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Arthur S. Leonard
New York Law School

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Speech

Lawrence v. Texas¹ and the New Law of Gay Rights

ARTHUR S. LEONARD*

On June 26, 2003, the U.S. Supreme Court revolutionized the law pertaining to gay people in the U.S. when it struck down the Texas “Homosexual Conduct Law”² in a far-reaching decision grounded in a constitutional right of personal liberty that provides a theoretical basis for compelling the state to treat sexual minorities as fully equal, first-class citizens with the right to marry, serve in the armed forces, bring their foreign same-sex partners permanently into the U.S., enjoy equal treatment under the tax laws, adopt children, and be totally open and out-of-the-closet in every occupation.

That’s one way to talk about the Court’s decision. Here’s an alternative way:

On June 26, 2003, the U.S. Supreme Court, in a theoretically ambiguous decision that strained to assure that it would have limited consequences beyond the immediate subject matter of the case, narrowly voted to overrule a prior decision³ and strike down the Texas “Homosexual Conduct Law” on the ground that the state had argued no justification beyond moral disapproval for intimate conduct that is, in large measure, identical to opposite-sex conduct that state law allows.

Which is the “correct” way to describe what happened on June 26, 2003, when the Supreme Court announced its decision in *Lawrence v. Texas*? Only time will truly tell. One cannot fully discern the meaning of any decision by a court of last resort until enough time has passed to see how that decision has

1. 123 S. Ct. 2472 (2003).

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2. TEX. PENAL CODE ANN. § 21.06 (a) (Vernon 2003).

3. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Lawrence*, 123 S. Ct. at 2484.

been treated subsequently by courts that are asked to apply or distinguish its holding with respect to different sets of facts, and how that court itself comes to view it as an artifact of the body of constitutional doctrine when citing and discussing the decision in later opinions. As binding precedent, of course, a decision is only as powerful as its subsequent applications, although the clarity, forcefulness, and persuasiveness of a court's language will certainly influence a decision's precedential scope.

I. HISTORY LEADING TO THE *LAWRENCE* DECISION

For now, the best we can do is to look at the opinions in *Lawrence v. Texas* itself, and speculate about how they may affect the continuing evolution of the law as it touches on the rights of sexual minorities. As part of this, we can look at how the decision that it overruled, *Bowers v. Hardwick*,⁴ had influenced the law over the past seventeen years.

Lawrence culminated more than a quarter-century of litigation about the constitutional validity of laws that criminalize particular forms of sexual intimacy between same-sex partners. Such laws in the United States have "ancient roots"⁵ deriving from Canon Law enforced by the Roman Catholic Church in pre-Reformation England, and can even be traced further back to statutes of Justinian, Emperor of the Eastern Roman Empire, almost two thousand years ago.⁶ The Church specified that anybody who inserted a penis into the anus of another person had committed an abominable and detestable crime against nature, a great sin meriting eternal damnation and dire earthly punishment, regardless of whether the act was consensual. This sin applied to both same-sex and opposite-sex conduct, and could not be accomplished by two women, although the Church found other bases, from New Testament references, to condemn sexual conduct between women. The Church also condemned oral sex, and indeed all sexual activity that was not potentially procreative in nature and that was not restricted to marital partners. When the English Reformation began, King Henry VIII called upon Parliament to pass statutes to replace Canon Law as the Roman Church had been dis-established.

4. 478 U.S. at 186.

5. *Id.* at 192 (White, J., Opinion for the Court). Chief Justice Warren E. Burger's concurring opinion in *Bowers* referred to "millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

6. In the *Lawrence* majority opinion, Justice Anthony M. Kennedy, Jr., recounted some of this history. *Lawrence*, 123 S. Ct. at 2478-79. The following paragraphs of text can be documented through the historical sources Justice Kennedy cited, including the nineteenth century treatises on American criminal law, *Lawrence*, 123 S. Ct. at 2478, and such twentieth century works as JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995) and JOHN D'EMILIO & ESTELLE B. FREEDMAN *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (2d ed. 1997). For other sources on the historical material, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) and DONALD J. KNUTSON, *HOMOSEXUALITY AND THE LAW* (1980).

The first English statute against anal sex was enacted in 1533.⁷ The law spoke in euphemistic terms about a “crime against nature,” commonly referred to as “buggery,” and everybody knew what was prohibited despite the lack of specificity. The law was part of the general condemnation of non-procreative sex derived from religious teachings.

The English law was the law in England’s American colonies. When independence was declared in 1776, the states continued to apply English law as state common law. During the nineteenth century, many states replaced their common law crimes with statutes that covered the same subject matter. Open conversation about sex was not something nineteenth century American legislators wanted to have, so these statutes continued to perpetuate such euphemisms as “crime against nature” and “buggery.” From time to time, a court might rule that the statute was limited to the original historical meaning of anal intercourse, while others applied it to oral sex as well. Some states revised their statutes early in the twentieth century to be more specific about forbidden acts. But it was not until the later half of the twentieth century that states began to recast their laws to allow married couples, and in some cases, all opposite-sex partners, to engage in such conduct, reacting to the developing constitutional doctrine of privacy.

In other words, although the kinds of *sexual intercourse* (but not necessarily every kind of *sexual contact*) available to same-sex couples were outlawed in all states until 1962, the prohibition was not specifically aimed at gay people.⁸ During the 1950s, the American Law Institute (ALI), drafting a Model Penal Code (MPC), devised a section dealing with sex crimes that took a libertarian stance. Based on the idea that what consenting adults did in private was generally not the concern of government, the ALI recommended ending criminal penalties for private, consensual sexual activity between adults, but retaining penalties for sexual activity that took place in public, without consent, or between adults and minors. The Model Penal Code also replaced the vague euphemisms of the common law and many early statutes with a clinical description of the act that it labeled “deviate sexual intercourse.” The MPC made “deviate sexual intercourse” a crime when it did not meet the requirement of consenting adults acting in private. The MPC also provided criminal penalties for loitering in a public place for the purpose of soliciting somebody to engage in deviate sexual intercourse, or for actually soliciting such activity, on the theory that the government has a public order interest in limiting sexual solicitation in public places.⁹

7. *Lawrence*, 123 S. Ct. 2478.

8. *Id.* at 2479. (“American laws targeting same-sex couples did not develop until the last third of the twentieth century.”)

9. MODEL PENAL CODE § 207.5 (Proposed Tentative Draft No. 4, 1955); see ESKRIDGE, *supra* note 6, at 85.

Many states adopted the MPC sex crimes provisions, beginning with Illinois, whose new penal code went into effect in 1962.¹⁰ Over the course of the 1960s and 1970s, most states adopted the Code, but many took the prerogative to modify the sex crimes provisions, retaining criminal penalties for consensual deviate sexual intercourse, although frequently with lesser penalties than before, usually making it a misdemeanor.¹¹ And some states, such as Georgia, remained with their original felony sodomy laws.

