evaluate different kinds of justifications. When apologists claim that religious beliefs are immune from questions of proof because they are subjectively held or self authenticating they are ignoring the character of the challenge against such beliefs. We cannot avoid examining alternative courses of action in terms of justifiable assertions. We are not free to adopt unjustified beliefs in the course of our experience, as such a posture will have dangerous, if not fatal, consequences. This truism can be explained by insights in evolutionary biology which assert that our cognitive faculties evolved to be commensurate with our ability to act in the world. Because our beliefs must be restricted to the orderly behavior of phenomena, they will be intelligible only to the extent that they logically cohere.28 This imposes certain restraints on the kind of utterances that can convey meaning. We cannot, for example,

27 The example of heresy can illustrate this point. Historically there have been numerous religious sects which have been characterized as heretical. The idea of heresy implies error. The proto-orthodox view of Christianity had to contend with numerous heterodoxies- the Ebionites, Marionites, Gnostics, and Arians all held incommensurable assumptions regarding the divinity of Jesus and the nature of his mission. Each sect had its cannon of traditions, rituals and authoritative Holy Scriptures- including Gospels- documenting the nature of their belief. But what does it mean to claim that any of these accounts were False? How, for example, can the belief that Jesus was wholly divine or completely human be judged to be in error? See Bart D. Ehrman The Lost Christianities: The Battles for Scripture and the Faiths We Never Knew.

28 This is even the case for skeptical claims. As Thomas Nagel states in The Last Word: “…any considerations against the objective validity of a type of reasoning are inevitably attempts to offer reasons against it, and these must be rationally assessed. The use of reason in the response is not a gratuitous importation by the defender: it is demanded by the character of objections offered by the challenger. In contrast, a challenge to the authority of tea leaves does not lead us back to the tea leaves.”
affirm and deny the truth value of a given proposition simultaneously, and be taken seriously by anyone of sound mentality.29

Because this process is inescapable the question is not if our beliefs must be justified, but rather how can we distinguish and evaluate different kinds of justifications once they are asserted. If we are asked to act on the basis of a belief, we must ask how coherent that belief is. Is the belief internally consistent? Does this belief comport with what we already know about the world? Is this belief part of a larger framework of explanation? Is there tension or contradiction between the propositions supported by the comprehensive framework of ideas? Is this belief predictive of unexpected events in the world? On the whole in light of all the preceding considerations, is this belief probable? If those who encourage us to act upon their transcendental beliefs cannot clearly answer the preceding questions, we cannot be justified to do so. It might be true that a system of beliefs cannot be judged, in its entirety, to be true or false. But the reasons articulated in support of particular beliefs can be consistent, or inconsistent, intelligible or unintelligible, etc. Hence, despite the assertion that transcendental and naturalistic worldviews cannot, in their entirety, be evaluated in this way, we can compare the particular beliefs within these worldviews. And if it is the case that the vast majority of beliefs asserted within the transcendental worldview cannot be justified, then this fact should make the transcendental view untenable, particularly in the context of judicial analysis.

Of course, if religion really were a “private” matter, then such contentions would be intellectually discrete. But because religion is oriented towards ultimate, rather than prudential concerns, believers are likely to view their conception of the good as universal and act accordingly. Transcendental views are thus very likely to intrude into matters of public policy and law. This is an inescapable consequence of their constitutive significance in the lives of believers. A worldview, after all, encompasses the most significant components of one’s system of beliefs. It would be extraordinarily difficult to compartmentalize one’s life in a way that maintains a rigorous separation between ideas regarding the existence of a supernatural intelligence that is personally involved in our lives, for example, and significant legal and public

29 We also cannot purport to do what is known to be impossible. Many religious traditions have held that God can enable believers to fly—one may think of Ezekiel and the chariot of fire, or Mohammed’s night flight to Mecca. But if a man was intent on leaping from the top of a tall building because he was convinced that God had granted him the power of flight, and the only evidence of his claim was his own attestation, we would prevent him from doing so even if his belief was sincerely held.
policy issues such as homosexuality, abortion or euthanasia—issues that are entangled with such transcendental concerns.

This explains why the conflation of morality and religion has had profound and insidious consequences in determining the outcome of public controversies. Legal arguments, unlike religious arguments, cannot be restricted in application to an insular circle of believers, they must be generally persuasive. Legal arguments must be the product of reflective judgment and evaluation incorporating due consideration of all relevant evidence as well as the soundness and validity of each given inference. Legal arguments demand adequate justification to accept the conclusion as true. Arguments which do not conform to such expectations should be considered deficient, and should not be taken seriously as a rational basis for law.

**Religious Reasoning in Legal Analysis**

Despite the fact that most religious arguments are not rationally contestable, they continue to exert tremendous influence in the judicial analysis which concerns the rights of homosexual persons. The legality of homosexual conduct has been addressed by the courts on the basis of both substantive due process and equal protection claims. And to some extent, religious values have shaped the courts jurisprudence in both contexts. Substantive due process cases are triggered when a state restricts the exercise of a “fundamental right”—a right that is implicit in the concept of ordered liberty, and that can be found in the history and traditions of the nation. Cases based on the Equal Protection Clause of the 14th amendment of the U.S. Constitution arise when a state grants a particular class of individuals the right to engage in an activity while denying other individuals who are similarly situated the same right.

The now overturned 1986 case *Bowers v. Hardwick* examined homosexual conduct from a fundamental rights perspective. In *Bowers*, Georgia’s anti-sodomy statute was challenged by a defendant who had been arrested while performing a sexual act with another man. The majority in *Bowers* held that there was no Constitutional right for homosexuals to engage in such practices:

“The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court’s prior

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31 “Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows: ‘(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another...’ (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years...’” *Id.* at 186 n.1.
cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case.”

