On Interpretation: The Adultery Clause of the Ten Commandments

Sanford Levinson

Using an ingenious example drawn from his own course in constitutional law Sanford Levinson describes a variety of problems confronting anybody who undertakes to interpret broad concepts with ancient roots such as the Ten Commandments. Professor Levinson teaches at the University of Texas Law School.

Author's Note: . . . I have for many years introduced my first-year constitutional law course with the following hypothetical exercise. It has proved useful in helping students to grasp the kinds of interpretive issues that analysis of the constitutional text necessarily raises.

Consider the following problem:

In 1970, a number of concerned citizens, worried about what they regarded as the corruption of American life, met to consider what could be done. During the course of the discussion, one of the speakers electrified the audience with the following comments:

> The cure for our ills is a return to old-time religion, and the best single guide remains the Ten Commandments. Whenever I am perplexed as to what I ought to do, I turn to the Commandments for the answer, and I am never disappointed. Sometimes I don't immediately like what I discover, but then I think more about the problem and realize how limited my perspective is compared to that of the framer of those great words. Indeed, all that is necessary is for everyone to obey the Ten Commandments, and our problems will all be solved.[1]

Within several hours the following plan was devised: As part of the effort to encourage a return to the "old-time religion" of the Ten Commandments, a number of young people would be asked to take an oath on their eighteenth birthday to "obey, protect, support, and defend the Ten Commandments" in all of their actions. If the person complied with the oath for seventeen years, he or she would receive an award of $10,000 on his or her thirty-fifth birthday.

The foundation for the Ten Commandments was funded by the members of the 1970 convention, plus the proceeds of a national campaign for contributions. The speak quoted above contributed $20 million, and an additional $30 million was collected, $15 million from the convention and $15 million from the national campaign. The interest generated by the $50 million is approximately $6 million per year. Each year since 1970, 500 persons have taken the oath. *You* are appointed sole trustee of the Foundation, and your most important duty is to determine whether the oath-takers have complied with their vows and are thus entitled to the $10,000.

It is now 1987, and the first set of claimants comes before you:

1. Claimant *A* is a married male. Although freely admitting that he has had sexual intercourse with a number of women other than his wife during their marriage, he brings to your attention the fact that "adultery," at the time of Biblical Israel, referred only to the voluntary intercourse of a married woman with a man other than her husband. He specifically notes the following passage from the article *Adultery*, I JEWISH ENCYCLOPEDIA 314:

> The extramarital intercourse of a married man is not *per se* a crime in biblical or later Jewish law. This distinction stems from the economic aspect of Israelite marriage: The wife as the husband's possession . . . , and adultery constituted a violation of the husband's exclusive right to her; the wife, as the husband's possession, had no such right to him.

A has taken great care to make sure that all his sexual partners were unmarried, and

thus he claims to have been faithful to the original understanding of the Ten Commandments. However we might define "adultery" today, he argues, is irrelevant. His oath was to comply with the Ten Commandments; he claims to have done so. (It is stipulated that *A*, like all the other claimants, has complied with all the other commandments; the only question involves compliance with the commandment against adultery.)

Upon further questioning, you discover that no line-by-line explication of the Ten Commandments was proffered in 1970 at the time that *A* took the oath. But, says *A*, whenever a question arose in his mind as to what the Ten Commandments required of him, he made conscientious attempts to research the particular issue. He initially shared your (presumed) surprise at the results of his research, but further study indicated that all authorities agreed with the scholars who wrote the *Jewish Encyclopedia* regarding the original understanding of the Commandment.

2. Claimant *B* is *A*'s wife, who admits that she has had extramarital relationships with other men. She notes, though, that these affairs were entered into with the consent of her husband. In response to the fact that she undoubtedly violated the ancient understanding of "adultery," she states that that understanding is fatally outdated:

a. It is unfair to distinguish between the sexual rights of males and females. That the Israelites were outrageously sexist is no warrant for your maintaining the discrimination.

b. Moreover, the reason for the differentiation, as already noted, was the perception of the wife as property. That notion is a repugnant one that has been properly repudiated by all rational thinkers, including all major branches of the Judeo-Christian religious tradition historically linked to the Ten Commandments.

c. She further argues that, insofar as the modern prohibition of adultery is defensible, it rests on the ideal of discouraging deceit and the betrayal of promises of sexual fidelity. But these admittedly negative factors are not present in her case because she had scrupulously informed her husband and received his consent, as required by their marriage contract outlining the terms of their "open marriage."

