

2004

Thoughts on Lawrence v. Texas

Arthur S. Leonard
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

11 Widener L. Rev. 171 (2004-2005)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

WIDENER LAW REVIEW

Volume 11

2005

Issue 2

THOUGHTS ON *LAWRENCE v. TEXAS*

ARTHUR S. LEONARD*

The Supreme Court's June 26, 2003, decision in *Lawrence v. Texas*¹ may change everything concerning gay rights and American law, or it may change very little. One way of seeing it is that by eliminating laws against consensual, private acts of sodomy by adults, the decision removes the stigma of criminality from gay sex, opening up the possibility that lesbians, gay men, and bisexuals can attain full and equal rights of citizenship in this country.² Another way of seeing it is that by writing an opinion for the Supreme Court that eschews much of the normal vocabulary of due process analysis, and by skirting the equal protection issue raised by the Texas statute,³ Justice Anthony M. Kennedy, Jr., has given us a narrowly-focused opinion that may do away with archaic sodomy laws but is not particularly helpful in addressing the rest of the gay rights agenda.⁴ Of course, the ultimate impact may fall somewhere between these two poles.

As an optimist, I like to think that the former is the case, and that *Lawrence v. Texas* will prove helpful in a wide array of contexts and really change just about everything.

* *Professor of Law, New York Law School.* This article is based on remarks delivered as part of a plenary session panel discussion on *Lawrence v. Texas* held at the Lavender Law Conference, Fordham Law School, New York City, October 17, 2003. Some subsequent developments are noted in footnotes, and the text has been updated to reflect developments through the early summer of 2004. Faculty research grants from New York Law School underwrote time spent preparing the original presentation and the updating.

1. 539 U.S. 558 (2003).

2. This was certainly the spirit in which the Massachusetts Supreme Judicial Court cited and quoted from *Lawrence* at the beginning of its opinion in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that same-sex couples may not be categorically barred from the institution of marriage, since they are entitled to full rights of citizenship).

3. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1994).

4. U.S. Court of Appeals Judge Stanley Birch made this argument in *Lofton v. Secretary of the Dep't of Children and Family Services*, 358 F.3d 804, 815-17 (11th Cir. 2004), *petition for reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004) (opining that *Lawrence* was essentially irrelevant to the question of whether Florida could categorically ban "homosexuals" from adopting children); *See also* *Standhardt v. Superior Court*, 77 P.3d 451, 456-57 (Ariz. Ct. App. 2003) (Arizona Court of Appeals Judge Ann A. Scott Timmer, while acknowledging that *Lawrence* had recognized the right of gay people to their choice of intimate sexual partners, refused to read the case more broadly, as suggested in Justice Scalia's dissent in *Lawrence*, to extend to the right to marry.).

Lawrence marks the culmination of more than a quarter-century of legal challenges to sodomy laws, and a half century of intensive efforts at sodomy law reform. In the 1950s, gay sex was illegal everywhere in the United States, as it had been since the dawn of our nation.⁵ The first significant efforts to change that were asserted behind the scenes by some gay scholars who lobbied successfully with the legal bigwigs of the American Law Institute, a prestigious law reform group, to include decriminalization of consensual sodomy among the reforms to be achieved through the promulgation of the Model Penal Code (MPC).⁶ Prior to the MPC, American state criminal law was a hodgepodge of various common law crimes and idiosyncratic state statutes that had grown up from the time of our independence into the mid-20th century.⁷ Determined to modernize and introduce rationality and uniformity into the criminal law, American law reformers worked intensively on the project of drafting the MPC during the 1950s, and agreed, after extensive debate, to a "sex crimes" chapter in the code that would focus on issues of consent and the distinction between public and private conduct.⁸ Sexual activity between adults that was consensual and private would generally not be subject to state regulation or punishment through criminal law.⁹ There are undoubtedly heroic tales to be told about the strenuous efforts to include decriminalization of homosexual conduct as part of the MPC draft, as this was accomplished at a time when "enlightened opinion" held that homosexuality was a mental illness, and the gay rights movement had not yet advanced to the public demonstration stage.¹⁰ The official comments accompanying the MPC decriminalization proposal embodied this "enlightened opinion," asserting that homosexuality should be treated as a medical issue rather than a matter for the criminal law.¹¹

5. *Lawrence*, 539 U.S. at 572.

6. See MODEL PENAL CODE, cmt. at 267-81 (Tentative Draft No. 4 1955) [hereinafter Draft MPC]; See also MODEL PENAL CODE § 213.2 note on status on section (Proposed Official Draft 1962) [hereinafter MPC] at 144-46 (recounting the decision of the council to remove the proposed section prohibiting consensual sodomy).

7. At the time of American Independence, the early states continued to effect the English common law crimes.

8. The Supreme Court tells the MPC story briefly in *Lawrence*: "In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.'" *Lawrence*, 539 U.S. at 572, (quoting MODEL PENAL CODE § 213.2, cmt. 2 (1980)). "It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail." *Id.* (citing Draft MPC, at cmt. 277-280.) "In 1961 Illinois changed its laws to conform to the Model Penal Code." *Id.*

9. MPC, *supra* note 6, at 144-46.

10. These opinions are summarized in the commentary prepared for the council in 1955, published in Draft MPC, cmt. 276-81.

