How does the Conflation of Morality and Legality Hinder Marginalised Communities' Bodily Autonomy?

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‘HOW DOES THE CONFLATION OF MORALITY WITH LEGALITY HINDER MARGINALISED COMMUNITIES’ BODILY AUTONOMY?’ AN AMERICAN ANALYSIS.

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This essay explores how morality, particularly that of religious morality, interacts with both U.S. legislatures and judiciary to inform socially significant legal decisions upon marginalised communities' bodily autonomy. These legal decisions relate primarily to that of women’s reproduction rights, transgender individuals' access to healthcare and state intrusion upon non-normative sexual practices within queer communities, introducing a comparative evaluation within the UK’s legal system. Morality, when interpreted literally, is understood to be “a set of personal or social standards for good or bad behaviour and character.”[1] Meanwhile, bodily autonomy can be understood as one’s right of “self-governance” over the body, free from external influence.[2] Thus, when a concept as inherently subjective and variable as morality- shaped by individual beliefs or ever-evolving societal standards- is imposed upon the more concrete and tangible right of bodily autonomy, conflict becomes almost inevitable. Further, it is often those already marginalised, whose autonomy challenges prevailing moral norms, who face the greatest threats under morally driven legal decisions.

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Reproductive Rights and Religious Morality

Originalism can be defined as a mode of legal interpretation in which constitutional meaning is derived from "the original public meaning that it would have had at the time that it became law."[3] Accordingly, the focus of originalism in constitutional interpretation is one centred upon the initial intentions of its drafters. In the hypothetical, this may appear as a logical, objective choice of interpretative style for an unelected body to opt for, yet, in practice, it has proven itself to be a tool for justices to insert private morality into a public setting. Within the case of *Dobbs v Jackson Women's Health Organization* 2022, U.S. Supreme Court justices applied such a mode of constitutional interpretation, ruling that the U.S. constitution did not explicitly protect the right to an abortion.[4] In turn, this removed an almost 50 year old constitutional protection of abortion, established by *Roe v Wade* 1973.[5] When discussing *Dobbs*, Trau observes that justices displayed a fractured recounternance of historical evidence to achieve a "result-oriented" outcome, thus applying originalism inaccurately.[6] Trau's suggestion here of a wilful ignorance in the justices' reading of abortion's legislative history to achieve their desired result (that is, of removing the constitutionally protected status of women's reproductive rights established in Roe) is best understood within the leading ratio decidendi of the case. For instance, Justice Samuel Alito maintained that in reversing the constitutional protections established by *Roe v Wade*, the U.S. was restored to "an unbroken tradition of prohibiting abortion on pain of criminal punishment [that] persisted from the earliest days of the common law until 1973."[7] Alito's dismissal of abortion's cultural legacy within the United States is perhaps indicative of a one-dimensional understanding of its historical evolution, which, when analysed more comprehensively, reveals a more nuanced response.

For a more holistic understanding of abortion's historical relevance, we can look to Reagan, who cites a plethora of examples depicting abortion's historical significance as not only a present practice, but as a morally acceptable one.[8] She points to a mid-18th century salesmen selling drugs solely to induce miscarriage and texts such as Domestic Medicine (1774) or The Married Lady's Companion, or Poor Man's Friend (1808) offering advice on how to induce menstruation.[9] The presence of abortions, irrespective of their difference to the modern understanding, is indisputable. In fact, it was only by 1910 that abortion was criminalised nationally and became a pressing issue only within recent decades.[10] Thus, the reality of abortion's more nuanced role in U.S. history when compared to the Court's reductive understanding of it, indicates the justices' reading of the public meaning of 'liberty' in the Fourteenth Amendment, as a rather illegitimate application of originalism, displaying a gross ignorance towards real women's liberty found within a centuries-old practice of exercising reproductive rights. Whilst there was validity in asking the originalist question of the public meaning of liberty at the time of constitutional ratification, as Trau notes, in answering that question, "[The Court] ignored a substantial amount of history that, if considered, would have led to a much more complicated answer."[11]

Yet, the Court's arrival at such a contestable conclusion raises a more troubling question: how can the likes of Alito even stand to deliberate on questions with such comprehensive legislative histories, when they themselves are in such moral opposition? In the leading *Dobbs* opinion, all justices were conservative Christians, each believing that life commences upon conception and thereby criminalising any stage abortion.[12] Gold theorises that the conservative Christian departure from Roe reflects a broader judicial trend.[13] For instance, the 2014 Supreme Court ruling in *Burwell v. Hobby Lobby Stores Inc.* that the contraceptive coverage under the Affordable Care Act must yield to a corporation's Christian views opposing such assistance.[14] Thus, the significance of personal religious bias within *Dobbs*' legal reasoning should not be understated on account of its reflection of broader judicial trends.

