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Jamal Greene

Americans take seriously the difference between acts and ideas. We remain mystified, for example, by the to-do about the cartoons depicting the Prophet Muhammad. The act-idea distinction is alive and well in our culture, and it remains largely intact in American law. No store owner puts up a sign saying, “You covet it, you bought it!” If you want to show your commitment to “manliness” by refusing to hire women, you’re out of luck. Don’t want to pay your taxes because you don’t like the Administration’s views? Move to Canada. We let the government erect at least rudimentary boundaries between our impermissible acts and the permissible ideas those acts communicate. Otherwise, we would be forced to choose between the First Amendment and a society of laws. We couldn’t have both.

Lawrence v. Texas complicates the act-idea distinction. There has been much ado about Lawrence and what, if anything, it held. It’s an odd opinion. It avoided the most obvious (and, perhaps, most passive) ground for decision — Equal Protection — and jumped headfirst into the far thornier thicket of substantive due process. Before Lawrence was handed down, the $64,000 question was where, if it relied on due process, the Court would draw the line between permissible and impermissible regulation.

One common answer was that the Court would draw from John Stuart Mill’s harm principle, the idea that the State can regulate only those acts that harm others. The Court all but conceded, however, that its opinion did not invalidate laws against prostitution, incest, and same-sex marriage. Ever since the opinion came down, Lawrence pundits have been trying to figure out what theory the Court, in good faith, could rely on, if not some version of Mill’s?

We can understand the difference between same-sex sodomy and those laws the Lawrence majority left undisturbed through a concept I call “metaprivacy.” The basic conceit in operation in Lawrence is that a person can himself be an idea.

We’ve all heard the soap opera cliché, “You don’t like him, you just like the idea of him.” It’s a trite line, but it reflects our sense that a person may be so bound up with a distinctive set of normative commitments that we can no longer separate them from him. In turn, this set of commitments can be deeply associated with certain conduct. When we set out to punish the conduct, we must take care that we are motivated by the danger the conduct represents, rather than by a distaste for the associated normative commitments.
Thus, a law against same-sex sodomy is problematic, not because it punishes people for having sex, but because it punishes them for being gay, with all the moral baggage that status is made to carry. We can punish President Nixon for Watergate, but we can’t punish him for being Nixonian. We can punish him, that is, but we can’t punish the idea of him.

This is the best way to understand the debate between the Lawrence majority and Justice Scalia’s dissent. Justice Kennedy focused on the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” This appeal to social consensus explains how we identify conduct that is so tied to an idea that punishing it amounts to punishing the idea. Society must have arrived at a pervasive understanding that an act describes an idea before constitutional protection attaches.

Thus, Justice Kennedy’s answer to Justice Scalia’s question of whether anti-nudity laws are unconstitutional because they punish people for being nudists is that we understand sodomy to be connected to a particularized identity in a way that public nudity is not. “Gay” is not a formal category; rather, it is a social and cultural status.

Its existence as such can be verified through social and cultural inspection, in short, by examining our laws, mores, and practices for clues that being gay means something beyond simply engaging in same-sex intimacy. The military’s “Don’t Ask, Don’t Tell” policy, for example, is aimed more at those who are homosexual than at those who merely engage in homosexual conduct. Colorado’s Amendment 2, the subject of Romer v. Evans, sought to exclude gays — as against, say, people convicted of sodomy — from antidiscrimination legislation. One could not imagine a variant on Amendment 2 being passed with respect to nudists, because “nudist” has no significant social meaning beyond describing a person who engages in public nudity.

There is a right, then, recognized in Lawrence, against being punished for one’s association with a particularized set of normative commitments. This I call a right to metaprivacy. It is distinct from and broader than the right not to have the intimate details of one’s life publicized or the right not to have one’s personal effects perused. And it is far narrower than an undifferentiated liberty to do anything that does no harm to others. Rather, the right requires public participation. There must be a public awareness that one has a social status that might be defined by, but that is not merely the sum of, one’s acts.

If this right, however, is not merely sui generis, emerging only when convenient to the Court, it must have some application outside the context of sodomy. Otherwise it could hardly be called a right at all.

One possible application is capital sentencing. The difference between life and death at the sentencing phase of a capital trial often rests on a judgment similar to the one condemned in Lawrence. Both mitigation and aggravation evidence often try to get at whether, when he committed a heinous murder, the defendant was a person just doing something or was instead a person being himself.
The sentencing process attempts to identify a social consensus (reflected in the jury) that the defendant’s conduct is a reflection of a profound normative commitment to evil-doing. Does he have remorse? Did he kill his pets growing up? Is he a good father? Is he church-going? Put more simply, is he a fundamentally “good” person or a fundamentally “bad” person? If the defendant’s history and character actually tend towards producing the crime of conviction — in other words, if the defendant is a bad person — then our system allows his execution. Indeed, \textit{Woodson v. North Carolina} and \textit{Lockett v. Ohio} virtually require that we take the difference between “good” and “bad” people into account.

If we cannot punish someone for being gay, why can we punish someone for being “bad”? One obvious explanation is that someone punished for being gay didn’t kill anybody. But the “bad” person who was executed did no more wrong than a hypothetical “good” person who also murdered but managed to escape death. All he “did” in addition was be a bad person, which, from the perspective of many who support anti-sodomy laws, is the same thing the sodomist did.

So how do we resolve this tension? Limiting mitigation evidence at capital trials is something that, I gather, would make most people uncomfortable and, without question, would be unconstitutional. Perhaps, instead, the rationale behind \textit{Lawrence} needs reconsideration. Equal protection would have opened a different, but more predictable, can of worms. For now, it will be worth thinking about those contexts in which we are — and are not — comfortable punishing not so much a person as the idea of one.