11. *Id.*

The MPC was a “model” put out by a non-governmental group, and it was up to each state to decide whether to adopt it as proposed, to amend it to satisfy local legislative preferences, or to ignore it altogether. The first state to adopt the MPC with the proposed sex crimes chapter was Illinois,¹² which thus became the first U.S. jurisdiction to decriminalize consensual, private gay sex when its version of the MPC went into effect in 1962. Some states followed Illinois’ lead while others, like New York, bowed to moralistic objections and amended the MPC to retain criminal penalties for what was now to be called “deviate sexual intercourse.”¹³ Still other states decided not to join the model laws bandwagon and to retain their own criminal statutes or common law (non-statutory) criminal definitions.¹⁴

Meanwhile, a federal constitutional due process revolution, kicked off by the Supreme Court under the leadership of Chief Justice Earl Warren during the 1950s and 1960s, led law reformers to begin attacking sodomy laws in the courts, claiming, for example, that states that had not adopted the MPC definition of “deviate sexual intercourse” were maintaining unconstitutionally vague laws on their books.¹⁵ Pre-MPC statutes outlawed “the abominable and detestable crime against nature,” or used other euphemisms such as “unnatural acts” to describe the crime.¹⁶ It was rare for a pre-MPC statute actually to spell out in detail what body parts had to come into contact to violate the law. None of these pre-MPC statutes made any distinction between same-sex or opposite-sex conduct, either, or even as to whether the conduct was public or private.¹⁷ Under Warren Court precedents requiring that criminal statutes be precise enough so that persons of ordinary intelligence could tell what acts were prohibited, law reformers charged into the courts in Florida, Tennessee, and Massachusetts, claiming that the statutes flunked the vagueness test.¹⁸ They were all unsuccessful, as courts (including the U.S. Supreme Court) opined that “everybody knows” what was prohibited, as a result of the application of the statutes in actual cases.¹⁹

Another part of the due process revolution was the willingness of the Warren Court to find that due process of law required states to have compelling interests

12. Laws 1961, p. 1983, § 5/11-2 (repealed by P.A. 83-1067, 1984).

13. N.Y. PENAL LAW § 130.38 (McKinney, 1978) (repealed 2001) (held unconstitutional as applied to private, consensual adult sexual conduct because it violated the Equal Protection Clause by applying only to unmarried persons in *People v. Onofre*, 415 N.E.2d 936, 942-43 (1980), *cert. denied*, 451 U.S. 987 (1981)).

14. One example is California, which waited until 1975 to decriminalize private, consensual adult sexual conduct in the Brown Act of 1975, CAL. PENAL CODE § 286 (West 2003) (effective July 1, 1976).

15. *Wainwright v. Stone*, 414 U.S. 21 (1973).

16. *See Rose v. Locke*, 423 U.S. 48 (1975).

17. *Lawrence*, *supra* note 1.

18. *Wainwright*, 414 U.S. 21 (1973); *see also* *Commonwealth v. Balthazar*, 318 N.E.2d 478, 480 (Mass. 1974); *see also* *Rose*, 423 U.S. at 50-53.

19. *See Rose*, 423 U.S. at 50.

at stake if they wanted to restrict individual rights that were deemed "fundamental" to American citizenship.²⁰ (This was referred to by legal scholars as "substantive due process.") Most pertinently, the Supreme Court found in 1965 that Connecticut had violated the Due Process Clause by making it a crime for married persons to use contraceptives to prevent pregnancy,²¹ and in 1967 that Virginia had violated both the Due Process Clause and the Equal Protection Clause by forbidding persons of color and "white people" from marrying each other.²² In both cases, concepts of privacy and individual liberty were violated because fundamental rights were being abridged without, as far as the Supreme Court could see, any substantial non-discriminatory justification for doing so. The religious or moralistic inspiration for both laws was dismissed by the Court as insufficient to justify a criminal statute. It was not up to the criminal law to enforce religious precepts.

Thus encouraged, gay rights advocates sought to challenge sodomy laws during the 1970s, using the same due process theory, but failed in several cases. Challenges were mounted first in Texas and then in Virginia.²³ The Texas case achieved an initial victory at the trial court level in 1970, but the decision was vacated by the Supreme Court on procedural grounds.²⁴ This litigation did have the effect of stimulating legislative reform, as Texas repealed its traditional "crime against nature" felony statute and substituted the Homosexual Conduct Act, thus decriminalizing sodomy for heterosexuals and reducing the level of the crime from a felony to a misdemeanor, carrying only a small maximum fine but still imposing the stigma of a criminal record with whatever ramifications might flow from that.²⁵

The Virginia case was a spectacular defeat, as the trial court rejected the due process privacy argument, and the Supreme Court affirmed that ruling without even bothering to order oral argument and issue an opinion, signaling its view that the federal constitutional issues raised by the case were negligible.²⁶

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

21. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

22. *Loving v. Virginia*, 388 U.S. 1 (1967).

23. *Doe v. Commonwealth's Attorney for Richmond, Virginia*, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd without opinion*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated and remanded sub nom.*, *Wade v. Buchanan and Buchanan v. Wade*, 401 U.S. 989 (1971).

24. *Buchanan*, *supra* note 23.

25. TEX. PENAL CODE ANN. § 21.06 (Vernon 1994).

26. *Doe v. Commonwealth's Attorney 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).