This paradigm signals a disconcerting progression in U.S. law from a supposed 'land of the free' to a nation becoming increasingly governed by conservative Christian rhetoric. Thus, Alito's failure to acknowledge women's history and the prior moral neutrality towards abortion comes as no surprise- a court interwoven with moral-religious doctrine cannot neutrally and holistically evaluate a history which directly challenges this view. Greenhouse writes "It was not constitutional analysis, but religious doctrine that drove the opposition

to *Roe*," and when analysing the Court's leading opinion, it becomes difficult to disagree.[15] Within the leading opinion, Justice Alito referred to abortion as a "profound moral question,"[16] a phrase which Greenhouse argues reveals an assumption that the moral gravity of abortion is singular and self-evident- an assumption reflective of the majority's Catholic upbringing.[17] In assuming the objective nature of abortion's relationship to morality, the Court signals its own religious bias in answering the legal question at hand. Therefore, the question of abortion's constitutional status within Dobbs was arguably already answered. When a conservative-Christian court inserts morality (and, as a result, its subjective definition of morality), 'cherry-picks' through women's history in a shallow attempt at originalism and rejects evidence pointing to the contrary, it is rather inevitable that the Court will come to a decision that aligned with the asserted morality of the judges - that is, to restrict bodily autonomy by curtailing the right to an abortion.

However, the implications of removing abortion's constitutional status are more comprehensively accounted for when analysing the racial and financial disparities between varying groups of women. For instance, 60% of Black women and 59% of American Indian and Alsaka Native (AIAN) women live in states with abortion bans or restrictions, compared to 53% of white women,[18] who make up 53% of the U.S. population of women.[19] Consequently, the removal of constitutional protections disproportionately hinders the bodily autonomy of women already vulnerable to adversity on the grounds of race. Despite white women being the majority demographic of U.S. women, Black and AIAN women are still more likely to live in states with abortion bans. Additionally, women of colour are more likely to suffer from economic barriers than their white counterparts. For instance, white women aged 18-49 are nearly half as likely to have low incomes than AIAN and Black women.[20] On this basis, it follows that women of colour are not only less able to afford an abortion, priced at over $500 in 2021, but those living in states with restrictive abortion laws, are less likely to have the means for cross-state travel as a mode of obtaining care.[21] Thus, whilst *Dobbs*' confusion of morality with legality undoubtedly hinders all women's bodily autonomy, it is perhaps women of colour who are left the most vulnerable by the Court's ruling.

Moral Panics and the Policing of Transgender Bodies

The conflation of moral values within legal frameworks has not singularly influenced reproductive rights and has gained additional notoriety through vehicles of moral panic when regarding the transgender community in both the U.S. and United Kingdom. Whilst this essay seeks to confront U.S. legal trends, evaluating such trends in comparison to a similarly western state, may aid in demonstrating this phenomenon more comprehensively.

According to Cohen, a moral panic occurs when "a condition, episode, person or group of persons [emerge] to become defined as a threat to societal values and interests."[22] Pepin-Neff and Cohen argue that such an occurrence has been engineered by Trump in the U.S.via the 'trans debate', dating back to July 2017 when President Trump tweeted from his 'X' account that transgender individuals would no longer be able to serve in the military, citing the supposed burden of medical costs.[23] This sentiment has been embraced by members of congress, with the likes of Congresswoman Rep. Vicky Hartzler claiming the cost of trans healthcare within the military to be "over a billion dollars."[24] Contrary to Hartzler's claims, a 2016 study found the actual costs to be between $2.4 million and $8.4 million - a sliver of the pentagon's annual budget.[25] By Cohen's definition, the disparity between the actual costs of trans healthcare and U.S. politicians' narrative of such costs is illustrative of a moral panic - transgender individuals are cast as threats to traditional societal order, to the strength of the American military, and to broader social progress, despite the empirical reality suggesting the falseness of such claims. Pepin-Neff and Cohen assign responsibility to Trump for a "moral panic presidency", utilising social media as a vehicle for fear directed at the supposed transgender "deviant."[26] Through providing a climate of moral fear and threat, such policies can be viewed as a necessity, legitimising state intrusion, and with it the authorised regulation of transgender bodies.