The Supreme Court began to develop a law of sexual privacy with the *Griswold* case in 1965,¹² and some states modified their laws to reflect the new understanding that applying their sex crimes laws to consenting marital partners would raise constitutional issues.¹³ The Supreme Court's subsequent decisions in sexual privacy cases in the areas of contraception,¹⁴ abortion,¹⁵ and marriage¹⁶ led gay rights advocates and civil libertarians, a group whose membership significantly overlapped, to begin challenging sodomy laws. First, there were challenges in states that still had ambiguous definitions, arguing that the statutes did not give fair notice of what was prohibited, leaving too much discretion for discriminatory law enforcement.¹⁷ Such arguments failed because, as one federal judge wrote in 1964, the case law had made it clear that the crime against nature did not "embrace . . . walking on the grass."¹⁸

10. 983 ILL. COMP. STAT. 5/11-2 (1961) (effective Jan. 1, 1962 and repealed in 1984).

11. For example, N.Y. PENAL LAW § 130.38 (McKinney 1998) made it a misdemeanor for persons not married to each other to engage in anal or oral sex. This statute was declared unconstitutional as applied to private, noncommercial conduct involving consenting adults in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981).

12. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding Connecticut law banning use of contraceptives by married persons to prevent pregnancy violated federal constitutional right of privacy).

13. Texas was one such state. In *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), a three-judge federal district court ruled that the Texas sodomy law, which at that time made it a felony for anyone, regardless of sex, to engage in anal or oral sex, violated the right of privacy described in *Griswold*. Although the decision was vacated and remanded by the Supreme Court in *Wade v. Buchanan*, 401 U.S. 989 (1971), on procedural grounds, the Texas Legislature got the message and reformed its sodomy law, adopting the Homosexual Conduct Law that was challenged in *Lawrence*, in its place.

14. *Griswold*, 381 U.S. at 479.

15. *Roe v. Wade*, 410 U.S. 113 (1973) (holding Texas criminal abortion statute violates federal constitutional right of privacy).

16. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia miscegenation statute violates federal constitutional right of privacy and equal protection).

17. See *Wainwright v. Stone*, 414 U.S. 21 (1973) (rejecting argument that "crime against nature" statute is too vague to meet requirements of federal due process); see also *Rose v. Locke*, 423 U.S. 48 (1975) (holding crime against nature statute could constitutionally be construed to apply to oral sex even though it was derived from a English common law statute that condemned only anal sex).

18. *Perkins v. North Carolina*, 234 F. Supp. 333, 336 (W.D. N.C. 1964).

Then, the new privacy cases were summoned as precedent, sometimes successfully in state courts,¹⁹ but unsuccessfully in the Supreme Court in a mid-1970s challenge to the Virginia sodomy law, *Doe v. Commonwealth's Attorney*, brought by the American Civil Liberties Union (ACLU) as a test case.²⁰ The Supreme Court summarily affirmed a decision rejecting the challenge to a ruling by a three-judge district court in the Eastern District of Virginia.²¹ The Supreme Court did not even write an opinion in that case.²²

But the law did not stand still after *Doe v. Commonwealth's Attorney*, and new challenges were mounted to sodomy laws. The Texas Legislature modified its law during the 1970s, resulting in the Homosexual Conduct Law,²³ which prohibited anal or oral sex for same-sex couples, but treated the offense as a misdemeanor carrying a token fine. The Texas Human Rights Foundation challenged that law on both privacy and equal protection grounds, winning a victory in *Baker v. Wade* in a federal court in Dallas in 1982, which turned into defeat a few years later in the Fifth Circuit.²⁴ In Atlanta, a gay man, Michael Hardwick, arrested while having oral sex in his bedroom, challenged the Georgia sodomy law, which made it a felony carrying up to twenty years in prison for any person to engage in sodomy, defined as anal or oral sex.²⁵ The U.S. District Court in Atlanta, feeling bound by *Doe v. Commonwealth's Attorney*, granted summary judgment for the state, but the Eleventh Circuit reversed, finding that the Supreme Court's privacy cases applied to this case as well and that *Doe* had been superseded by subsequent rulings.²⁶

The State of Georgia successfully petitioned the Supreme Court for review. The plaintiffs in the Texas case also petitioned the Supreme Court for review, and the Justices held their petition pending the decision in Michael Hardwick's case. *Bowers v. Hardwick*²⁷ was announced at the end of June 1986, ironically as America was about to celebrate the centennial of the Statue of Liberty. By a 5-4 vote, the Supreme Court said that the constitutional right of privacy did not apply to homosexuals engaging in sodomy.²⁸ Justice Byron

19. *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974) (holding criminal law against oral sex does not apply to private, consensual adult behavior, thus avoiding constitutional privacy problem).

20. *Doe v. Commonwealth's Atty. for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd without opinion*, 425 U.S. 901 (1976), *reh'g denied*, 425 U.S. 985 (1976).

21. *Id.*

22. *Id.*

23. TEX. PENAL CODE ANN. § 21.06 (a) (Vernon 2003).

24. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *rev'd en banc*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), *reh'g denied*, 478 U.S. 1035 (1986).

25. GA. CODE ANN. § 16-6-2 (1984).

26. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

27. 478 U.S. 186 (1986).

28. *See id.*

White wrote for the Court, stating that any attempt to equate homosexual sodomy with the conduct the Court had previously found protected was "facetious,"²⁹ and that moral disapproval for homosexual conduct by state legislators provided a sufficient justification to sustain the law under rational basis review.³⁰ There were lengthy dissenting opinions by Justices Harry Blackmun, emphasizing the right of privacy,³¹ and John Paul Stevens, emphasizing equal protection.³² A few days later, the Court rejected the petition for review in the Texas case.³³

Defeated, but not beaten, the gay rights movement turned to state courts, arguing that state constitutions provided a broader right to privacy than that found in the Fourteenth Amendment. With some exceptions,³⁴ the movement was successful in a string of litigation victories beginning during the 1990s, winning invalidation of the sodomy laws in Tennessee,³⁵ Kentucky,³⁶ Montana,³⁷ Arkansas,³⁸ Georgia,³⁹ and Maryland.⁴⁰ There was continuing litigation in Texas and some temporary victories in the intermediate courts of appeals,⁴¹ but neither the Texas Supreme Court⁴² nor the Texas Court of Criminal

29. *Id.* at 194.

30. *Id.* at 196. Under the Court's terminology then used for analyzing claims that a statute violated the Due Process Clause, a law that did *not* burden a "fundamental right" would be presumed constitutional, and the burden being placed on the challenger to show that the state had no rational justification for the law. In light of the Court's subsequent decisions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Lawrence*, 1235 S. Ct. at 2472, one may question, as the writer does above, whether this methodology retains its vitality.

31. *Bowers*, 478 U.S. at 199-214 (Blackmun, J., dissenting).

32. *Id.*, at 214-20 (Stevens, J., dissenting).