Advocates then turned their attention to state courts and proved more successful in building on the growing body of federal privacy law,²⁷ achieving the most significant victories in Pennsylvania²⁸ and New York.²⁹

By the early 1980s, the mounting federal privacy precedents led gay rights advocates back into the federal courts for major challenges against the sodomy laws of Texas, Georgia, and Louisiana.³⁰ The Georgia case achieved some success, winning an affirmative ruling from the U.S. Court of Appeals in Atlanta, but that was overturned by the Supreme Court's notorious *Bowers v. Hardwick*,³¹ decision in 1986, with Justice Byron White writing for the Court that any attempt to equate gay sex with the kind of "fundamental rights" that had been protected under the Due Process Clause was "facetious."³² The Texas case also achieved some early success, with a sweeping ruling by a federal trial judge in Dallas striking down the sodomy law as violating both due process and equal protection (due to its one-sided impact on gay people), but this ruling was reversed by the federal appeals court, and the Supreme Court declined to review the case after issuing its Georgia decision.³³ The Louisiana challenge was barely under way when the *Hardwick* decision was announced, and the litigators decided to withdraw the case as a strategic retreat.³⁴

During the 1990s, as the Supreme Court appeared to become even more conservative with the post-*Hardwick* appointments of two judges, Anthony M. Kennedy, Jr., and Antonin Scalia, by Ronald Reagan, and two judges, David M. Souter and Clarence Thomas, by George H.W. Bush, and the elevation of William H. Rehnquist as Chief Justice, the sodomy reform movement shifted its attention back again to the state courts, arguing that state constitutions could be interpreted to provide more protection for individual privacy than the federal constitution. They were notably successful in getting sodomy laws struck down

27. The federal privacy law developed in abortion cases for which there was a comfortable majority through the years of Chief Justice Warren Burger, even though he himself was a frequent dissenter. See *Roe*, *supra* note 20; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

28. *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

29. *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied sub nom.*, *New York v. Onofre*, 451 U.S. 987 (1981).

30. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd en banc*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985) *rev'd*, *Bowers v. Hardwick*, 476 U.S. 186 (1986); *Ward v. Connick* (E.D. La.) There is no citation for this case because the case was withdrawn following the Supreme Court's decision in *Bowers*.

31. *Bowers*, *supra* note 30.

32. *Id.* at 194.

33. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd en banc*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

34. *Ward v. Connick* (E.D. La.). The author was a member of the Legal Committee at Lambda Legal Defense and Education Fund at the relevant time and participated in discussions about the filing and withdrawal of the Louisiana sodomy law challenge.

by the appellate courts in several states,³⁵ and litigation involving heterosexual sodomy prosecutions,³⁶ as well as further legislative repeals, had, by the end of the decade, reduced the number of sodomy laws on the books to barely more than a dozen, of which only a handful specifically targeted same-sex conduct.³⁷ By the end of the 1990s, the gay rights litigators had concluded that it was time to resume the inclusion of federal constitutional claims in their state sodomy law cases, because the U.S. Supreme Court had issued two decisions during the 1990s that gave many legal observers hope that there were at least five votes on the Court to strike down sodomy laws on federal constitutional grounds.³⁸ In addition, President Bill Clinton appointed two justices, Ruth Bader Ginsburg and Stephen Breyer, whose prior opinions on the federal courts of appeals indicated receptivity to gay rights arguments.³⁹ Even though these cases were in state courts, an adverse decision from the highest state appeals court on the federal constitutional arguments could be appealed to the U.S. Supreme Court.

The two fateful federal constitutional decisions were *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴⁰ and *Romer v. Evans*.⁴¹ *Casey* was supposed to be the right-wing's vehicle to overrule *Roe v. Wade*⁴² and put an end to constitutional protection for women's right to abortion, but a centrist group of Republican appointees consisting of Justices Anthony M. Kennedy, Jr., Sandra Day O'Connor, and David Souter⁴³ rallied around a concept of "liberty" under the Due Process Clause as an anchor for continued protection of that intimate personal decision.⁴⁴ Their jointly-signed opinion contained rhetoric in support of individual autonomy and choice that was very suggestive for those dedicated to overturning *Bowers v. Hardwick*.⁴⁵ For example, in a portion of the opinion widely believed to have been written by Justice Kennedy appears the following

35. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

36. See, e.g., *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (sodomy law that was upheld in *Bowers* declared unconstitutional under state Due Process Clause in prosecution for heterosexual oral sex).

37. *Lawrence*, 539 U.S. at 573. "The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct." *Id.*

38. *Casey*, 505 U.S. at 850; *Romer v. Evans*, 517 U.S. 620 (1996).

39. As to Justice Ginsburg, see *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated en banc sub nom.*; *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994). As to Breyer, see *Matthews v. Marsh*, 755 F.2d 182 (1st Cir. 1985) (Breyer, J., dissenting).

40. 505 U.S. 833 (1992).

41. 517 U.S. 620 (1996).

42. 410 U.S. 113 (1973).

43. Justices Anthony M. Kennedy, Jr. and Sandra Day O'Connor were both appointed by President Reagan, and Justice David Souter was appointed by the first President Bush.

44. *Casey*, 505 U.S. at 845-47.