Further, the influence of religious morality within the U.S. has served to evolve this moral panic, arguably providing a climate in which restrictive transgender legislation is encouraged, rather than challenged.

Opposition to transgender individuals is perhaps most prevalent within Christian communities, with 75% of white evangelical Christians believing gender to be determined by sex at birth, compared to just 24% of atheists in the U.S.[27] Despite not embracing traditional Christian family values within his personal life, having been thrice married and allegedly establishing complex legal arrangements to hide multiple affairs within his current marriage,[28] Donald Trump attained around 80% of the white evangelical Christian vote in the 2024 Presidential Election.[29] This is a fact of which President Trump is expressly aware as within the first day of his second presidential term, he signed an executive order recognising only two genders,[30] despite 9 years ago vocalising his support for transgender individuals using whichever gendered toilets they feel appropriate.[31] Trump's changing policy position from relative apathy to ardent opposition towards transgender individuals, paired with his accumulation of white evangelical support, is perhaps indicative of a strategic use of religious pandering. This suggestion can be further observed within the 2024 election cycle, in which Republican candidates spent more than $65 million on anti-transgender advertisements,[32] despite transgender people making up less than 1% of the U.S. population.[33] Given the disproportionate prominence of transgender bodies in contemporary political debate compared to their small demographic presence in U.S. society, it is arguable that legislatures' efforts to restrict trans bodily autonomy (whether that be removing access to gender-affirming health care or exclusion from military service) are not rooted in legal necessity, but rather serve as a strategic appeal to conservative- Christian ideologies, amplified in the context of an engineered moral panic. The dangers of conflating legality with religious morality are imminent, with journalists such as Katherine Stewart noting Trump's recent establishment of a Faith Office, designed to tackle anti-Christian bias as a "further perversion of the institutions of justice."[34] In forsaking the separation of Church and state to appease distorted religious narratives, administrations such as Trump's compromise transgender individuals' fundamental right to bodily autonomy, inviting an unwelcome intrusion by the state.

The legitimising of state intrusion upon transgender individuals via moral panics has found a similar footing amidst the UK's domestic politics, indicating the growing influence of U.S. religious-morality amongst western states. Within the case *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* 2025, the Supreme Court of the United Kingdom (UKSC) held that a woman is defined by biological sex under the Equality Act 2010.[35] When taking interventions, the Court's exercise of discretion over who should participate in the litigation of the case is revelatory of the growing presence of religious-moral doctrine within the UK's legal system. For instance, the Court refused to take interventions from any transgender individuals, but did accept submissions from a number of gender-critical groups.[36] British feminist groups have increasingly found themselves to be in ideological agreement with the U.S. religious right. The primarily U.S. organisation 'Hands Across the Aisle Coalition,' for instance, has sought to unite both feminist thinkers and groups from the religious right in their pursuit of combating 'gender identity ideology.'[37] Amongst these UK gender-critical groups are 'Transgender Trend' and the 'LGB Alliance.'[38] Further, the influence of such groups should not be understated. During the litigation of *For Women*, the LGB Alliance were consulted through written submission, indicating a degree of institutional influence offered to such groups.[39] Whilst gender-critical groups evidently embracing elements of religious doctrine have been passionate advocates for the Court's ruling, medical experts have not embraced such a view. NHS resident doctors, for example, denounced the Court's ruling as "having no basis in science."[40] Additionally, at the British Medical Association's Resident Doctor's Conference, medics passed a motion criticising the ruling for imposing a "rigid binary."[41] Whilst the Court may not have explicitly indicated religious ideals in their judgement, their prioritisation of ideological groups, interwoven with echoes of religious doctrine above medical professionals and transgender individuals themselves, is revealing of the U.S. religious right's growing influence within the UK's legal frameworks. Through prioritsing the voices of gender-critical groups such as the LGB Alliance within a legal setting, and consequently the U.S. religious-moral doctrine they are aligned with, such doctrines are implicitly afforded legitimacy.