33. *Baker v. Wade*, 478 U.S. 1022 (1986).

34. The main defeat was in Louisiana, where the state's highest court rejected repeated challenges to the state's antiquated "crime against nature" law. See *La. Electorate of Gays and Lesbians, Inc. v. Louisiana*, 833 So. 2d 1016 (La. 2002); *Louisiana v. Smith*, 661 So. 2d 442 (La. 1995); *Louisiana v. Baxley*, 656 So. 2d 973 (La. 1995).

35. *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

36. *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

37. *Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997).

38. *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

39. *Powell v. Georgia*, 510 S.E.2d 18 (Ga. 1998).

40. *Williams v. Glendening*, No. 98 036031-CC1059 (Md. Cir. Ct., Oct. 15, 1998) (unpublished trial court opinion held that the sodomy law may not be enforced in cases of private consensual adult activity; government conceded unconstitutionality of the law and settled the case on grounds of a promise of non-enforcement under described circumstances).

41. *Lawrence v. Texas*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417 (Tex. Ct. App. June 8, 2003); *England v. Texas*, 846 S.W.2d 957 (Tex. Ct. App. 1993); *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992).

42. *Texas v. Morales*, 869 S.W.2d 941 (Tex. 1994).

Appeals⁴³ was willing to invalidate the sodomy law. And there were legislative repeals as well.⁴⁴

By the late 1990s, gay rights litigators had become convinced that it was time to bring the issue back to the U.S. Supreme Court. Two cases made this appear feasible. In *Planned Parenthood v. Casey*,⁴⁵ while reaffirming the core holding in *Roe v. Wade*⁴⁶ that a woman has a constitutional right during the first trimester of pregnancy to choose abortion, the Court had used rhetoric about individual liberty that seemed to apply equally to an individual's choice of a sexual partner. And, in *Romer v. Evans*,⁴⁷ while striking down a Colorado constitutional amendment that prohibited the state from protecting gays from discrimination, the Court asserted that dislike or moral disapproval by legislators or the public could not serve as a legitimate justification for the state to disfavor a particular social group.

In both cases, Justice Anthony M. Kennedy, Jr. was part of the majority and played a key role, writing the opinion for six members of the Court in *Romer*⁴⁸ and participating in the three-member group that produced the plurality opinion in *Casey*⁴⁹—where he was widely believed to have written the due process language that gay rights advocates saw as so promising. Justice David Souter was also part of the majority in both cases. Those who were counting votes quickly saw that Justices Kennedy and Souter might provide the fourth and fifth votes for overruling *Bowers v. Hardwick* and striking down a state sodomy law. The operative assumption was that Justice Stevens remained committed to the views he expressed in his *Bowers* dissent, and that Justices Stephen Breyer and Ruth Bader Ginsburg, appointees of President Bill Clinton who had been receptive to gay rights claims as appeals court judges⁵⁰ and in the *Romer* case, would vote to strike down a sodomy law.

43. *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. Ct. App. 2001) (en banc).

44. NEV. REV. STAT. § 518 (1993) (repealing NEV. REV. STAT. § 201.193); 2001, Ariz. Sess. Laws 382 § 1 (repealing ARIZ. REV. STAT. ANN § 13-1411) (West Supp. 2003).

45. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding a woman's right to chose abortion is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment).

46. *Roe v. Wade*, 410 U.S. 113 (1973).

47. 517 U.S. 620 (1996) (holding a state constitutional amendment banning state from extending protection against discrimination to homosexuals violates Equal Protection Clause of the Fourteenth Amendment).

48. *Id.* The majority, in addition to Justice Kennedy, included Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. *Id.* The dissenters were Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.*

49. *Casey*, 505 U.S. at 833. The other plurality members were Justices O'Connor and Souter. *Id.* Justices John Paul Stevens and Harry Blackmun voted to strike down the statute virtually in its entirety, while Chief Justice Rehnquist and Justices Antonin Scalia, Byron White, and Clarence Thomas voted to uphold the statute in its entirety. *Id.*

50. As to Justice Ginsburg, see *Steffan v. Perry*, 41 F.3d 677, 700-01 (D.C. Cir. 1994) (en banc)

There was even some hope that Justice Sandra Day O'Connor, part of the *Bowers* majority, may have moderated her views, as signified by her votes in *Casey* and *Romer*.

II. THE *LAWRENCE* CASE

Beginning with the Arkansas case filed in the late 1990s,⁵¹ gay rights litigators resumed their sodomy challenges, including federal constitutional claims, even though they were still being filed in state courts. When local law enforcement officials in Houston decided to prosecute a sodomy charge against John Geddes Lawrence and Tyron Garner, the stage was set for an ideal sodomy law challenge—an actual prosecution involving two consenting adults in private who had accidentally been discovered by police responding to a false gun report from a third person.⁵² Such an opportunity does not come along very often. (Indeed, as the Supreme Court observed in its decision, actual prosecutions for private, consensual sodomy are extremely rare in the case reports throughout American history.⁵³)

The resulting case produced a temporary victory when a three-judge panel of the Texas Court of Appeals in Houston declared the Homosexual Conduct Law unconstitutional,⁵⁴ but that ruling was quickly reversed *en banc*.⁵⁵ The Court of Criminal Appeals refused to consider the matter,⁵⁶ and the U.S. Supreme Court granted certiorari not only on the questions of whether the Texas statute violated the Due Process and Equal Protection Clauses, but also on the question of whether *Bowers* should be overruled.⁵⁷

The Court's opinion, written by Justice Kennedy, is not quick to yield its doctrinal fruits. On the one hand, it is clear that a majority of the Court was eager to overrule *Bowers*. Kennedy subjected that opinion to unmerciful dissection in all of its aspects, and ultimately said that it "was not correct when

(Ginsburg, J., dissenting); *Clarke v. United States*, 915 F.2d 699, 709 (D.C. Cir. 1990) (*en banc*) (Edwards, J., dissenting); *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986). As to Justice Breyer, see Matthews v. Marsh, 755 F.2d 182, 184 (1st Cir. 1985) (Breyer, J., dissenting).

51. *Jegley v. Picado*, 80 S.W.3d 332 (2002).

52. *Lawrence*, 123 S. Ct. at 2475-76; see Steve Brewer, *Local Challenge to Law on Sodomy to be Heard Today*, HOUS. CHRON., Dec. 22, 1998, at A21; C. Bryson Hull, *Challenge to Sodomy Law Moves to Appeals Court*, AUSTIN AMERICAN-STATESMAN, Dec. 23, 1998, at B7; Lisa Teachey, *Defendant in Sodomy Case Out of Jail After Assault Charges Dismissed*, HOUS. CHRON., Nov. 25, 1998, at A23.

53. *Lawrence*, 123 S. Ct. at 2478-79.

54. *Lawrence*, Nos. 14-99-00109-CR, 14-19-00111-CR, 2000 WL 729417.