45. *Id.* at 846-53.

helpful assertion: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."⁴⁶

On top of that, the 1996 decision in *Romer v. Evans* marked the first major gay rights victory in the Supreme Court in a generation.⁴⁷ The opinion by Justice Kennedy, declaring unconstitutional Colorado's infamous Amendment 2,⁴⁸ again contained language suggesting sympathy for the right of gay people to be treated as equal citizens of the United States and not to be singled out for invidious treatment by the government.⁴⁹ The Court specifically rejected the idea that "moral disapproval" of homosexuality by voters or legislators was a sufficient justification to treat gay people as "unequal to everyone else."⁵⁰ In a fulminating dissent, Justice Antonin Scalia heatedly contended that the ruling was inconsistent with *Bowers v. Hardwick*, which the Court's opinion had neither specifically overruled nor attempted to distinguish.⁵¹

Thus, when the ideal test case came along in Texas,⁵² the gay rights lawyers at Lambda Legal Defense and Education Fund,⁵³ called in to represent the defendants, did not hesitate to raise federal constitutional claims as part of their defense. And when the Texas Court of Appeals refused to strike down the Homosexual Conduct Law, citing *Bowers v. Hardwick* as its main authority,⁵⁴ Lambda petitioned the Supreme Court specifically to overrule *Bowers*, as well as

46. *Casey*, 505 U.S. at 847.

47. *Romer*, 517 U.S. at 620. The previous great victory was an early 1960's decision holding that gay literature was not necessarily obscene, and therefore could be distributed through the mail; it was a decision necessary to the birth of the nationally distributed gay print media. *Manual Enterprises v. Day*, 370 U.S. 478 (1962); *ONE, Inc. v. Oleson*, 355 U.S. 371 (1958), *summarily rev'g* 241 F.2d 772 (9th Cir. 1957).

48. COL. CONST. art. I, § 30b (1993). The amendment intended to bar either the state or its counties or cities from passing gay rights protections.

49. *Romer*, 517 U.S. at 620.

50. *Id.* at 635.

51. *Id.* at 636. Indeed, the majority decision did not even mention *Bowers*. See generally *id.*

52. *Lawrence* was an ideal test case because it was a criminal prosecution of two male adults who were arrested while engaging in consensual sex in a private, residential apartment. *Lawrence*, 539 U.S. at 562-63. Police officers came into the apartment through an unlocked door in response to a third party's report of suspicious activity. *Id.* Thus, the case presented none of the usual complications found in sodomy law challenges stemming from actual arrests, such as public solicitation, public sexual acts, involvement of minors, possible lack of consent, or supervening Fourth Amendment violations by the police officers.

53. Local counsel, Mitchell Katine, represented the defendants in the initial state court proceedings, *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tex. Ct. App. 14th Dist. 2001), and Lambda staff attorneys took over primary responsibility for the case at the appellate level. *Lawrence*, 539 U.S. at 561.

54. *Lawrence*, *supra* note 53.

to declare the law unconstitutional on both due process and equal protection grounds.⁵⁵

Both of these constitutional theories were potentially in play, and both could be very important for future gay rights battles, although it was probably equal protection that was more important in the long run, since it related more directly to many of the remaining gay rights issues, notably other forms of governmental discrimination, including marriage, parental rights (custody, visitation and adoption), military service, immigration rights for partners, equal benefits rights, tax status discrimination, and so forth. A case challenging the Homosexual Conduct Law seemed the ideal vehicle to prod the Supreme Court to take a substantial crack at the equal protection issue, since the Texas law appeared discriminatory on its face, penalizing conduct when performed by same-sex partners that was left free of criminal prosecution when performed by opposite-sex partners.⁵⁶ Although gay legal observers had hailed the 1996 victory in *Romer*, the opinion in that equal protection victory had failed to engage in a traditional equal protection analysis, characterizing Amendment 2 as an enactment of a type that "defied" such analysis due to its breadth and irrationality.⁵⁷ Perhaps *Lawrence* would provide the kind of analysis that had not materialized in *Romer*.

But it was not to be. The big gay rights victory—and, make no mistake, it is a big gay rights victory for more than just symbolic reasons—appeared, to judge by Justice Kennedy's opinion for the Court, to be grounded solely in due process. Furthermore, eschewing the controversial language of "privacy" and "fundamental rights," Kennedy devoted most of his opinion to demonstrating why *Bowers* was "incorrect" when it was decided, and only at the end, almost as an afterthought, gave a brief, generalized justification for striking down the Texas law as a violation of the "liberty" protected by the Due Process Clause.⁵⁸

55. *Lawrence*, 539 U.S. at 564.

56. The Homosexual Conduct Law, 5 TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1994).

57. *Romer*, 517 U.S. at 621.

58. *Lawrence*, 539 U.S. at 578. The paragraph that can narrowly be characterized as the "holding" of the Court seems more concerned with narrowing the focus of the specific question presented than with stating a broad principle of constitutional rights. Kennedy wrote:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. 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

Kennedy briefly acknowledged that Lambda had also challenged the law under the Equal Protection Clause, and described such challenge as "a tenable argument," but dismissed it as a basis for this case, asserting that an equal protection ruling would not make it clear that all sodomy laws had to fail as a violation of "liberty."⁵⁹ Furthermore, he correctly stated, striking down all the sodomy laws took care of any lingering equal protection problems that they might pose, in any event, so it was not necessary for the Court to address the equal protection issue.⁶⁰ And he intimated that the Court's ruling did not necessarily decide whether the government had an obligation to recognize same-sex unions.⁶¹