We must note how narrowly the issue is construed by the majority in this case. First of all the Georgia statute was not, ostensibly, directed at homosexual conduct, but oral and anal sex generally. Although as the statute was applied, no heterosexuality couple was ever charged with a violation, even though it safe to assume, that many heterosexual couples had engaged in these activities. Secondly, the fundamental rights issue should have been addressed in terms of a generalized liberty interest, a right to engage in private, non-reproductive, consensual sexual conduct, because this is really what was at stake. By limiting the issue to homosexual sodomy, the majority was able to selectively narrow the historical and judicial context in a way that would essentially guarantee the statute’s legitimacy. It is not a surprise that the framers of the Constitution did not specifically enumerate a right to homosexual sodomy. These framers also did not contemplate deep kissing, mutual masturbation, or the myriad other permutations of consensual sexual postures. But the real issue in this case is this: does private, non reproductive, consensual sexual conduct bear a resemblance to conduct involving family relationships, marriage, and reproductive sexuality? Perhaps the majority’s decision can be defended by claiming that the right to privacy extends only to family marriage and procreation. But already in Eisenstadt and Roe the court held that the area of constitutionally-protected liberty not only encompassed sexual relations but extended beyond sex occurring between married partners. In light of those holdings, it is difficult to take the Bowers majority opinion at face value.

Justice White’s holding, however, becomes transparent when read in the context of his strong disapprobation against homosexuality which is made explicit later in the opinion:

Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. Stanley itself

32 Id. at 190-191.
33 A heterosexual couple also claimed that they had been “chilled and deterred” from engaging in sexual activity in the privacy of their home by 16-6-2 and joined in this action. The District Court denied standing, however, on the basis that they (as heterosexuals) had not sustained any harm nor were in immediate danger of sustaining any direct injury. Id. at n.2.
34 “[T]his case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be left alone.’” Bowers, 478 U.S. 186 (Blakmum, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)).
35 Eisenstadt v. Baird, 405 U.S. 438 (1972), held that unmarried people had a constitutional right to possess contraception on the same basis as married couples. By implication, this case has also been seen to affirm the right of such couples to engage in procreative sex. Roe v. Wade, 410 U.S. 113 (1973), affirmed an unmarried woman’s right to have an abortion.
recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods...And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.  

Here, homosexual conduct is compared to the illegal possession of drugs, firearms and stolen goods, as well as adultery and incest and certain other “sexual crimes.” But the basis of analogous reasoning in a legal opinion rests upon a strong, material similarity between the activities which are being comparatively analyzed. Drug use and addiction is widely believed to be dehumanizing and associated with violence and other forms of criminality. Illegal firearms represent and obvious menace as such firearms are likely to be used in violent criminal activity such as robbery and homicide. The possession of stolen goods is *malum in se*, incompatible with respect for the rights of ownership and the principle of social comity. Adultery generally entails coercion and deception and is potentially destructive of the family unit. Incest is universally prohibited, as consensual incest is a rarity and even in those cases can be strongly correlated with psychological trauma. Here then, the basis of comparison is very weak, as the kind of consensual sexual contact described in the Georgia statute is not characterized by any of these things.

How can the apparent vitriol of the argument be explained? In the conclusion of the *Bowers* opinion, Justice White jettisoned the Constitutional argument completely, and exposed the actual foundations of his defense of the Georgia statute:

...respondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, 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.  

What kind of morality, one might ask, is incompatible with the assertion of the Due Process Clause- a legal construct intrinsic to the articulation of political liberalism? The idea of Due Process, after all, is predicated on the principle of fundamental fairness, the principle that there are limitations on the power of the majority and that it is the role of judges to ensure that justice

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37 *Id.* at 192.
and equality prevail. Of course this aspect of the Constitution is inextricable linked to enlightenment conceptions of morality. Ideas of utility, reciprocity, justice, equality, fairness are all moral concepts. These are all concepts linked to the treatment of human being derived from valuations of right and wrong. It is wrong to treat someone unfairly. This is rooted in the respect for autonomy, the recognition that all persons are of equal worth, that your desires, emotions, aspirations are no less important than mine, at least abstractly. To think otherwise is to objectify you, to use you, to treat you not as a person but as a thing.

But the Georgia sodomy statute, like all U.S. laws against sodomy, is traceable to religious ideas about sexual behavior rather than to any theory of morality. Chief Justice Warren Burger notes in his concurring opinion in *Bowers* that sodomy laws in the United States were derived from those in English common law, which in turn developed out of ecclesiastical law during the Protestant Reformation. “Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards…During the English Reformation, when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed.”38 Such laws were concerned with maintaining the sanctity and purity of the community and were not, strictly speaking, moral in nature. These concepts are rooted in the transcendental idea of pollution and transgression, disobedience of God’s will. In light of this, what, exactly, are the “essentially moral” choices to which Justice White refers? The tradition which views homosexuality as sinful, wicked, ritually impure, is not a moral tradition. In fact this decision is based completely on a religious argument.

In his dissent, Justice Blackmum rejected the majority’s narrow framing of the issue. Rather than restricting the analysis to “homosexual sodomy,” Blackmum saw the claim as being enmeshed in the “constitutional right of privacy.”39 Blackmum both asserted the issue as one encompassed by the right to privacy, and attacked the validity of the state interest protected by the Georgia statute.

I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians.”40

38 Id. at 194-95 (Burger, J., concurring).
39 Id. at 197 (Blackmum, J., dissenting).
40 Id. at 197. Here Blackmum is citing *Herring v. State*, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904).
Blackmum’s dissent is significant, not only because the *Bowers* majority would be subsequently overturned in *Lawrence v. Texas*, but because Blackmum sets the foundation for the majority decisions in both *Lawrence* and *Romer v. Evans*—both decisions which, to some degree, support homosexual rights.