55. *Lawrence*, 41 S.W.3d 349.

56. The defendants' petition for discretionary review was denied in an unpublished order on April 17, 2002.

57. *Lawrence v. Texas*, 537 U.S. 1044 (2002) (order granting petition for certiorari and specifying questions to be addressed).

it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”⁵⁸ Most of Justice Kennedy’s opinion was devoted to criticizing the Court’s opinion in *Bowers* for framing the question presented too narrowly,⁵⁹ for distorting historical record,⁶⁰ and for failing to properly apply the evolving constitutional privacy doctrine.⁶¹

But that does not end the matter. What was the doctrinal basis for declaring the Homosexual Conduct Act unconstitutional? Here, Justice Kennedy’s opinion is opaque. After observing that the case did not involve minors, coercion, injury, lack of consent, public conduct, prostitution, or a claim for legal recognition of a same-sex relationship,⁶² the entire doctrinal basis for the decision boils down to these few sentences:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the *Due Process Clause* gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.⁶³

Followed by a brief rhetorical paragraph rejecting the claim that due process protection is limited by the contemplation of the Framers of the Fifth and Fourteenth Amendments,⁶⁴ that is basically all Justice Kennedy has to say. Although the earlier parts of the opinion include much discussion about the history of homosexuality, its legal treatment in the U.S., many assertions about “liberty,” and about the inclusion of gay people’s intimate relationships within the sphere of liberty, Justice Kennedy never actually explains what the full scope of “liberty” is or why “homosexual conduct” comes within it. He

58. *Lawrence*, 123 S. Ct. at 2484.

59. *Id.* at 2478.

60. *Id.* at 2478-80. “In summary,” wrote Justice Kennedy, “the historical grounds relief upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.” *Id.* at 2480.

61. *Id.* at 2476-77.

62. *Lawrence*, 123 S. Ct. at 2484.

63. *Id.* (citation omitted).

64. *Id.*

concludes by asserting: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."⁶⁵

This opinion won five votes—a majority of the Court. One additional vote to strike the statute came from Justice O'Connor,⁶⁶ who refused to back away from her vote in *Bowers*, here determined that the Homosexual Conduct Law violated the Equal Protection Clause because it prohibited same-sex partners from doing what it allowed opposite-sex partners to do.⁶⁷ This violated the precedent of *Romer v. Evans*,⁶⁸ which disallows imposition of unequal treatment against specific groups on the basis of moral disapproval or dislike for those groups.

In his opinion for the Court, Justice Kennedy briefly considered the possibility of deciding the case on an equal protection basis, but rejected that route on the ground that *Bowers* should be overruled and all sodomy laws subjected to the same analysis, regardless to whether they singled out same-sex couples or not, as an impermissible restriction on personal liberty.⁶⁹ Kennedy wrote that striking down the Texas law on equal protection grounds would leave doubts as to whether sodomy was a constitutionally protected activity,⁷⁰ and a majority of the Court apparently wanted to strike down all sodomy laws, not just the Texas law.

A lengthy dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, asserted that the Court had knocked the props out of all morals legislation and opened a path to same-sex marriage claims.⁷¹ A milder dissent by Justice Thomas borrowed a leaf from Justice Potter Stewart's dissent in *Griswold*, calling the Texas statute a "silly" law that he would vote against in the legislature, but rejecting the idea that it could be invalidated through judicial review.⁷²

III. THE POTENTIAL IMPACT OF *LAWRENCE*

So, where does this leave us? What is the method of analysis for courts now confronted with claims by lesbian and gay litigants that some governmental policy is treating them unfairly? The range of such claims is quite broad. The Supreme Court has already given some attention to one, and gay

65. *Id.*

66. *Id.* at 2284-88 (O'Connor, J., concurring).

67. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring) ("Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants.")

68. 517 U.S. 620 (1996).

69. *Lawrence*, 123 S. Ct. at 2484.

70. *Id.*

71. *Id.* at 2488-98 (Scalia, J., dissenting).

72. *Id.* at 2498 (Thomas, J., dissenting).

litigants have already filed suit to claim the benefit of the *Lawrence* ruling in some other areas.

When the Court decided *Lawrence*, it also had before it a petition in the case of *Limon v. Kansas*.⁷³ Mr. Limon, now twenty-one, had just turned eighteen years old when he was charged with sodomy for initiating oral sex with a fellow male resident of a state institution for learning-impaired teens. His “partner in crime” was just shy of fifteen years old. Under Kansas law, consensual oral sex between persons of the same sex is a misdemeanor carrying either a six-month prison sentence or an one-thousand-dollar fine—unless, it seems, the act involved an adult having oral sex with a minor in which case it was treated as a serious felony carrying a lengthy prison term. Since Mr. Limon had turned eighteen, he was an adult, and he was sentenced to seventeen years in prison. Interestingly, had his sex partner been an underage girl instead of a boy, he would have been charged only with sexual assault and, due to the closeness of their ages, subject to a maximum prison term of thirteen to fifteen months. The ACLU assisted Limon in appealing his sentence, which he had begun to serve. The Kansas courts rejected the argument that there was any constitutional infirmity here citing *Bowers*, but the U.S. Supreme Court, just days after *Lawrence*, granted a writ of certiorari, vacated the Kansas Court of Appeals decision, and remanded the case for reconsideration “in light of *Lawrence v. Texas*.”⁷⁴

What is it about *Lawrence* that would require a different result in *Limon*? Could *Lawrence* be construed to mean that an eighteen-year-old man has a constitutionally protected liberty interest in having a not-quite-fifteen-year-old boy as a partner for oral sex? Does the Court mean to extend the more general right to sexual intimacy to teenagers? Or is this more of an equal protection case as it had been framed by the ACLU in its petition for certiorari? If so, what does *Lawrence* mean for equal protection analysis? *Bowers*, the case that *Lawrence* overruled, had turned out to be quite significant for equal protection analysis, at least in the eyes of many federal judges confronting equal protection cases after *Bowers* was decided.⁷⁵

Just one year after *Bowers v. Hardwick*, the D.C. Circuit Court of Appeals, rejecting an equal protection challenge to the FBI’s policy against

73. *Limon v. Kansas*, 41 P.3d 303 (Kan. Ct. App. 2002) (unpublished table decision).

74. *Limon v. Kansas*, 123 S. Ct. 2638. For a journalistic account of the facts, see Tony Rizzo, *Kansas Told to Rethink Gay Sex Case*, KANSAS CITY STAR, June 28, 2003, at A1.