There was one more vote to strike down the Texas law, from Justice O'Connor, and her opinion includes a suggestive discussion of how the Court might treat the equal protection issue in the gay rights cases to come.⁶²

As the Court has developed its equal protection analysis, the question whether a challenged government policy is found constitutional turns heavily on whether it uses a "suspect classification" as a basis for unequal treatment, or whether it provides for unequal treatment regarding a "fundamental right." A government policy that involves either of those is presumptively unconstitutional, and a heavy burden is placed on the government to prove that the policy is necessary and narrowly-tailored to achieve compelling governmental interests.⁶³ When government policies involve classifications that are not suspect, or interests that are not "fundamental," the Court presumes the policies to be constitutional and places the burden on the challenger to show that the policies bear no rational relationship to any legitimate government interest.⁶⁴ The Court has identified "sex" as a classification falling somewhere along the scale between "suspect" and "not suspect," looking to the state to justify government policies that treat people differently based on their sex by showing an important interest that the policy advances in order to support its constitutionality.⁶⁵

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.

Id. (citations omitted).

59. *Lawrence*, 539 U.S. at 574-75.

60. *Id.*

61. *Id.* at 578. The bulk of Kennedy's opinion, devoted to showing why *Bowers* had been wrongly decided, provided the source of expansive quotes about liberty and sexual privacy that have been relied upon by some judges in subsequent cases to give *Lawrence* broader precedential weight, while those who seek to restrict its scope cite the paragraph quoted at *supra* note 58.

62. *Id.* at 579-85 (O'Connor, J., concurring).

63. This test is referred to as "strict scrutiny."

64. *Lawrence*, 539 U.S. at 579. This test is referred to as "rational basis review" or "rationality review," and is considered the least demanding form of judicial review in terms of its deference to legislative preferences.

65. Perhaps the most enlightening discussion of the equal protection analysis in a Supreme

The Court has never directly analyzed whether "sexual orientation" is a suspect classification. In *Romer*, it found the Colorado constitutional amendment so lacking in rational justification that there was no need, for purposes of deciding the case, to analyze more generally how the burdens of proof and justification should be allocated in equality cases involving sexual orientation.⁶⁶ In subsequent decisions, some lower federal courts have invoked *Romer* as supporting the view that anti-gay government policies are presumptively valid, and the burden is on the challenger to show they are irrational.⁶⁷ It is much more difficult to win a challenge to an anti-gay policy when the challenger starts from such a disadvantageous constitutional position. *Romer* itself shows that it is not impossible to win, but *Romer* was an extraordinary case, as Justice Kennedy's opinion suggests. *Lawrence* provided the Court with an excellent opportunity to engage in a more detailed, substantive discussion of the type of judicial review appropriate for claims that government policies unconstitutionally discriminate on the ground of sexual orientation.

In her concurring opinion in *Lawrence*, Justice O'Connor, who had voted with the majority in *Bowers*, declined to join in overruling that decision, and declined to join in declaring that the Texas Homosexual Conduct Law violates the Due Process Clause, but contended that it violates the Equal Protection Clause.⁶⁸ Reviewing the Court's equal protection precedents, she classified *Romer* together with a few other cases where the Court has declared unconstitutional various government policies that did not involve "fundamental rights" or "suspect classifications," finding as their common core that the challenged policies were motivated by "a bare . . . desire to harm a politically unpopular group," and where "the challenged legislation inhibits personal relationships."⁶⁹ Certainly, a law criminalizing same-sex intimacy "inhibits personal relationships" and is aimed at a "politically unpopular" group. For such cases, O'Connor stated, the Court would engage in a "more searching" form of rational basis review.⁷⁰

Court opinion was written by Justice Byron White in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-40 (1985), from which Justice O'Connor cited and quoted in her *Lawrence* concurrence. 539 U.S. at 579-85.

66. *Romer*, 517 U.S. at 620.

67. The prime example of this is *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *petition for reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004) (rejecting the argument that Florida's categorical ban on gay people adopting children should be subjected to any heightened form of judicial scrutiny.). See also Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997).

68. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

69. *Id.* at 580.

70. *Lawrence*, 539 U.S. at 580. The cases upon which Justice O'Connor relied, in addition to *Romer*, were *Cleburne*, 473 U.S. at 440; *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534, (1973); *Nordlinger v. Hahn*, 505 U.S. 1, 11-12, (1992).

The equal protection issue thus joined, O'Connor turned to the state's proffered justification for the law. In this case, Texas argued that it was necessary to outlaw homosexual conduct in order to promote morality.⁷¹ This was essentially the winning argument Georgia made in *Bowers*, the case in which Justice O'Connor voted to reject the constitutional challenge.⁷² But she saw a sharp distinction when morality was raised in an equal protection context. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause, she asserted.⁷³ Why? "[B]ecause legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law,'" she answered, quoting from *Romer*.⁷⁴ In other words, a legislature can adopt a policy that has the effect of discriminating against a particular group, if the motivation for adopting the policy is some legitimate motivation *other than* specifically to discriminate against that group. This is, perhaps, a long way around to saying that groups whose common identifying trait centers on a non-suspect classification may have a constitutional claim when the legislature specifically singles them out for disparate treatment, but not when the legislature adopts a policy for other reasons that has the incidental effect of disadvantaging them. "[T]he Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake,'" she continued, again quoting from *Romer*.⁷⁵

The rest of her opinion was devoted to showing that the Texas legislature had been specifically motivated to legislate against homosexuals when it adopted the law; it was an easy case to make, especially in light of the name given to the law by the legislature.⁷⁶ She did take care, in response to Justice Scalia's dissent, to emphasize her view that this decision did not decide the case of same-sex marriage, since "preserving the traditional institution of marriage" could be seen as a "legitimate state interest" that was "beyond mere moral disapproval of an excluded group."⁷⁷ This comment drew the scorn of Justice Scalia, who argued in dissent that the *Lawrence* ruling opened the door to same-sex marriage and spelled the end of all "morals" legislation.⁷⁸

71. *Lawrence*, 539 U.S. at 583.