The majorities in these subsequent cases, while not specifically rejecting religious reasoning per se, have been less willing to assent to the moral beliefs of the community where such beliefs have infringed upon the rights of homosexual persons. In *Romer v. Evans*, the court struck down a voter-initiated state constitutional amendment in Colorado on an equal protection basis. Colorado Amendment 2, prohibited the enactment of any ordinance, regulation or statute to protect homosexual citizens from discrimination on the basis of their sexual orientation. Amendment 2 was drafted by a conservative Christian group called *Colorado for Family Values* with assistance from the *National Legal Foundation*, a public interest law firm which claimed its mission was to “support and facilitate God's purpose” for America. Amendment 2 would have repealed all of Colorado’s existing laws, regulations and ordinances which protected against discrimination on the basis of sexual orientation. It would have also prevented any new protective legislation from being implemented.

In 1993, the matter was heard in the Colorado District Court for Denver. Various religious authorities and theologians argued at length regarding the relationship between the State, religion and public morality. The State District Court found that while the State did have a compelling interest in protecting religious freedom this interest could have been met by exempting religious

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42  Id. at 621.
43  Amendment 2 stated: “No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” Numerous Colorado cities and counties had each enacted ordinances which (according to many of the proponents of Amendment 2) banned discrimination on the basis of sexual orientation (Denver Rev. Municipal Code §§ 28-91 to 28-116 [1991]; Aspen Municipal Code § 13-98 [1977]; Boulder Rev. Code §§ 12-1-1 to 12-1-11 [1987]).  Id. at 621.
44  *Colorado for Family Values* is a Colorado based organization dedicated to preserving “family values” and “religious liberty.” In a pamphlet supporting Amendment 2, the organization claimed that “sexual molestation of children is a large part of many homosexuals' lifestyle.”
45  These groups received significant financial support from James Dobson, founder of “Focus on the Family, an organization whose charter refers to the need to resist “judicial tyranny,” and the “homosexual agenda.”
46  Joyce Murdoch and Deb Price present a detailed account of the background of the *Romer* litigation in *Courting Justice: Gay Men and Lesbians V. The Supreme Court* (2002).
organizations from non-discrimination laws.\footnote{Romer, 517 U.S. at 621.} The U.S. Supreme Court, while finding Amendment 2 unconstitutional, largely circumvented the compelling state interest debate and so avoided delimiting the boundaries of public morality in adjudicating constitutional questions. The Court applied an equal protection analysis, and held that Amendment 2 infringed on the right to political participation by "fencing out" a class of persons.\footnote{Id. at 626.} The right to participate equally in the political process was clearly affected by amendment, because it barred gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation.\footnote{Id.}

It is interesting to note that the \textit{Romer} court applied the rational basis standard of review rather than strict scrutiny. Strict scrutiny review in an equal protection analysis generally is triggered by the involvement of a "protected" group. Here, because homosexuals had never been perceived by a federal court as a protected class, the court applied the rational basis test. The majority’s decision was very unusual, as rational-basis review is highly deferential to the legislature or, in this case, to the electorate that directly adopted statutes by the initiative process. In \textit{F.C.C. v. Beach Communications, Inc.}, the court argued that "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification."\footnote{FCC v. Beach Commc’ns, Inc., 508 U.S. 307 (1993). This case was primarily an economic dispute. Many commentators have suggested that the FCC standard is no longer applicable in non-economic controversies. But in Lofton v. Secretary of the Department of Children and Family Services, 358 F.3d 804. (2004), a U.S. Court of Appeals case in the Eleventh Circuit, the rational basis test still appears to be a formidable barrier to plaintiffs to overcome: “Even in purely non- economic cases, under rational-basis review categories created by the legislature will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. “A classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” Also, in \textit{City of Cleburne v. Cleburne Living Center, Inc.}, 473 U.S. 432 (1985): “A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.”}

\footnote{Romer, 517 U.S. at 621.}
\footnote{Id. at 626. “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”}
\footnote{Id.}
\footnote{Id.}
the class that it affects; it lacks a rational relationship to legitimate state interests.”51 Put another way, the only conceivable basis which could motivate such a law would be an irrational hatred of homosexual persons.

Despite this finding by the majority, Justice Scalia strongly dissented:

“Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries old criminal laws that we held constitutional in Bowers.”52

Here, as in the Bowers case, Scalia makes a policy argument that holds homosexual conduct, like murder, or cruelty to animals, to be morally reprehensible and worthy of animus.53 But this reasoning is conclusory. Justice Scalia does not make clear on what basis homosexual conduct can be held to be reprehensible. What does “reprehensible” mean in this context? Certainly, many people find such conduct to be highly offensive. But as Corvino has argued, this seems to be an aesthetic criteria rather than a moral one. Different people find many activities disgusting—eating snails for example. But eating snails is a matter of personal taste—like a preference for chocolate, rather than a moral stance. Judgments of personal taste are incorrigible, because they are not based on publicly justifiable reasons. But Scalia does not simply say that he is offended by homosexual conduct, but rather such conduct—the various sexual acts practiced in the context of same sex sexual relationships—are reprehensible. Significantly, Justice Scalia does not attempt to justify the foundational assumptions of his claim, stating only that the court should not take