75. “Equal Protection” is mentioned just once in the Court’s opinion in *Bowers*, in a footnote noting that the respondents were not defending the Eleventh Circuit’s opinion in their favor on the basis of equal protection. 478 U.S. at 196, n.8. In his dissent, Justice Blackmun states his disagreement with the Court’s “refusal” to consider an equal protection challenge to the Georgia sodomy law. 478 U.S. at 201. Justice Stevens’ dissent in *Bowers* is devoted to arguing that the law violates the Equal Protection Clause. 478 U.S. at 214-20.

hiring lesbian or gay applicants, asserted that since the conduct—homosexual sodomy—that defined the class—lesbians and gay men—was not constitutionally protected and, in fact, could be criminalized, it was not possible for a gay litigant to claim that the government could not subject her to the less serious disadvantage of denial of employment.⁷⁶ In other words, the D.C. Circuit ruled that because of *Bowers*, lesbians and gay men could not be a “suspect class” for equal protection purposes (or, putting it more precisely, sexual orientation would not be considered a suspect classification), and thus discrimination against gay people was presumptively constitutional as long as the court could imagine some rational justification. The court said that the FBI, as a law enforcement agency, could rationally prefer not to hire people whose sex lives made them criminals in half of the states.⁷⁷ And that was that.

Only one federal appeals court in the aftermath of *Bowers* was willing to suggest any kind of heightened scrutiny for equal protection claims by gay litigants, and that was a three-judge panel whose decision was revoked for *en banc* review in a military case.⁷⁸

Now that *Bowers* is gone as precedent, how will the federal courts analyze equal protection claims brought by gay litigants? The only Supreme Court decision about gays involving an equal protection claim is *Romer v. Evans*, the 1996 case in which the Court struck down Colorado Amendment 2,⁷⁹ a popularly-enacted measure intended to prevent the state or its political subdivisions from adopting laws or rules that would treat gay people as a protected class or entitle gay people to assert discrimination claims. In *Romer*, Justice Kennedy, writing for six members of the Court, asserted that this kind of sweeping measure expressly targeted at a particular group was alien to our legal traditions and so lacking in rational justification as to defy any sort of traditional equal protection analysis.⁸⁰ The *Romer* opinion never directly discussed whether sexual orientation discrimination claims would merit heightened scrutiny, or how such claims would fall along the equal protection scale between suspect and non-suspect classifications. Finding the Colorado amendment lacking in rational justification, the Court struck it down.⁸¹ Many subsequent lower federal court decisions have treated *Romer* as if it held that sexual orientation claims merit only rational basis review.⁸²

76. *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

77. *Id.* at 104.

78. *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*). The panel decision holding 2-1 that heightened scrutiny should be given to the military's exclusionary regulations was published, *as amended*, at 847 F. 2d 1329 (9th Cir. 1988).

79. *Romer vs. Evans*, 517 U.S. 620, 623 (1996).

80. *Id.* at 633.

81. *Id.* at 635.

82. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002); *Equality Found., Inc. v.*

In her *Lawrence* concurring opinion, Justice O'Connor suggested that *Romer* was one of a collection of equal protection cases in which the common element was government interference with personal relationships.⁸³ In such cases, she suggested the Court had applied a "more searching" version of the rational basis test.⁸⁴ That is, it is not enough for the state to put forward some vaguely plausible reason for what it is doing. At the very least, it has to put forth a legitimate state concern that is actually advanced by applying the discriminatory policy, and a bare desire to harm or treat as unequal a particular group of people cannot count as such a legitimate concern.⁸⁵ In *Lawrence*, O'Connor said that moral disapproval of gay people, or a state desire to signal that gay people are inferior citizens, could not serve as such a legitimate rationale for the sodomy law does not apply to opposite-sex couples.⁸⁶

How would this play out in *Limon*? Could the state say that there is some legitimate reason to treat oral sex as a grave felony offense when an eighteen year old performs it with a fifteen year old of the same sex, but only as a misdemeanor when an eighteen year old performs it with a member of the opposite sex? Clearly, the state believes homosexual conduct is a graver offense than heterosexual conduct when it involves teens, but the question is why? Is it just moral disapproval? Is it a belief that homosexual conduct is more harmful or more stressful and could do greater psychological or physical damage? After *Lawrence*, can the state just assert this, or must it come forth with some sort of empirical evidence? What if the legislative history is silent on the motivation of the legislators? As the case is now on remand, we do not yet know how the Kansas courts will respond. The ACLU may argue that *Lawrence* effectively held that gay sex is a fundamental right and that strict scrutiny should be applied to the Kansas law. And the state would undoubtedly argue to the contrary.⁸⁷ But the Supreme Court's action of remanding certainly seems to signal that the post-*Bowers* equal protection analysis—assuming that anti-gay discrimination merits no heightened scrutiny in equal protection cases—is invalid under *Lawrence*, or at least has to be re-thought.⁸⁸

City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997).

83. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

84. *Id.* (O'Connor, J., concurring).

85. *Id.* (O'Connor, J., concurring).

86. *Id.* at 2485-86 (O'Connor, J., concurring).

87. Apparently oblivious to the Supreme Court's stated disapproval of using legislative moral judgments as the basis for justifying unequal treatment for distinct classes of people, the Kansas Attorney General has apparently made the argument on remand that the state should be able to make the distinction that it made in Matthew Limon's case on grounds of moral disapproval. See Mike Hendricks, *Legislating a Skewed Morality*, KANSAS CITY STAR, Sept. 19, 2003, at B2 (reporting on the argument held before the Kansas Court of Appeals on remand).

88. On January 30, 2004, a three-judge panel of the Kansas Court of Appeals reaffirmed its original

A lawsuit filed in Arizona immediately after *Lawrence* directly raises the question of same-sex marriage.⁸⁹ Justice Kennedy, in the penultimate paragraph of his opinion, said that the challenge to the Texas statute “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁹⁰ Similarly, Justice O’Connor, in her concurrence, suggested that her equal protection analysis with its “more searching” rationality review,

does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.⁹¹

Reacting to these comments, Justice Scalia wrote in his dissent that Justice O’Connor’s reasoning “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.”⁹² Scalia asserts that the main basis for denying same-sex marriage is moral disapproval for same-sex relationships, and once that disappears from the equation as a valid justification, what can the state argue?⁹³ Taking on Justice Kennedy’s assertion that the Texas case did not present the question as to whether the government needs to formally recognize same-sex relationships, Scalia insisted:

Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “persons . . . in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁹⁴

decision by a 2-1 vote, opining that because *Lawrence v. Texas* was a due process case about sex between adults, it was not relevant to Limon’s equal protection claim. *Limon v. Kansas*, 2004 Westlaw 177649. The ACLU announced that it would appeal this ruling. The dissent described the rational bases for the law identified by the majority as “incomprehensible.”

89. *Standhardt v. Superior Court*, No. 1 CA-SA 03-0150, 2003 WL 22299701 (Ariz. Ct. App. Oct. 8, 2003).

90. *Lawrence*, 1235 S. Ct. at 2484.

91. *Id.* at 2487-88 (O’Connor, J., concurring).

92. *Id.* at 2496 (Scalia, J., dissenting).

93. *See id.* at 2498 (Scalia, J., dissenting).

94. *Id.* (Scalia, J., dissenting).