72. *Bowers*, *supra* note 30 (overruled by *Lawrence*, 539 U.S. 558 (2003)).

73. *Lawrence*, 539 U.S. at 583.

74. *Id.* at 583 (quoting *Romer*, 517 U.S. at 633).

75. *Id.* (quoting *Romer*, 517 U.S. at 635).

76. *Id.* (O'Connor, J., concurring.) Justice O'Connor specifically rejected the state's disingenuous argument that the Homosexual Conduct Law did not discriminate against homosexuals as a group because it also outlawed "homosexual conduct" by heterosexuals, i.e., two straight men or women engaging in oral or anal sex with each other. *Id.*

77. *Lawrence*, 539 U.S. at 585.

78. *Id.* at 599.

But what is the meaning of *Lawrence* for future gay rights litigation? Removing the stigma of criminality from gay relations will undoubtedly be helpful in an array of cases, although it is well to remember that statutes other than sodomy laws have contributed to such stigma. The decriminalization of sodomy in Illinois in 1962 did not suddenly liberate the gay people of that state from oppressive state policing of their sex lives. The MPC still provided criminal penalties for "soliciting" somebody to engage in "deviate sexual intercourse,"⁷⁹ and such laws have long been the main vehicle for law enforcement to crack down on gay meeting places and to arrest gay men.⁸⁰ Even in the post-*Lawrence* world, such laws still bedevil gay people. For example, on August 6, 2003, the California 3rd District Court of Appeal upheld a decision by the California Real Estate Commissioner to deny a real estate broker's license to a gay man on morality grounds because he had twice been arrested for soliciting a plainclothes police officer to engage in "deviate sexual intercourse" in a public restroom.⁸¹ The statutes under which such arrests take place are not specifically anti-gay statutes, but they are clearly enforced as such, since plainclothes police officers generally do not lurk about public restrooms enticing heterosexuals to solicit them for sex and then arresting them. Twenty-five years ago, a California appellate court took judicial notice of research showing that those arrested under such laws were almost exclusively men seeking sex with men.⁸²

But on to the broader gay rights agenda, what does *Lawrence* mean for same-sex marriage? For gay parental rights to custody, visitation, or adoption? For an end to discriminatory treatment under immigration laws, tax laws, public benefits laws such as Social Security and military regulations? Does it portend a more expansive use of the "liberty" mentioned in the Fifth and Fourteenth Amendments to subject a wider range of governmental restrictions on individual rights to some form of heightened scrutiny, even in cases where the Court's

79. E.g., N.Y. PENAL LAW § 240.35 (McKinney, 1978), which was declared unconstitutional by the New York Court of Appeals in *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983), *cert. dismissed as improvidently granted*, 467 U.S. 246 (1984).

80. Criminal prosecution of lesbians for violating sodomy laws is so rare that it is difficult to find case citations, but sodomy laws have routinely been invoked as grounds for discriminating against them. The most notorious case of this is *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (upholding the Federal Bureau of Investigation's refusal to hire a lesbian on the ground that it was rational for a federal law enforcement agency to refuse to employ a person whose sex life would be illegal in half the states); see also *Shahar v. Bowers*, 114 F.3d 1097, 1110-11 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1997) (upholding the Attorney General of Georgia's revocation of a job offer from a young lesbian attorney, on the ground that it would confuse the public for the state's chief law enforcement officer to employ an attorney whose sex life violated the state's felony sodomy law).

81. *Harden v. Zinnemann*, No. CO42848, 2003 WL 21802259 at *1 (Cal. Ct. App., 3rd Dist., Aug. 6, 2003).

82. *Pryor v. Municipal Court for Los Angeles County*, 599 P.2d 636, 644 (Cal. 1979).

traditional tests based on history would not find a fundamental right at stake? Will *Lawrence* lead to “heightened scrutiny” for gay equal protection claims?

The Supreme Court provided a hint when, shortly after announcing its opinion in *Lawrence*, it took action in the pending case of *Limon v. Kansas*.⁸³ Matthew Limon, then 18 years old, received a 17-year prison sentence for initiating sexual contact with a younger teenager when both were residents of a state group home.⁸⁴ Under Kansas law, the penalty for sex with a slightly-under-age female would have been minimal by comparison.⁸⁵ The ACLU argued that this violated Limon’s constitutional rights.⁸⁶ The Kansas courts disagreed and upheld the sentence, finding that the state could rationally impose harsher penalties for homosexual contact between an “adult” and a “minor,” relying upon *Bowers*.⁸⁷ The Supreme Court granted Limon’s petition, vacated the Kansas ruling, and sent the case back for reconsideration “in light of *Lawrence v. Texas*,”⁸⁸ signaling that *Lawrence* has some potential precedential application to the situation presented by Limon’s conviction and sentencing.

