Law, Community, and Moral Reasoning: Foreword

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Foreword

Sanford H. Kadish†

The essays that make up this issue of the Review are products of a Conference on Community, Law, and Moral Reasoning held on the campus of the University of California at Berkeley on September 30 and October 1, 1988 and supported by the generosity of the Academic Senate’s Jefferson Memorial Lecture Committee, the School of Law, and the Center for the Study of Law and Society. The Conference, in turn, was the product of the Jurisprudence and Social Policy Program, the Law School’s interdisciplinary Ph.D. graduate program devoted to the study of the law as an academic discipline. The planners of the Conference—Philip Selznick, who chaired the group, Robert Post and myself—conceived of the Conference as another way through which the JSP Program might make a contribution to thought in an area falling within its concerns.

The decision of the Supreme Court in Bowers v. Hardwick, 1 upholding the constitutionality of a homosexual sodomy statute, sparked the idea for this conference. The majority found it untenable to regard sodomy as a fundamental right in the face of “millennia of moral teaching” condemning it. In dissent, on the other hand, Justice Blackmun rejected the conclusion that “either the length of time a majority has held its convictions or the passions with which it defends them” could alone dispose of a claim of constitutional right. For the dissent the decisive consideration was “the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”

The clash raised once again the issue confronted over a hundred years earlier by John Stuart Mill and James Fitzjames Stephen—the propriety of legal prohibitions that serve to protect a community’s sense of

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decency and regard for its traditions, even at the cost of infringing personal liberties of individuals. Mill rejected laws of this kind on the ground that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Against this, Stephen argued that the cohesion and integrity of a social order depend on the continued assertion of a common morality, so that what was at stake in laws of this kind was a community’s very character and identity. The debate was resumed in the 1950s when the *Woldenden Report* proposed the decriminalization of homosexual sodomy, with Lord Patrick Delvin championing the Stephen position and Professor H.L.A. Hart the Mill position. Today it is again the sodomy issue that revives the debate.

Two considerations seemed to us to recommend further consideration of these issues at this time. First, the passage of time has failed to produce a consensus. The liberal view seemed in the ascendancy in the post-World War II era, but, as the Supreme Court’s opinion in *Bowers v. Hardwick* shows, there has been a resurgence of conservatism in American political and intellectual life. Second, and of major importance, in moral philosophy today there is renewed interest in a “communitarian” perspective, with persons of otherwise liberal persuasion joining traditional conservatives in defending the legitimacy of community action to protect its values and its way of life.

This challenge to the liberal premises that have supported much of contemporary jurisprudence and social policy is particularly sharp when viewed from the perspective of a Court charged with the responsibility of constitutional review. The Warren Court was heavily influenced by liberal concerns when it extended unprecedented protection to individual rights in the face of countervailing community values. The new communitarian perspective suggests the need for a fresh look at these concerns both generally and as premises for judicial review in a democratic society.

With these thoughts in mind our committee submitted to the participants the following main themes as the basis for the deliberations of the Conference:

1. *Conceptions of community and tradition.* What qualifies as a “tradition” and what goes into the making of a “community”? What is the connection between a “moral” community, a “political” community, and an “historical” community? What is the role of constitutional ideals, such as “privacy,” in the formation of community? What is the moral worth of tradition? Can an understanding of that worth give direction to social policy?

2. *Conventional and critical morality.* Most philosophers have long agreed that a genuine morality must be in some sense “reflective” or
"critical." The need for critical morality stems from characteristic failings of conventional morality, which often sends contradictory messages as to what is morally right; is unrealistic in not adapting to new circumstances, including changes in attitudes or practice; or is excessively parochial in too closely identifying morality with the interests of a particular group or community.

But critical morality has its own failings, including lack of realism, a too ready reliance on abstract forms or moral argument, and insensitivity to communitarian values. Therefore it is important to look closely at the proper conection between critical and conventional morality. Just how does the critical transcend the conventional? What are the continuities?

3. Political majorities and the moral order. In the Hardwick case the Supreme Court upheld the authority of a political majority, through the legislature, to define and enforce a norm of sexual conduct. Because the harm was unspecified, unclear, or speculative (unlike ordinary legislation defining crimes and civil wrongs) serious questions are raised regarding the rights of majorities and the protection of minorities. What is the proper role of a majority in determining what is intrinsically right or wrong? To what extent do majorities have the right to establish or protect the moral premises of a community? How far should they prevail in determining "what kind of a people we are," that is, what is our culture and our history? If there is a proper role for the majority, when is a simple majority sufficient and when must a broader consensus be shown?

The essays that follow constitute the response of the participants to the challenge of these questions.