Scalia argued that the logic of the Court's opinion "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."⁹⁵

A gay couple in Arizona decided immediately to test Scalia's prophecy. Don Standhardt and Tod Keltner, who have lived together as domestic partners for six years and run a travel agency together, decided to marry.⁹⁶ They went with their lawyer, Michael Ryan, to the local city clerk's office to apply for a license. When they were turned down, Ryan filed an action in the Arizona Court of Appeals, seeking an order to the clerk to grant the license.⁹⁷ Standhardt and Keltner claimed that Arizona could not justify denying them a marriage license under *Lawrence*.⁹⁸ The Arizona Court of Appeals disagreed with them, noting that both Justice Kennedy and Justice O'Connor had specifically stated (the first by indirection and the second more directly) that the *Lawrence* ruling was not taking on the marriage issue, and asserting, with "due respect" to Justice Scalia, that the state did have a rational basis for seeking to promote traditional heterosexual marriages by limiting the rights and benefits of marriage to such unions based on the legislature's judgment that children are best conceived and raised within a traditional heterosexual marriage.⁹⁹ Standhardt and Keltner appealed to the Arizona Supreme Court.

Meanwhile, two other same-sex marriage lawsuits were pending in Massachusetts and New Jersey. In the former, the Supreme Judicial Court, citing *Lawrence*, ruled that the state's exclusion of same-sex couples from the right to marry violated the equality requirements of the state constitution.¹⁰⁰ In the latter, a state trial judge, seizing the comments in *Lawrence* by Justices Kennedy and O'Connor that the marriage issue raised different questions, granted the state's motion for summary judgment and the plaintiffs appealed.¹⁰¹

Then there is the military. The armed services had a formal policy of attempting to identify and deny enlistment to gay people, and to dismiss them from the armed forces if they were discovered, beginning with World War II.¹⁰² Before 1993, this was a matter of regulations implementing Article 125

95. *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).

96. See *Standhardt*, No. 1 CA-SA 03-0150, 2003 WL 22299701, at *1.

97. See *id.*

98. *Id.*

99. *Id.* at § 17-18, 33-41.

100. *Goodridge v. Department of Public Health*, 723 N.E.2d 1 (2003); Opinions of the Justices to the Senate, 2004 WL 202184 (Mass. Sup. Jud. Ct., Feb. 3, 2004) (reiterating the earlier holding and opining that a proposed civil union bill that would forbid same-sex marriage was unconstitutional).

101. *Lewis v. Harris*, 2003 WL 23191114 (N.J. Superior Ct. 2003).

102. See RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY* (1993).

of the Uniform Code of Military Justice (UCMJ), which is a sodomy law.¹⁰³ (We have to ask whether Article 125 remains valid in light of *Lawrence*, an issue that will most likely be first confronted in the context of court-martial proceedings or an action by a discharged gay service member seeking a “correction” in his veteran status.¹⁰⁴) In the 1992 Presidential election, Bill Clinton promised that if elected, he would repeal the regulation in an executive order as President Harry Truman had—ending racial segregation in the military by executive order. But when Clinton reiterated this after he was elected, military commanders and their allies in Congress loudly protested that letting gay people serve would destroy the effectiveness of the military. And Clinton backed away from his promise. Instead, Congress enacted legislation, accepted by Clinton, embodying “don’t ask, don’t tell.”¹⁰⁵ For the first time, the gay ban was statutory, but to avoid potentially unconstitutional status discrimination, it was carefully phrased to be a ban against people with a propensity to engage in homosexual conduct rather than a ban on “homosexuals.”¹⁰⁶ Congress declared that “homosexuality” (presumably, the performance of homosexual acts) was “incompatible” with military service, and detrimental to unit cohesion and morale based on the assumption that the presence of openly gay members would cause dissension among their non-gay colleagues.¹⁰⁷

Gays can enlist and serve so long as they keep their sexual orientation a secret. Any word or gesture signaling same-sex orientation triggers the presumption that they have a propensity to violate Article 125 of the UCMJ and, unless they can prove that they do not have such a propensity, they are subject

This book provides a detailed history of U.S. military policy towards “homosexuals,” culminating with the beginning of the public discussions that led to the “don’t ask, don’t tell” policy adopted in 1993 by Congress and the President.

103. UNIFORM CODE OF MILITARY JUSTICE, art. 125 (codified at 10 U.S.C. § 925, 2001) provides: “Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.”

104. Both kinds of proceedings were underway at the time of writing. Charles Lane, *Sodomy Ruling Spurs Challenges to Military’s Policy on Gays*, WASH. POST, August 4, 2003 at A1. According to press releases issued by Servicemembers Legal Defense Network, (SLDN), an organization established to provide legal advice to members of the U.S. Armed Services relating to sexual orientation, on October 7th and Lambda Legal on October 2nd, both in 2003, gay rights legal groups have filed amicus briefs in the U.S. Court of Appeals for the Armed Forces in a pending appeal of a military sodomy conviction, urging the court to declare Article 125 unconstitutional in light of *Lawrence*. Oral argument was heard on October 7th. Similar articles are being raised in other pending military sodomy prosecutions, according to the Lambda Legal Press release. Press releases are available at <http://www.sldn.org> and <http://www.lambdalegal.org>.

105. See 10 U.S.C. § 654 (2001).

106. *Id.* § 654 (a) (15).

107. See *id.*

to discharge. This was presented to the public as a compromise under which gays who were discreet could continue to serve in the military, but it has been a formula for disaster. The number of military members discharged under these rules was actually larger than the numbers who were being discharged under prior regulations, even though the military was shrinking throughout the 1990s.¹⁰⁸

Less than two weeks after the Supreme Court announced its decision in *Lawrence*, Loren S. Loomis sued in the U.S. District Court in Washington, D.C., seeking to reverse his discharge and have his military record corrected.¹⁰⁹ Loomis was wounded in the Vietnam War, won two Bronze Stars and a Purple Heart for his service, remained in the Army, and attained the rank of lieutenant colonel. He was stationed at Fort Hood, Texas in 1996 when his house burned down. A firefighter found a videotape showing Loomis engaged in gay sex and turned it over to the Army. The fire was set by an Army private who said he had posed for nude photographs for Loomis and had burned down the house to destroy the evidence. The Army discharged Loomis under "other than honorable" conditions, one week short of him attaining his twentieth anniversary in the Army, which would have entitled him to full retirement benefits.¹¹⁰

Loomis claims that Article 125 is unconstitutional as well as the "don't ask, don't tell" policy. Numerous federal courts have upheld the policy,¹¹¹ and military courts have uniformly rejected constitutional challenges to Article 125, citing *Bowers*.¹¹² In *Lawrence*, the Court said that *Bowers* was incorrect