(It turns out, incidentally, that *A* had failed to inform his wife of at least one of his sexual encounters. Though he freely admits that this constitutes a breach of the contract he had made with *B*, he nevertheless returns to his basic argument about original understanding, which makes consent irrelevant.)

3. *C*, a male (is this relevant?), is the participant in a bigamous marriage. *C* had no sexual encounters beyond his two wives. (He also points out that bigamy was clearly tolerated in both pre- and post-Sinai Israel and indeed was accepted within the Yemenite community of Jews well into the twentieth century. It is also accepted in a variety of world cultures.)

4. *D*, a practicing Christian, admits that he has often lusted after women other than his wife. (Indeed, he confesses as well that it was only after much contemplation that he decided not to sexually consummate a relationship with a coworker whom he thinks he "may love" and with whom he has held hands.) You are familiar with Christ's words, *Matthew* 5:28: "Whosoever looketh on a woman to lust after, he hath committed adultery with her already in his heart." (Would it matter to you if *D* were the wife, who had lusted after other men?)

5. Finally, claimant *E* has never even lusted after another woman since his marriage on the same day he took his oath. He does admit, however, to occasional lustful fantasies about his wife. *G*, a Catholic, is shocked when informed of Pope John Paul II's statement that "adultery in your heart is committed not only when you look with concupiscence at a woman who is not your wife, but also if you look in the same manner at your wife." The Pope's rationale apparently is that all lust, even that directed toward a spouse, dehumanizes and reduces the other person "to an erotic object."

Which, if any, of the claimants should get the $10,000? . . .

NOTES

[1] *Cf.* Statement of President Ronald Reagan, Press Conference, Feb. 21, 1985, reprinted in *N.Y. Times*, Feb. 22, 1985 § 1, at 10, col. 3: "I've found that the Bible contains an answer to just about everything and every problem that confronts us, and I wonder sometimes why we won't recognize that one Book could solve a lot of problems for us."

REVIEW AND DISCUSSION QUESTIONS

1. Describe the situation Levinson envisions.
2. Summarize the arguments of each of the five claimants.
3. Which of the five, if any, should get the money? Explain.
4. How is this story relevant to Justice Rehnquist's position described in the previous essay?

Constitutional Cases

Ronald Dworkin

Few, if any, contemporary thinkers have had more influence on legal theory than Ronald Dworkin. In the following essay, he defends judicial activism against those who argue that judges should allow the decisions of other branches of government to stand whenever there is controversy about a law's constitutionality. The latter view, which he terms judicial restraint, *could be defended on one of two grounds: skepticism about the existence of moral rights and deference to democratic political institutions. Dworkin considers and rejects each of these defenses of judicial restraint.*

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When Richard Nixon was running for President he promised that he would appoint to the Supreme Court men who represented his own legal philosophy, that is, who were what he called "strict constructionists." . . .

Nixon claimed that his opposition to the Warren Court's desegregation decisions, and to other decisions it took, were not based simply on a personal or political distaste for the results. He argued that the decisions violated the standards of adjudication that the Court should follow. The Court was usurping, in his views, powers that rightly belong to other institutions, including the legislatures of the various states whose school systems the Court sought to reform. . . .

I shall argue that there is in fact no coherent philosophy to which such politicians may consistently appeal. . . .

Nixon is no longer president, and his crimes were so grave that no one is likely to worry very much any more about the details of his own legal philosophy. Nevertheless in what follows I shall use the name "Nixon" to refer, not to Nixon, but to any politician holding the set of attitudes about the Supreme Court that he made explicit in his political campaigns. There was, fortunately, only one real Nixon, but there are, in the special sense in which I use the name, many Nixons.

What can be the basis of this composite Nixon's opposition to the controversial decisions of the Warren Court? He cannot object to these decisions simply because they went beyond prior law, or say that the Supreme Court must never change its mind. Indeed the Burger Court itself seems intent on limiting the liberal decisions of the Warren Court, like *Miranda*. The Constitution's guarantee of "equal protection of the laws," it is true, does not in plain words determine that "separate but equal" school facilities are unconstitutional, or that segregation was so unjust that heroic measures are required to undo its effects. But neither does it provide that as a matter of constitutional law the