On the one hand, *Limon* seems closely analogous to *Lawrence* in that the Kansas law, like the Texas law, specifically targets gays for harsher penalties. But it is unlike the Texas law in that Kansas still imposes criminal penalties on straight inter-generational sex,⁸⁹ albeit lesser penalties than are imposed for same-sex conduct, whereas the Texas law allowed heterosexuals to have anal or oral sex without penalty. What was the Court trying to signal here? That the “liberty” interest identified in *Lawrence* may extend to inter-generational sex? This seems unlikely. More likely, the Court was trying to signal that *Lawrence*, viewed in the context of prior cases, including *Romer*, signals that moral disapproval of homosexuality may no longer be the basis for a state differentiating between same-sex conduct and opposite-sex conduct. That is, a majority of the Court may see *Lawrence* as incorporating an equal protection component in its holding as a logical extension of its due process holding. This would be fully consistent

83. 41 P.3d 303 (Kan. App. 2002) (unpublished disposition), *cert. granted, vacated and remanded for reconsideration*, 539 U.S. 955 (2003) *original decision reaff’d*, 83 P.3d 229 (Kans. App. 2004), *cert. granted*, 2004 Kan. LEXIS 284, at *1 (May 25, 2004).

84. *Limon v. Kansas*, 83 P.3d 229, 232 (Kan. App. 2004).

85. *Id.* at 232-33. Limon was convicted of violating KAN.STAT.ANN. § 21-3505(a)(2) (1999), a level 3 person felony. Had his sexual partner been an underage girl, his crime would have come under KAN. STAT. ANN. § 21-3522(a)(2) (1999), the so-called “Romeo and Juliet Law,” a level 9 person felony. The presumptive sentence for conviction under the former is a lengthy prison term, while the presumptive sentence for conviction under the latter is probation. In Limon’s case, prior scrapes with the law produced an even lengthier sentence than the presumptive one under the harsher statute. See the court of appeals dissent by Judge Pierron for an explanation. *Limon*, 41 P.3d at 390 (Pierron, J., dissenting).

86. *Limon*, 83 P.3d at 232.

87. *Id.*

88. *Limon*, 539 U.S. at 955.

89. KAN. STAT. ANN. § 21-3522(a)(2) (1999).

with the Court's view that the guarantee of due process in the Fifth Amendment imposes a requirement of equal protection on the federal government that is co-extensive with the equal protection requirement imposed on the states by the Fourteenth Amendment's express terms,⁹⁰ and is implicit in Justice Kennedy's comment that deciding *Lawrence* on due process grounds takes care of any equal protection issues raised by the Texas law.⁹¹

Of course, this does not guarantee that lower federal courts or state courts will understand the relevance of *Lawrence* to such issues, as the initial decision on remand to the Kansas courts in *Limon* has demonstrated.⁹² A majority of the Kansas Court of Appeals three-judge panel, focusing on the brief paragraph at the end of Justice Kennedy's decision that specified that the *Lawrence* case was not about sex involving minors, concluded that *Lawrence* was not relevant to its disposition of the case, to the consternation of a dissenting judge.⁹³ The majority totally missed the point that *Lawrence* is about due process in its fullest sense, which includes the equal protection obligation implicit in a requirement of fundamental fairness.

What might *Lawrence* mean for other heavily contested issues in gay rights? Is Justice Scalia correct in arguing that *Lawrence* severely undermines the case against same-sex marriage, or is Justice O'Connor correct in asserting that the state's interest in "preserving the traditional institution of marriage" may be enough of a legitimate, nondiscriminatory reason to withstand the "more searching" judicial review that she finds appropriate for state policies that "inhibit personal relationships"? O'Connor might argue that the denial of marriage to same-sex couples does not "inhibit" their personal relationships, as striking down the sodomy law allows them to have sex and live together in a joint household free of any state interference, and the disadvantages they suffer by being excluded from marriage are incidental and unintended consequences of the state's desire to nurture a historically-sanctioned opposite-sex relationship.

One presumes, on the other hand, that the Supreme Court's *Lawrence* majority would find unconstitutional statutes such as the Virginia laws against "fornication and cohabitation,"⁹⁴ which have been applied against opposite-sex couples living together without benefit of marriage, as violating the same "liberty" right identified in *Lawrence*. Would O'Connor find these laws unconstitutional? Maybe not, since they are not "discriminatory" in the sense she identified in her *Lawrence* concurrence.

90. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

91. *Lawrence*, 539 U.S. at 574-75.

92. *Limon*, 83 P.3d at 303.

93. *Limon*, 83 P.3d at 234-35.

94. VA. CODE ANN. §§ 18.2-344 and 345 (Michie 1950); *See Doe v. Duling*, 603 F. Supp. 960 (E.D. Va. 1985), *vacated*, 782 F.2d 1202 (4th Cir. 1986) (rejecting constitutional challenge in test case litigation brought by opposite-sex cohabiting couple).