51 Romer, 517 U.S. at 625.
52 Id. at 629 (Scalia, J., dissenting).
53 Id. at 630 (Scalia, J., dissenting). Justice Scalia replicates the ugly (and obviously fallacious) equivocations with harmful and coercive criminal activity as Justice White had done in Bowers. Further, he compares homosexuality to polygamy in that a “geographically concentrated and politically powerful minority” has attempted to undermine the sexual morality of the majority of citizens. Id. at 632 (Scalia, J., dissenting). First of all, some degree of ignorance regarding the prevalence of homosexuality is revealed by Scalia’s characterization of homosexuals as geographically isolated. That issue aside, however, the comparison with polygamy appears tenuous. As Richard Posner has argued, polygamy would impose substantial social costs in a modern society that would not be offset by its alleged benefits. Posner’s analysis cites the monopolization of available female partners by those men who could afford to sustain multiple wives. This in turn would incentivize single men to seek younger and younger partners, introducing problems of coercion and reducing the educational opportunities for young women and girls. Posner’s analysis seems to account for the actual conditions of the numerous polygamous “compounds” which operate illegally in Utah and Texas. It is interesting to note, that such a social arrangement only appears to flourish in conditions of extreme isolation and religious indoctrination. On this basis, polygamous relationships can be distinguished prima fascia from traditional heterosexual relationships. In contrast, legal acknowledgement of homosexual relationships would have none of these consequences. In this light, it is difficult to see how Scalia’s analogy is credible.
part in the “culture wars.” Perhaps his view is that the arguments regarding the reprehensible nature of homosexual conduct are obvious, and that his claim lacks the necessity of reasoned argument.

Scalia subtly shifts the argument away from a substantive moral analysis when he makes the reference to “our moral heritage” and the efforts of the “majority of citizens to preserve its view of sexual morality.” Courts often reference moral tradition in the context of legal argument. But in a culture characterized by religious and cultural pluralism, questions of tradition and moral heritage become problematic. When various cultures, values and histories are in play, which should be regulative? Even assuming those values associated with some variant of European Christian culture are dominant, as I assume Scalia intends, what does this tradition mean? After all, even in this tradition religious values and moral values can be distinguished, and in fact, can even be in conflict. And non-religious arguments against homosexuality are generally unpersuasive. It appears that what Scalia is really talking about is not morality but religion. This is an argument based on transcendental reasoning, but those transcendental assumptions are cloaked by references to tradition and moral heritage. This is not to say that Scalia’s position on homosexuality is wrong, or that such assumptions cannot be

54 “When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains- and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools.” Id. at 633 (Scalia, J., dissenting).
55 Id. at 630 (Scalia, J., dissenting).
56 Id. at 633 (Scalia, J., dissenting).
57 According to two comprehensive surveys on religious identification done by the sociologists Barry Kosmin, and Seymour Lachman at the Graduate School of the City University of New York, the number of recognized religions in the United States is very large indeed. The National Survey of Religious Identification (1990) and the American Religious Identity Survey (2001) asked people to identify their religious affiliation, if any. 75% of the participants identified with some form of Christianity. These included: Catholic, Baptist, Protestant, Methodist/Wesleyan, Lutheran, Presbyterian, Pentecostal, Charismatic, Episcopal/Anglican, Mormon/Latter-day Saints/LDS, Churches of Christ, Jehovah's Witness, Seventh-Day Adventist, Assemblies of God, Holiness/Holy, Congregational/United Church of Christ, Church of the Nazarines, Church of God, Eastern Orthodox, Evangelical, Mennonite, Christian Science, Church of the Brethren, Born Again, Nondenominational Christians, Disciples of Christ, Reformed/Dutch Reformed, Apostolic/New Apostolic, Quaker, Full Gospel, Christian Reform, Foursquare Gospel, Fundamentalist, Salvation Army, Independent Christian Church, Covenant Church, and Jewish Christians (plus those classified as "other"). Further, In the U.S. about 25% of the population self identifies as non-Christian. These affiliations include Judaism, Islam, Buddhism, Unitarians, Wiccans, Pagans, Druids, Native American Religions, the Baha’i faith, Sikhism, Sientology, Taoism, Eckankar, and Deism. Of the 25% of non-Christian Americans, about 14% identify as completely non-religious (including humanist, agnostic and atheist). According to every major study, this last group is the fastest growing segment of the U.S. population.
58 Here, I do not mean to invoke by implication the doctrine of cultural relativism (a view which I find to be untenable). Rather, if one person attempts to invoke a particular set of traditions or values on the basis of subjective transcendental belief rather than empirical facts or generally persuasive arguments, on what basis should we choose those values rather than some alternative?
rationally justified. But if they are to be instrumental in shaping a legal decision, a decision intended to be binding on all citizens regardless of religious or moral outlook, such reasons must be explicitly stated. And of course, once stated, these reasons must be subjected to debate.

If Scalia’s arguments were to be made explicit, what would such an argument look like? And in a community characterized by religious plurality, on whom is such reasoning intended to be binding? First, just exactly what is the claim here? The Book of Genesis, Leviticus, and Romans may condemn homosexual conduct. But hermeneutical problems abound regarding the interpretive nature of such texts, contextually understood. And even assuming we could reach agreement on meaning and authority of religious texts, such arguments can be unpacked only so far. For example, the claim that God condemns homosexual behavior does not address the sufficient epistemological conditions which must be met to posit the nature, or even existence, of God. In fact, aside from the tradition of natural theology, few philosophers or theologians would assert that such claims can be rationally adjudicated. Of course for many transcendentalists, the demand of skeptics for rational justification misses the point. In at least one sense, transcendental beliefs rest upon the defiance of experience and future expectancy. Such an idea is implicit in the definition of faith. It is the very dissonance with the experienced world that gives faith substance. As Tertullian said, “I believe because it is absurd.” Kierkegaard, in Fear and Trembling, even decried the attempts to “rationalize” Christianity. “Hence the only thing which can save him is recourse to the absurd, and this recourse he has through his faith.”