Following the Court's judgement, Prime Minister Keir Starmer endorsed the Court's view, stating that a woman "is an adult female, and the Court has made that absolutely clear."[42] This provides a stark contrast to the Prime Minister's position just a few years prior, where he affirmed "a woman is a female adult and, in addition to that, trans women are women."[43] Starmer's rapidly changing political position regarding the transgender community is demonstrative of a wider trend in UK policy making, reflecting a familiar shift observed within his U.S. counterpart. Despite no recorded complaints against transgender patients in hospitals, in October 2023 then-Health Secretary, Steve Barclay, committed to banning trans patients from male and female-only wards.[44] In spite of making up just 0.5% of the English and Welsh population in 2021, proposed legislation of gender self-identification in the Scottish Gender Recognition Act 2022, was met with the similar panic-narrative of the 'trans predator.'[45] When commenting on the bill, then-Minister Kemi Badenoch suggested that such legislation would give rise to predators.[46] Duffy notes of Badenoch's sentiment that the "implied threat… is clear…If trans people are allowed to self-identify, predators will exploit the system."[47] Yet, in spite of the narrative that the transgender community presents a 'threat' to the safety of cisgendered women, transgender individuals are twice as likely to be victims of crimes than their cisgendered counterparts, a statistic revealing of the predatory rhetoric's panic policy basis, rather than actual legal concern.[48] As Cohen theorised, such moral panics do not find their basis in empirical evidence, but in the casting of perceived deviant groups as "folk devils" threatening normality.[49] The seismic shift towards transphobic attitudes is self-evidential within the UK's contemporary political setting. The very notion of trans autonomy, whether that be self-identifying or accessing medical care, is framed as an imminent threat to safety, and with it, normality. When discussing such restrictive policies, Duffy notes: "The reason the law must uphold normality is that it is seen as the arbiter of respectability and the regulator of deviance: in short, law as protector against chaos. To the law, queerness is chaotic. Cisgender heterosexuality is stable."[50] Thus, when a moral panic dominates the western political landscape, it presents a troubling reality: it is often those most vulnerable to marginalisation and whose existence challenges prevailing traditional norms whose autonomy will be sacrificed in legal decision-making in order to soothe manufactured societal fears.

Judicial Morality and Non-Normative Sexual Practices

The intrusion upon bodily autonomy by the state has further revealed itself within cases of non-normative sexual practices, where subjective judicial opinions on deviant behaviour have been conflated with more objective legal reasoning. This phenomenon is particularly apparent within the 1967 Californian case of *People v Samuels*,[51] highlighting the use of personal moralism in legal decision-making as a more practiced behaviour, as opposed to a passing trend. Samuels was found guilty of aggravated assault after whipping a masochist in the production of a 'blue film' to satisfy the victims masochistic desires, with the Court rejecting consent as a defence.[52] In articulating their judgement, the Court emphasised that it is a "matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."[53] As Kleining notes, though sadomasochism may be unconventional, there was no evidence to substantiate the conclusion that participants of sadomasochism are "not mentally competent."[54] Thus, in imposing a standard of normality, a construct defined by subjective social norms, the Court implicitly signals its personal interpretation of social standards. Similarly, in the UK case of *R v Brown* 1994, a group of homosexual men who had engaged in consensual sadomasochistic sex were subsequently charged with assault, in spite of freely consenting, conducting their behaviour in private, and leaving no lasting harm.[55] However, in dismissing consent as a relevant defence, the Court's judgement was saturated with morally charged language. Lord Templeman, for instance, referred to sadomasochism as both "an evil thing" and "uncivilised."[56] The emotive language utilised by Lord Templeman, indicates an overt moral disapproval from the Court, not merely on the act of inflicting harm, but of the very nature of the practice itself. Kerr contends that the prosecuting of private, consensual sexual activities is evidence of an overly paternalistic state that undermines personal autonomy, as deciding what is socially acceptable removes "the right of the individual to decide which conduct they are willing to consent to."[57] Thus, when Courts, such as

those of Samuels and Brown, utilise moralistic language, rather than articulating their judgements on the basis of more objective legal principles, a dangerous precedent for individuals who challenge the Court's personal moral values is presented- their autonomy will be impeded on, not out of legal necessity for the public interest, but rather, on account of the Court's subjective interpretation of moral norms.