And what about military service? Clearly, the 1993 enactment of the “don’t ask, don’t tell” policy was specifically motivated to keep openly-gay people out of uniformed military service.⁹⁵ The articulated justification—to promote unit cohesion and morale—was not expressly based on moral disapproval by Congress,⁹⁶ but rather on the contention by military commanders who testified before Congress that the presence of openly gay personnel would undermine the military mission because other service members could not (or would not) be able to bond with gay co-workers as fellow warriors.⁹⁷ The key question under equal protection theory is the degree of skepticism that a court should bring to evaluating this reasoning. If anti-gay discrimination, especially intentional rather than incidental anti-gay discrimination, is in some sense suspect, then the government should have to do more than assert this contention, as it has never been backed up by any credible social science research and is belied by the experience of many of our major military allies who have ended the gay ban for a decade or more.⁹⁸ Of course, the traditional judicial deference to military “expertise” in personnel matters gets in the way of a pure equal protection analysis as well.⁹⁹

What could *Lawrence* mean for the parental rights of gay people? In some jurisdictions judges have routinely cited sodomy laws to cast gay parents into inferior positions in custody and visitation disputes, regardless of their comparative merits as desirable custodians or role models for their children.¹⁰⁰ The removal of sodomy laws takes away that rationalization. But what about the judges who find it preferable for children not to be placed with parents who are the subject of community moral disapproval, or judges who continue to see homosexual relationships as “illicit” even in jurisdictions where sodomy laws have long since been repealed or invalidated, or judges who believe that children

95. 10 U.S.C.A. § 654 (West 1993).

96. *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998). Some members of Congress stated their individual moral disapproval for homosexuality. For example, Rep. Floyd Spence of South Carolina, then the ranking Republican on the House Armed Services Committee, described homosexuality as “unnatural, immoral as well as being illegal in some states.” Donna Cassata, *Tighter Limits on Gays OK’d; House Military Can’t Afford Risk*, CHARLOTTE OBSERVER, Sept. 29, 1993, available at 1993 WLNR 16 32405.

97. *Able*, 155 F.3d at 634.

98. Among prominent U.S. military allies that allow openly gay personnel to serve in the military are the United Kingdom, Canada, Australia, and Israel.

99. See, e.g., *Able*, 155 F.3d at 632-33, in which the district court had found the military policy unconstitutional, but the court of appeals reversed and upheld the policy, based primarily on the argument that normal analysis of constitutionally protected individual rights must give way to traditional judicial deference to military expertise in matters of military personnel policy.

100. One Florida judge thought that a father who was a murder convict was automatically a more desirable parent than a lesbian mother, for example, even though consensual sodomy was a mere misdemeanor in Florida while homicide was a felony. *Ward v. Ward*, 742 So. 2d 250, 255 (Fla. Dist. Ct. App. 1996).

are best off with the heterosexual parent who has remarried and can give the child a home with a traditional opposite-sex parental dyad as role models? What about all the judges who will only allow a gay parent to have visitation if their same-sex partner is excluded from any contact with the child? How will these cases fare under *Lawrence*? Would Justice O'Connor's "more searching" judicial review be relevant here, when the issue is not a statute specifically disadvantaging gay people, but rather judicial attitudes deployed in the exercise of relatively unsupervised "discretion" in a system where appellate courts are generally loathe to second-guess the front-line decision-makers? The Supreme Court has yet to take on a gay parenting dispute of any type, and its failure to confront the equal protection doctrinal issue in *Lawrence* forestalls the day when we can confidently answer that question.

What does *Lawrence* mean for the eventual fate of the Defense of Marriage Act (DOMA),¹⁰¹ the mean-spirited statute passed by Congress in 1996 in an election-year frenzy of reaction against the looming possibility that Hawaiian courts might rule in favor of same-sex marriage? Just months after DOMA was passed, their worst fears seemed to come true when a Hawaii trial judge ordered the state to issue marriage licenses to three same-sex couples.¹⁰² But the court's order was stayed pending appeal and the people of Hawaii amended their constitution to give their legislature the right to reject same-sex marriage.¹⁰³ Here is a federal statute that surely would merit "searching review" from Justice O'Connor, in light of its legislative history. Does Congress have a legitimate interest in "defending" the "traditional institution of marriage" against same-sex partners who might be married in Canada or Massachusetts, civilly united in Vermont, domestically-partnered in California, reciprocally-beneficiaried (now, there's a neologism) in Hawaii, seeking equal treatment under federal immigration, tax, or benefits laws, when DOMA was clearly passed for the valuable election-year political purpose of going on record against a politically unpopular minority? These remain open questions.

Lawrence v. Texas could have been the vehicle to begin addressing many of these concerns, but the way in which Justice Kennedy wrote the Court's opinion falls short of providing a clear roadmap for analyzing the constitutional questions. Justice Scalia's frustration at the lack of clear constitutional analysis

101. The operative provisions of DOMA are codified at 1 U.S.C.A. § 7 (West 1996) (definition of "marriage" for all purposes of federal law) and 28 U.S.C.A. § 1738C (West 1996) (purporting to relieve states of any obligation under the Full Faith and Credit Clause to recognize same-sex marriages performed in other states).

102. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996) (not officially published).

103. HAW. CONST. art. I, § 23 (1998). "The legislature shall have the power to reserve marriage to opposite-sex couples." (Added by H.B. 117 [1997], and election Nov. 3, 1998.) For a historical account, see David O. Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000).

in the opinion is understandable from this perspective. It is hard to hit a target that lies concealed behind mist and generalizations about “liberty.” Perhaps Justice Kennedy concluded, as a strategic matter, that in such an emotionally charged case, it was best to “leave ‘em guessing,” and that’s where he has left us.