In \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), the majority essentially replicated the jurisprudence of \textit{Romer} by repudiating the state interest rather than asserting that the conduct implicated a fundamental right or involved a suspect class. In this case, the majority held that Texas’s sodomy law was unconstitutional. In doing so, Justice Kennedy rejected the narrow framing of the issue by the \textit{Bowers} court, citing Justice Stevens dissent in \textit{Bowers}: “…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.” Justice Kennedy continued:

\textit{…those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment… knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.}
This case has been cited as a landmark victory by the gay and lesbian communities. But while the decision did effectively invalidate laws criminalizing intimate sexual conduct between consenting adults, it is a problematic decision in many respects. First of all, even though the case was decided on a substantive due process basis, no fundamental right was asserted. And, as justice Scalia noted in his dissent, despite finding the Texas statute prohibiting homosexual sodomy to be constitutionally invalid, the majority refused to invoke strict scrutiny standard of review appropriate to a fundamental rights question.

“Not once does it describe homosexual sodomy as a “fundamental right” or a “fundamental liberty interest…Instead, having failed to establish that the right to homosexual sodomy is “deeply rooted in this Nation’s history and tradition,” the Court concludes that the application of Texas’s statute to petitioner’s conduct fails the rational basis test and overrules Bowers’ holding to the contrary.”\(^63\)

Like the majority in Romer, the Lawrence Court appeared to apply the rational basis standard of review. But both courts applied the rational basis standard in a manner that radically departed from previous decisions. Some judicial commentators have termed this level of review “rational basis with bite” and it appears to be a kind of heightened review. But just what does this “heightened” rational basis standard entail? In previous cases, the rational basis test has been applied as a kind of balancing test weighing the purported state interest against the harm to a disadvantaged group. Plyler v Doe, 457 U.S. 202 (1982), for example, involved a Texas law that denied public education to the children of illegal immigrants. A similar analysis was used in Cleburne v Cleburne Living Center, 473 U.S. 432 (1985), which concerned a zoning limitation that denied a permit to a home for developmental delayed persons. In these cases, little deference was shown to the asserted state interest, although no fundamental right nor suspect class was involved.

The Romer and Lawrence decisions are distinct because they invalidate the state interest on the basis of the nature of that interest. In both cases, the apparent discontinuity between the statutory content of the laws involved and their purported intent, gives rise to an inference of animus. But while this approach allowed the majority in these cases to invalidate the Amendment 2 and the Nation’s Sodomy laws, it prevented the court from articulating a coherent standard for adjudicating similar matters in the future. Many of the advocates of laws limiting

\(^{63}\) Id at 577 (Scalia, J., dissenting).
homosexual conduct argue that homosexuality is sinful, and an abomination, and that the United States is incurring the wrath of God by capitulating to the “homosexual agenda.”\textsuperscript{64} If this were the case then the public morality component of the legal analysis would be compelling indeed. Why then, do the \textit{Romer} and \textit{Lawrence} majorities bypass a substantive critique of the arguments in support of Amendment 2 or the sodomy laws? The answer becomes clear as soon as one attempts to evaluate the factual content of these arguments. Such assertions directly involve matters of metaphysics, and theology and unless the court is willing to articulate a preference in regard such matters, these “propositions” cannot be subjected to any kind of coherent legal analysis. By ignoring the substance of the legislative debate in Colorado and Texas, the Court evades the religious considerations which are the impetus for Amendment 2 and the sodomy law. The Court chooses to treat the motivation behind Amendment 2 as if it were akin to racism or sexism. But this is a distortion of the issue in contention. The religious justifications for the prohibition against homosexual sodomy, for example, are not irrational in the sense that racism is irrational. Racism entails that one is making a judgment of the basis of an arbitrary characteristic-one that bears no relationship to any morally relevant consideration. Religious arguments, in contrast, might be morally compelling if properly justified. But while religious believers can assert such arguments to be self-justifying as they assume the verity of sacred texts or revelations, the Court, as a religiously neutral institution, cannot.

The \textit{Lawrence} and \textit{Romer} cases have had a mixed impact on the jurisprudence which has followed. On the one hand, courts can no longer justify the equivocation between homosexuality and criminality central to the holding in \textit{Bowers}. But, by failing to articulate a clear standard of review for statutory classifications based on sexual orientation, the \textit{Lawrence} and \textit{Romer} majorities have exacerbated the problem by allowing lower courts to bend the constraints of “rational state interest” to the point of failure. By refusing to negate the religious pretext in its entirety, the Supreme Court has forced some lower courts to engage in a torturous re-articulation of the anti-discriminatory intent of \textit{Lawrence} and \textit{Romer}. Simultaneously, other courts have ignored the spirit of these decisions in order to perpetuate traditional homophobic conceptions of public morality.

\textsuperscript{64}“If the widespread practice of homosexuality will bring about the destruction of your nation, if it will bring about terrorist bombs, if it'll bring about earthquakes, tornadoes and possibly a meteor, it isn't necessarily something we ought to open our arms to.” Pat Robertson, \textit{The 700 Club} television program, August 6, 1998.
Two cases illustrate the problem with the *Lawrence* and *Romer* holdings: *State v. Limon*, 122 P.3d 22 (Kan. 2005), and *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004). In *Limon*, a Kansas court heard an equal protection challenge brought by a developmentally disabled eighteen-year-old boy who was convicted of engaging in consensual oral sex with a similarly disabled teenager, three years his junior. Limon was given a sentence of 17 years for criminal sodomy. Had the victim been female, Limon could have been charged under Kansas's "Romeo and Juliet" statute under which the maximum sentence is fifteen months. The sentence was appealed to the Kansas Court of Appeals, which affirmed the lower courts decision. That court, applying a rational basis test, distinguished consensual teenage heterosexual sodomy from consensual teenage homosexual sodomy by observing that "[t]he State has a compelling interest in the well-being of its children and particularly in their protection from all forms of cruelty, neglect, degradation, and inhumanity." Soon after *Lawrence* was decided the U.S. Supreme Court vacated the decision upholding Limon’s conviction and remanded his appeal for reconsideration in light of the *Lawrence* holding. But the Kansas Court of Appeals again turned down Limon’s appeal. Again, under a rational basis review, the Kansas court cited “traditional sexual morality,” and “protecting the traditional sexual development of children” as a basis for the holding. The decision was ultimately reversed by the Kansas Supreme Court, citing to *Lawrence* that the “moral disapproval of a group cannot be a legitimate government interest.” While this provided Limon with a remedy to the injustice he had suffered, this holding is troubling in at least two ways. First of all, it would be prohibitively difficult to selectively disentangle moral and legal imperatives each time the court is faced with a similar challenge. The problem is not the