In spite of the firm stance taken in *Brown*, the courts departed from this judgement within the case of *R v Wilson*, concerning a married, heterosexual couple similarly engaging in violent sexual conduct.[58] On account of Mr Wilson's branding of his initials onto his wife's buttocks, the nature of violence in Wilson was permanent and required medical attention,[59] unlike *Brown* where harm was temporary.[60] Yet, the couple's actions were not deemed to pose a threat to the public interest.[61] Kerr submits that this disparity reflects significant judicial discretion, where "the moral standards of the judges involved often influence their decisions."[62] In *Brown*, Lord Templeman described the appellants actions as responsible for "the corruption of a youth," a statement reflective of familiar narratives regarding homosexual men as threats to the sanctity of children's innocence.[63] For instance, in 2019, nationwide protests arose against LGBTQIA+ education in British schools, fueled by parental fears that their children might be "recruited to be gay."[64] In contrast, when articulating their judgement, the Court in *Wilson* opted for a more neutral stance, holding that "what goes on between consenting adults in the privacy of their home is a matter for them, not the law."[65] This shift in language is indicative of a notable inconsistency in judicial approach. As Chan and Gommer observe, the Court in *Wilson* was able to deliberate "without resorting to strong moral language and with recognition of the heterogeneity of heterosexual relationships, neither of which they were able to do with the homosexual relationships in *R v Brown*."[66] Arguably, such a discrepancy highlights the moralistic standards imposed upon queer identities by the Courts, which are notably absent in the treatment of their heterosexual counterparts. The divergence in legal reasoning between *Wilson* and *Brown* signals the dangers of morally charged legal judgements. If courts conflate legality with morality, they risk infringing upon the autonomy of those who challenge dominant moral norms thereby exposing them to greater state intrusion. This threat is only heightened when such challenges arise from non-traditional identities.

Furthermore, the intensity of moral stigma directed at practitioners of sadomasochism appears to vary depending on sexual orientation. A 2022 study by Boyd-Rogers and Maddox revealed queer BDSM (Bondage and Discipline, Domination and Submission, Sadism and Masochism) practitioners experienced a greater severity in discriminatory experiences arising from their sexual practices than their heterosexual counterparts.[67] Kushwah argues that the public expression of kinks such as BDSM within queer spaces are met with greater moral opposition as they disrupt heteronormative ideals on the "respectable" expression of queerness.[68] Thus, it is arguable that queer BDSM practitioners face greater hostility than heterosexuals as their sexual expression challenges both sexual norms and heteronormative ideals of 'sanitised' queerness. Contextualising *R v Brown* and *People v Samuels* within this debate, the basis of asymmetrical judicial application of moralism is highlighted. In Brown, for instance, the Court faced non-normative homosexual sex that directly confronted the traditional, socially palatable presentation of homosexuality such a confrontation to social and moral norms simply did not exist within the confines of *Wilson*'s heterosexual marriage. This, in turn, is further revelatory of the vulnerability to state intrusion that those who challenge moral and social norms face. Through providing a moral disapproval of such non-normativity within judicial decisions, courts risk further legitimising social othering.

Conclusion

The interaction of morality with legality in the U.S. has presented itself to be a dangerous conflation to those whose autonomy challenges moral norms, whether that be persons assigned as female at birth exercising their reproductive rights, transgender individuals exercising their right of identification, or individuals who participate in non-normative sexual practices exercising their right to a private life. When the law operates in response to moral anxieties, the soothing of societal discomfort operates at the expense of those whose simple exercising of autonomy confronts such comforts.

Inserting subjective ideals into legislative direction, particularly when regarding judicial decisions, affords such ideals a degree of legitimacy, and in turn, objectivity. If morality becomes legality, those whose autonomy challenges the status quo, will continue to be at the mercy of an intrusive state, volatility and engineered political fiction.

Footnotes

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