108. According to data presented on the website of the SLDN, the number of persons discharged under the military policy on homosexuality during the years of the Clinton Administration were as follows: 1994: 617; 1995: 772; 1996: 870; 1997: 1,007; 1998: 1,163; 1999: 1,046; 2000: 1231. Servicemembers Legal Defense Network, at <http://www.sldn.org> (Oct. 14, 2003). According to the organization's 8th Annual Report, more than 1,250 service members were discharged on grounds related to homosexuality during 2001. *Id.* Thus, more than 7,800 uniformed military personnel were discharged under this policy. *Id.* The SLDN based its numbers on data obtained from the U.S. Department of Defense. *Id.*

109. Kim Cobb, *Sodomy Ruling May Affect Military; Gay Ex-soldier Thinks His Case Could Topple Don't Ask, Don't Tell Policy*, HOUS. CHRON., July 14, 2003 at A1; George Edmonson, *Lawsuit Challenges Military's Gay Policy; Texas Sodomy Ruling May Influence Courts*, ATLANTA JOURNAL-CONSTITUTION, July 20, 2003 at 5A; *Gay Man, Citing Supreme Court Ruling, Fights '97 Army Discharge*, N.Y. TIMES, July 9, 2003 at A14. The suit was filed in the U.S. District Court, District of Columbia in July, 2003.

110. Details about Loomis's discharge can be gleaned from the newspaper articles cited above.

111. *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Thorne v. U.S. Dep't of Defense*, 139 F.3d 893; *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996).

112. *United States v. Allen*, No. ACM 32727, 1999 WL 305093 (C. Crim. App. A.F. April 22, 1999) (rejecting constitutional challenge to military sodomy regulations as applied to consenting adult heterosexuals); *United States v. Modesto*, 39 M.J. 1055 (affirming military conviction of dismissal and confinement for sodomy and cross-dressing); *United States v. Fagg*, 34 M.J. 179 (1992), *on remand*, No. ACM 29129 (F Rev), 1992 WL 129473 (C.M.R. 1992), *cert. denied*, 506 U.S. 829 (1992) (upholding military

when decided, which surely means that *Lawrence* is a decision with retroactive effect. Does this mean that Article 125 was unconstitutional when Loomis was discharged? Does this mean that the “don’t ask, don’t tell” policy has been unconstitutional since 1993, and that the federal government is potentially liable to thousands of service members who were discharged under this policy?¹¹³

Justice O’Connor included a fleeting reference to this issue in her concurring opinion in *Lawrence* when she said that “national security” might provide a justification for treating heterosexuals and homosexuals differently.¹¹⁴ But under the “more searching” rational basis review that she would apply to anti-gay governmental policies, is it enough for the Defense Department to cite “national security,” or do they have to provide some real evidence that keeping openly gay people out of the military, and preventing gay military members from having sex, is justified by national security concerns? Numerous military allies of the United States have ended their gay bans—some for more than ten years—and there is no evidence that their military readiness has been affected. Would a Supreme Court, faced with this evidence, find that the U.S. Department of Defense had justified the discrimination sufficiently to meet a “more searching” rational basis test? Meanwhile, in one of the first decisions to cite *Lawrence*, the Ninth Circuit Court of Appeals revived a lawsuit by Dr. John Hensala, a psychiatrist who was dismissed from the service after “coming out” as gay in a letter to his commander.¹¹⁵ The Pentagon was dunning Hensala for the \$71,000 in scholarship assistance they gave him for medical school. He sued to escape that liability, claiming he was willing to serve and the policies applied to him were unconstitutional. A district judge ruled against Hensala on a pretrial motion, but a 2-1 vote in the Ninth Circuit brings it back to life for trial, based on Hensala’s allegation that enforcement of the policy against him was discriminatory.

Of course, the military question presents distinctive concerns since the Supreme Court has held that individual civil rights may have to bend in a

law against heterosexual sodomy); *United States v. Henderson*, 34 M.J. 174 (1992) (upholding law against heterosexual sodomy).

113. The United Kingdom has already been confronting this issue as military members, who were discharged prior to a determination by the European Court of Human Rights that the British military gay ban violated European law, have sued for recompense. Responding to the Supreme Court’s decision in *Lawrence*, U.S. Representative Barney Frank (D. Mass.) filed a bill calling for the amendment of Article 125 in order to insert the word “nonconsensual” and add a definition of consent as well as to exempt from the operation of the provision consensual acts of a sexual nature between adults that are not for compensation and cohabitation of adults. Anti-Hypocrisy Act of 2003, H.R. 2676, 108th Cong. (2003).

114. *Lawrence*, 123 S. Ct. at 2488 (O’Connor, J., concurring).

115. *Hensala v. Dep’t of Air Force*, 343 F.3d 951 (9th Cir. 2003).

military context to accommodate national security.¹¹⁶ In a test case challenging the “don’t ask, don’t tell” policy, the U.S. Court of Appeals for the Second Circuit ruled just a few years ago that regardless of a constitutional equal protection analysis, the doctrine of deference to military expertise in personnel matters compelled a ruling against the challengers.¹¹⁷ Perhaps judicial deference to military expertise will continue to control this question.

It is surely correct to observe that the current military policy shows disrespect for gay people as a group, and this is precisely what Justice Kennedy suggests in *Lawrence* is not a proper role for government. But whether the broad, and somewhat vague notion of liberty taken from that opinion is strong enough to strike down the military ban is a matter of some doubt.

On a more practical level, however, a significant effect of *Lawrence* is to remove *Bowers* as constitutional precedent. *Bowers* has been the lynch pin for numerous lower court rulings—not just on gay issues—that involved individual claims of privacy and protection for intimate life and choice. *Bowers* has frequently been cited for the general proposition that due process claims on behalf of unenumerated constitutional rights are disfavored, and that only those rights that are well-secured in our history can be protected by the Due Process Clause.¹¹⁸ *Bowers* has been cited more specifically to support decisions denying or demeaning the parental rights of gay people.¹¹⁹ It was

116. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (First Amendment free exercise rights of a military chaplain had to yield to the military necessity of wearing distinctly religious garb while on duty); *Parker v. Levy*, 417 U.S. 733 (1974) (noting distinction between military and civilian life with respect to individual rights).

117. *Able v. United States*, 155 F.3d 628 (2d Cir. 1998).

118. See, e.g., *Herndon v. Chapel-Hill-Carboro City Bd. of Edu.*, 89 F.3d 174 (4th Cir. 1996) (rejecting due process and Thirteenth Amendment challenges to school board’s requirement that students perform pro bono work as a graduation requirement); *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994) (rejecting due process claim of a right to have public investigation files purged where the target of the investigation was cleared of wrongdoing); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (refusing to take an expansive view of fundamental rights not expressly articulated in the Constitution); *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (rejecting due process challenge to local ordinance that outlawed “cruising” around a major town thoroughfare); *Griffith v. Johnson*, 899 F.2d 1427 (5th Cir. 1990) (rejecting due process privacy argument concerning a state-operated adoption program); *Davis v. Bucher*, 853 F.2d 718 (9th Cir. 1969) (rejecting a privacy claim arising from corrections officers exchanging nude photographs of inmates on grounds that there is no express warrant for such a right in the Constitution). These cases are merely illustrative of scores of similar rulings citing and relying on *Bowers*.