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66 K.S.A. § 21-3522 states: Unlawful voluntary sexual relations is engaging in voluntary: (1) sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and child and the offender are the only parties involved and are members of the opposite sex.
68 Id.
71 Id. at 236-37.
72 State v. Limon, 122 P.3d 22 (Kan. 2005).
influence of morality on the law *per se*, but rather the influence of putative moral claims which, upon analysis, defy rational or evidentiary justification. Secondly, this quote is not from *Lawrence’s* majority opinion but from O’Connor’s concurrence.\(^73\) In her concurrence O’Connor seems to uphold the possibility of a majority acting legislatively to protect its traditional sexual norms as long as such legislation is not motivated by a “bare desire to harm” the minority.\(^74\) How can the court make such a determination? Religious prohibitions against heresy, for example, are not motivated by a “bare desire to harm” the heretic, but rather by a volitional submission to God’s authority regarding the inviolability of inspired church doctrine. Of course, if one treats the problem of heresy in conformity with Sharia law or the relevant interdictions of Leviticus, a certain degree of animus would operate as a correlative to the canonic instruction. The theologian claims that “God loves the sinner but hates the sin.” But an insight noted by many contemporary philosophers suggests that it is impossible to separate what we are from what we do. Behind the simulacra of social science, the Kansas Appellate Courts have articulated a view of homosexuality perfectly consonant with thirty centuries of biblical exegesis on sin.

In the case of *Lofton v. Secretary of the Department of Children and Family Services*,\(^75\) from the Eleventh Circuit, a plaintiff challenged Florida’s adoption law which prohibited adoption by any "homosexual" person.\(^76\) Again, under a rational basis review the court found that the Florida legislature, acting to promote traditional conceptions of public morality, could rationally conclude that homosexual and heterosexual singles are not "similarly situated in relevant respects concerning establishing family relationships."\(^77\) And further: “…the legislature could rationally act on the theory that heterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.”\(^78\) Again, the logic of the *Lofton* court reproduces the casuistry of the *Bowers* majority. There is first the assertion—without argument or evidence—of a categorical adulteration imputed to homosexuality followed

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\(^{73}\) *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring).

\(^{74}\) *See id.*

\(^{75}\) 358 F.3d 804 (11th Cir. 2004).

\(^{76}\) Id. at 812

\(^{77}\) Id.

\(^{78}\) Id. at 824. In addressing the *Lawrence* holding, the *Lofton* court found that “nowhere, however, did the Court characterize this right as “fundamental…Nor did the Court locate this right directly in the Constitution, but instead treated it as the by-product of several different constitutional principles and liberty interests.”
by a series of “objective” claims whose validity are derived entirely from the purported truth of
the first assumption. To note simply that this is a mistake of reason is to miss the nature of the
reasoning employed by the Lofton court. The moral and social character of homosexuality-a
matter determinative to the outcome of this case- cannot be reflexively asserted as a matter of
faith. Yet in the continual presence of religious thinking on the subject of sexuality, this error has
taken on the character of a legal axiom.

**Heightened Scrutiny for Religious Reasoning**

The problem with Lawrence and Romer is that both cases treat religious and non religious
claims about morality as being substantively equivalent. But this is not the case, because
religious claims about morality- such as the claim that homosexuality is an abomination- cannot
be rationally justified. But as a matter of jurisprudence, we can easily imagine a legal standard
which would clearly codify such a distinction. Instead of mining our “moral traditions” for the
vestigial remnants of axial age superstitions, we could, in the spirit of Rawls, posit a kind of
metaphysical “veil of ignorance”- an intellectual posture disarticulated from any religious
tradition. A judge could imagine, for example, a world without Leviticus or Deuteronomy,
without the Koran, or the Book of Romans. To imagine such a world would entail a
jurisprudence based solely upon reason and observation, and demand that judgments be
subjected to the crucible of evidence and sound logical inference. This method of jurisprudence
would not exclude transcendental claims from legal analysis prima fascia- but simply demand
that any claim of authority, revelation or miraculous intervention be treated like any other legal
argument. That is, that such a claim must be intelligible, coherent, falsifiable, and subject to
relevant evidentiary considerations.⁷⁹ I believe such an approach would entail that a court apply a
heightened standard of review any time religious reasoning is a substantive motivating factor in
the enactment of any statute. That is to say, in matters concerning fundamental rights or equal
protection, when a legislature make references to traditional religious conceptions of morality
that cannot also be rationally justified, such references should be treated judicially as if they were
a kind of animus.