119. See *Opinion of the Justices*, 525 A.2d 1095 (1987) (*Bowers* cited in decision upholding constitutionality of state law disqualifying gay people from being adoptive parents); *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987) (upholding denial of custody to lesbian mother); *Florida v. Cox*, 627 So.2d 1210 (Fla. 2d Dist. 1993), (rejecting constitutional challenge to state statute forbidding “homosexuals” from adopting children); *S.B. v. L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001) (upholding denial of custody to lesbian mother); *J.P. v. P.W.*, 772 S.W.2d 786 (Mo. App. 1989) (upholding restrictions on visitation rights of gay father); *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992) (requiring restrictions on lesbian mother’s visitation rights).

cited by the U.S. Court of Appeals for the Sixth Circuit in upholding a Cincinnati charter amendment that was a virtual duplicate of Colorado Amendment 2.¹²⁰ It was cited by the U.S. Court of Appeals for the Eleventh Circuit in upholding a state law banning the sale or possession of sex toys.¹²¹ It was also cited by the Eleventh Circuit in rejecting an employment discrimination claim by Robin Shahar, a lesbian attorney whose offer of a job with the Georgia Attorney General's Office was withdrawn when she had a same-sex commitment ceremony.¹²² The court accepted the argument that the Georgia Attorney General should not have to employ somebody who was a presumptive violator of the state's sodomy law. (Ironically, the Georgia Attorney General, Michael Bowers, later lost his political career when it came to light that he was having an adulterous affair with a woman who worked in his office in violation of Georgia's adultery and fornication laws.¹²³)

Bowers was cited by the Texas Supreme Court in rejecting an employment discrimination claim by a police officer who was fired because he was having an affair with a married woman.¹²⁴ *Bowers* has been cited by courts upholding claims of *per se* defamation on the ground that calling somebody gay is like calling them a criminal.¹²⁵ *Bowers* was cited to justify the Department of Defense's Security Clearance Office procedures that required *special* investigations of any applicant for a security clearance who was discovered to be gay.¹²⁶ It has been broadly cited in an array of cases where individuals claimed they were unfairly treated by the government due to their private sexual activities, and not just gay activities—cases involving prostitution, for example, as well as adultery.¹²⁷

In the absence of *Bowers*, as Justice Scalia observed in his dissent, the legal analysis begins anew on the array of sex crimes that penalize fornication, adultery, masturbation, and prostitution.¹²⁸ It is certainly possible to distinguish all of these activities from consensual gay sex in carrying out the analysis, but the *Lawrence* decision speaks broadly about liberty without adopting an analytical framework to determine what kinds of sexual activities come within that liberty. Justice Kennedy does, in criticizing the *Bowers*

120. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292 (6th Cir. 1997).

121. Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).

122. Shahar v. Bowers, 114 F.3d 1097, 1104 (11th Cir. 1997), cert. denied, 552 U.S. 1049 (1997).

123. Paul M. Barrett, *Consenting Adults: He Admits Adultery, She Married a Woman; They Clash on Values*, WALL ST. J., June 20, 1997, at A1.

124. City of Sherman v. Henry, 928 S.W.2d 464, 469 (Tex. 1996).

125. Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308 (5th Cir. 1997) (applying Texas law); Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980).

126. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

127. Henry, 928 S.W.2d at 464.

128. *Lawrence*, 123 S. Ct. at 2490 (Scalia, J. dissenting).

decision, emphasize the role of sex in the formation and perpetuation of intimate relationships, thus perhaps suggesting that the constitutional analysis should be different in considering casual sex as opposed to sex that is part of a relationship since the state might actually have good public health reasons to be concerned about the former more than the latter.

But perhaps a more fruitful way of speculating about the impact of *Lawrence v. Texas* is to step back from the immediate question faced by the Court—whether convicting John Geddes Lawrence and Tyron Garner for their private, consensual act of sodomy violated their constitutional rights—and to look again at the methodology the Court used to evaluate that claim. As Justice Scalia observed, the Court never stated that people have a “fundamental right” to engage in gay sex,¹²⁹ and yet the Court put the state to a stricter burden of justification than would normally be required for a due process case that does not involve a “fundamental right.” Past opinions, including *Bowers*, had grounded the fundamental rights analysis in history and refused to accord recognition to rights claimed that had lacked some longstanding social imprimatur. Yet Justice Kennedy dwelt on the way that knowledge and societal attitudes had changed over the past half a century regarding homosexuality, treating this just as significant, if not more so, than prior history in deciding whether the right claimed was important enough to merit constitutional protection as an aspect of “liberty” under the Due Process Clause,¹³⁰ and referred to evolving standards of human rights in other countries—something almost unprecedented for a United States Supreme Court opinion.¹³¹ A majority of the Court is apparently signaling that serious judicial review under the Due Process Clause may be premised on factors other than the long time historical regard for the particular activity. The Court may finally be acknowledging through this shift in rhetoric and method that as the pace of social change has accelerated, a jurisprudence of rationality evaluation for challenged legislation must become more meaningful if the basic principles of substantive due process—that the state must have an objectively valid justification for restricting individual liberty—are to be given due weight.

Perhaps the Court is abandoning the project of identifying “fundamental” rights so that lower courts can no longer simply apply a mechanistic tiered approach to judicial review. And instead is challenging the lower courts (and

129. *Id.* at 2488 (Scalia, J., dissenting).

130. *Id.* at 2480-81.

131. *Id.* at 2481. Justice Scalia commented, “[t]he Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’ *Foster v. Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).” *Id.* at 2495 (Scalia, J., dissenting) (quoting *Foster*) 537 U.S., at 991 (Thomas, J., concurring in denial of certiorari)).

legislators who care whether their proposals are constitutional) to engage in a more nuanced, more “searching” (to use Justice O’Connor’s term) evaluation of legislation that imposes hardship or disadvantage on identifiable groups of people. If so, then the Court is revolutionizing the framework of constitutional analysis as Justice Scalia suggests in his dissent. While Justice Scalia evidently considers this a bad thing, one may legitimately ask whether the regime that it replaces provided a satisfactory basis for preserving individual liberty in America.¹³²

132. Another case that was pending when *Lawrence* was decided was *Lofton v. Secretary of the Department of Children and Family Services*, a challenge to a Florida statute that categorically disqualifies “homosexuals” from adopting children in the State of Florida. A federal district court had rejected the challenge, and the Eleventh Circuit had received briefs and heard oral arguments. After *Lawrence*, the parties filed supplemental briefs. On January 28, 2004, the Eleventh Circuit panel issued its decision, 2004 WL 161275, unanimously affirming the district court, treating *Lawrence* as a narrow, somewhat inscrutable decision that had nothing to say about equal protection, and was narrowly focused on the criminalization of intimate conduct.