Here, one might ask, why such a legal construct would be necessary considering the
Constitution’s commitment to impartial justice. But Justice Scalia has suggested in the Romer

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⁷⁹ It is interesting to note, as a thought experiment, that in such a world, murder, larceny, fraud and assault would
likely remain subject to dire sanction. Yet a prohibition on homosexual conduct, like the prohibition on heresy,
would likely appear absurd.
dissent that it may be proper for a legislator to make a classification on the basis of their own personal religious view. Why should a court consider it improper for the legislature of a state make a law which was motivated by a religious animus against homosexuals? The answer is that the neutrality of the Constitution imposes a line that the legislature cannot cross. This is a requirement of impartiality. In the absence of a rational and impartial justification, a classification should be held to be prohibitively discriminatory. Because religious justifications cannot be asserted neutrally, there must be attendant reasons to support such a view. Such a doctrine could not recommend discriminatory treatment any more than it could recommend preferential treatment. In the absence of a rational justification which could be understood generally, without recourse to any particular transcendental view, such discriminatory line drawing is arbitrary. This violates the principle of impartiality implicit in any system of political liberalism.

Imagine, for example, if a city council in a small town with a large Hindu population passed a law similar to the Colorado’s Amendment 2, but that targeted Dalits rather than homosexuals. Clearly, that would involve a suspect classification, and so violate equal protection. But why is the animus toward Dalits more irrational than the animus against homosexuals? Historically, Dalits in India were associated with occupations such as butchering animals, cleaning sewers and other activities thought to be ritually impure. As a result, Dalits were often segregated and excluded from full participation in Hindu society. The animus cited by Scalia in the *Romer* dissent is analogous, as both stem from a reflexive response to a perceived religious impurity. But, just as many Hindus have come to see the caste system as being based upon an irrational bias against the Dalits and rejected its social segregation, the *Romer* and *Lawrence* decisions directed state legislatures to begin to comport with the moral architecture of political liberalism.

**Same Sex Relationships and the Right of Self-Definitional Autonomy**

If we think carefully and dispassionately, without the strong emotion engendered by religious belief, there are persuasive moral reasons to sanction same sex relationships. The Supreme Court’s substantive due process jurisprudence has led to a clear, unmistakable, broadly defined fundamental right of individual self definitional autonomy which should be inclusive of same sex rights. In the cases of *Baehr* v. *Lewin*, *Loving* v. *Virginia*, *Moore* v. *City of East Cleveland*, *Zablocki* v. *Redhail*, *Turner* v. *Safley*, *Griswold* v. *Connecticut*, *Eisenstadt* v. *Baird*, *Roe* v. *Wade*, *Planned Parenthood* v. *Casey*, and *Lawrence* v. *Texas*, the court has developed and
extended the course of liberty to this logical end. And while the more narrowly construed rights of same sex sexual and familial relations, may not on their face be rooted in the history and traditions of the Nation, such rights can be easily accommodated into the analysis of this more inclusive interest. If the Court finds, that despite the historic legal and social antagonism to a social practice, that practice was protected by a zone of privacy implicit in the concept of ordered liberty, the Court should protect that practice from state intrusion. The right of self definitional autonomy clearly encompasses being able to choose in areas concerning one’s intimate associations. This is the only approach consonant with the Framer’s moral vision regarding the purpose of liberty and happiness as articulated in the Declaration, Constitution, and Bill of Rights.

Unfortunately, in cases dealing with homosexual rights courts have conferred disproportionate authority to the religious traditions which have viewed homosexuality as an abomination. The fact that religious values have always been attendant to American political culture has distorted contemporary legal analysis. Most courts look to see if a plaintiff’s interest is “deeply rooted in the Nation’s history and tradition” to determine if that interest is a protected right. But such an analysis is problematic. First of all, the history and traditions test is inherently speculative, as the sum of individual attitudes, beliefs, and creeds which in the aggregate are called history, are always subject to multiple interpretations. As Justice White argued in Moore "What the deeply rooted traditions of the country are is arguable… Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of "liberty…” In addition, the inherent politics and dissembling which attends the collection of social narrative make even the attempt of descriptive history challenging. Normative interpretations of history multiply this difficulty nearly to the point of impossibility. But the most obvious problem with limiting protection to those interests embodied in historical practice, as Justice Brennan argues in the Michael H. dissent, is the exclusion of interests which do not conform with traditional normative assumptions: “the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.” For Justice Scalia, it

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80 This “deeply rooted” test was fully articulated by Justice Scalia in Michael H. v. Gerald D., 491 U.S. 110 (1989). Traditionally, the court had relied on the test in Palko v. Connecticut, 302 U.S. 319 (1937), which held an interest to be fundamental if it was “implicit in the concept of ordered liberty.”

seems that any practice which is not consonant with the religious values of colonial America, cannot be a fundamental right. Brennan continues:

We are not an assimilative, homogeneous society, but a facilitative, pluralistic one in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.

Admittedly, no reading of the Constitution would support the assertion that the framers directly contemplated homosexual relationships as a locus for autonomy or liberty. But that is not the point. Many framers did not anticipate Americans of non European origin or women to be worthy of full moral consideration. Yet today no one would seriously consider a law which circumscribed the rights of African Americans or women to be consonant with our current conception of liberty and autonomy. The post-enlightenment moral framework erected in the founding of the republic has yielded to prosperity far more inclusivity that was anticipated by the framers. The enjoyment of private, non reproductive sexual contact with a person of one’s choosing has always been an essential element to the personal dignity, happiness and autonomy enjoyed by heterosexual citizens. It is quite reasonable to assume that this close sexual intimacy has also been a corollary value in the lives of Americans who, by nature or choice, experience their primary sexual affiliations with persons of the same sex. And while the presence of these Americans is deeply rooted in our Nation’s history, recognition of their desires, hopes, aspirations, dignity, and happiness have never been fully integrated into the Nation’s consciousness. However such an interest is described- the right to privacy, liberty, or self definitional autonomy- it is clear that there is no legitimate moral basis to exclude gay and lesbian persons from the full protection of the Constitution.

The court has recently begun, incrementally, to resist seeing pure historical analysis as dispositive. Justice O’Connor’s formulation in the Lawrence concurrence that traditional conceptions of morality alone are insufficient to support a rational basis is, perhaps, a positive step. But as it stands, this formulation is substantively incoherent because it still conflates religious and moral reasoning. While law and religion are conceptually distinct, law and morality are enmeshed to such a degree that such analytical separation is impossible. Can the prohibition against murder, for example, be entirely disentangled from the relevant moral considerations which underlie the legal imperative? Murder is uniquely wrong because of its deprivation of the desires, aspirations and enjoyments attendant to ones continued existence. Murder has always
been universally conceptualized a crime *malum in se*. In practice, valuations of conduct derived from judgments concerning what is right and what is wrong, are always relevant in legal analysis. Concerns about justice, equality, utility, comity, and the like are moral considerations of the highest degree. And such concerns are, and should be, relevant considerations in matters of legal disputation.

The problem is that the phrases “morality” and “tradition” have come to be judicial shorthand for religious, rather than moral, reasoning. A cogent bright line standard would entail this analytical distinction. Moral reasoning should be considered when evaluating the rationality of legislative action as such reasoning is articulable and, at least potentially, rationally justifiable. By this standard, there are some moral arguments that should be determinative regarding the question of homosexual rights. For example, because some non-reproductive sexual relationships are an essential form of intimate expression, and because there is no legitimate basis for excluding homosexuals from accruing the benefits of such relationships, it is sometimes the case that homosexuals *should* have sexual relationships. In fact, once religious considerations are excluded, there are compelling reasons why these relationships should be encouraged by society, rather than prohibited. Vincent Punzo, a conservative Catholic and advocate of traditional sexual values, clearly articulates the relation between one’s sexuality and the value of self definitional autonomy:

“…the sexual encounter is a definitive experience, one in which the physical intimacy and merging involves also a merging of the non-physical dimensions of the partners. With these questions, man moves beyond the negative concern with avoiding his or another’s physical and psychological harm to the question of what he is making of himself and what he is contributing to the existential formation of his partner as a human subject.”\(^{82}\)

Punzo gives a compelling and fully developed account of the existential significance of non-reproductive sexual relationships. Although Punzo advocates that such sexual relationships should only be undertaken in the context of mutual and total commitment between partners, there is nothing in his argument which would exclude homosexual relationships.\(^{83}\) In fact, as sexual relationships represent the only possibility of the most “intimate physical expression” of one’s


\(^{83}\) I do not mean to imply that Punzo supports even monogamous, committed same sex relationships, as I believe this would misrepresent his position. Yet, as his argument is presented it does not exclude them *prima fascia*. If we take Punzo’s argument seriously it seems that committed same sex relationships could only be considered to be immoral by the fiat of transcendental objection.
own being, on what possible rational basis could gays and lesbians be excluded from this most
definitive of experiences? Punzo continues:

“Men and women are capable of consciously and purposively uniting themselves
in a common career and venture. They can commit themselves to sharing the
future with another, sharing it in all its aspects- in its fortunes and misfortunes, in
times of happiness and times of tragedy. Within the lives of those who have so
committed themselves to each other, sexual intercourse is a way of asserting and
confirming the fullness and totality of their mutual commitment.”

Some non-reproductive sex is not only pleasurable, but “an avenue of growth, of
communication, and of lasting interpersonal fulfillment.” On what basis could one assert that
persons similarly situated- sharing like desires, physicality, emotions and psychic motivations-
should be subject to a credible legal distinction? As I have argued, a primary characteristic of
legal judgments is impartiality. Any distinction made solely on the basis of the gender of the
sexual partners would be capricious and arbitrary and thus could not be the basis of a legal or
moral imperative. Not every heterosexual couple uses sex for the purpose of reproduction. At
least some of these non-reproductive sexual relationships can be defended- even encouraged- on
a moral basis. As Corvino states: “There are reasons why most heterosexual couples have sex
even if they don’t want children, don’t want children yet, or don’t want additional children. And
if these reasons are good enough for most heterosexual couples, then they should be good
enough for Tommy and Jim.”

If a purely historical analysis is not determinative here, if the issue really is one of analogy
to other established rights, then the question becomes this: do homosexual relationships
substantively resemble other protected intimate and family relationships? Justice White in the
Bowers case answered this question by denying any such “resemblance” regarding the nature of
these interests. This perhaps, is the most potent and offensive component of that opinion. That
the most human desires, emotions, and aspirations of gay and lesbian persons are essentially
unlike, and less human, than the desires, emotions and aspirations of heterosexuals. But as
Justice Kennedy stated in the Lawrence opinion:

"These matters, involving the most intimate and personal choices a person may
make in a lifetime, choices central to personal dignity and autonomy, are central
to the liberty protected by the Fourteenth Amendment. At the heart of liberty is

84 Id.
85 Id.
86 James Corvino, Why Shouldn’t Tommy and Jim Have Sex.
the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."\textsuperscript{87}

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. Yet the \textit{Bowers court} sought to deny gays and lesbians the right to define their own conception of existence and of meaning, and did so largely for religious reasons.

It is not likely that any amount of persuasion or argumentation will induce the faithful to fully integrate the concerns of gays and lesbians into their transcendental worldview. This is more than can be hoped for in a polity that is characterized by genuine plurality. But this is why religious arguments cannot be determinative in the context of legal analysis. The religious proscription against homosexual conduct is rooted in an Iron Age understanding of the world which also held that the earth was flat. The priests who declared same sex relationships an abomination also believed that comets were harbingers of disease, menstruating women were polluted, and that children should be put to death for unfilial conduct. It is a shocking fact that even as we begin the twenty-first century, certain insular communities continue to deny the full humanity of their fellow citizens on the basis of pre-scientific conceptions of ritual impurity. It should be inconceivable that any court should still find these views to be legally relevant.

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