

2005

The Future of Sodomy

Libby Adler

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Libby Adler, *The Future of Sodomy*, 32 Fordham Urb. L.J. 197 (2005).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol32/iss2/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Future of Sodomy

Cover Page Footnote

Associate Professor of Law, Northeastern University. Thanks to Aaron Belkin, Taylor Flynn, and Wendy Parmet for helpful feedback on earlier drafts, and to Jennifer Wood and James Alexander for their research assistance. Thanks also to the organizers of the plenary session on Lawrence v. Texas at the National Lesbian and Gay Law Foundation's Lavender Law Conference (October 17-19, 2003) at Fordham University School of Law, as well as to the editors of this symposium edition of the Fordham Urban Law Journal.

THE FUTURE OF SODOMY

*Libby Adler**

*The contaminant of sex, the redeeming corruption that de-idealizes the species and keeps us everlastingly mindful of the matter we are.*¹

INTRODUCTION

One evening in 1998, John Lawrence and Tyron Garner went to Lawrence's house and engaged in anal intercourse.² Upon seeing them go inside a malevolent neighbor contacted the police and falsely claimed to have heard a gunshot coming from the direction of the house.³ When the police responded to the call, they stumbled upon Lawrence and Garner in the midst of the forbidden sexual act.⁴ The police arrested the two men for violating the Texas anti-sodomy statute,⁵ thereby initiating the case that brought the eventual demise of the notorious *Bowers v. Hardwick*,⁶ the 1986 decision in which the Court rejected a challenge to Georgia's anti-sodomy law, holding that the Constitution did not confer a fundamental right upon homosexuals to engage in sodomy.⁷

Lawrence and Garner spent the night in jail, pled no contest to the facts, were fined \$200 each, and left the courthouse convicted sex offenders.⁸ Texas law is more lenient than that of about a dozen other states: If the

* Associate Professor of Law, Northeastern University. Thanks to Aaron Belkin, Taylor Flynn, and Wendy Parmet for helpful feedback on earlier drafts, and to Jennifer Wood and James Alexander for their research assistance. Thanks also to the organizers of the plenary session on *Lawrence v. Texas* at the National Lesbian and Gay Law Foundation's Lavender Law Conference (October 17-19, 2003) at Fordham University School of Law, as well as to the editors of this symposium edition of the Fordham Urban Law Journal.

1. PHILIP ROTH, *THE HUMAN STAIN* 37 (2001).

2. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003); see *Morning Edition with Nina Totenberg* (NPR radio broadcast, Mar. 26, 2003) [hereinafter *Morning Edition*].

3. *Lawrence*, 539 U.S. at 559.

4. *Id.* at 563.

5. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The neighbor was also arrested, and convicted of filing a false police report. *Morning Edition*, *supra* note 2.

6. 478 U.S. 186 (1986).

7. *Id.* at 186.

8. *Lawrence*, 539 U.S. at 563.

Texas convictions had stood, they would have carried no prison time,⁹ though the convicted men would have been barred from certain professions, including—in a law as ironic as it is ill-conceived—interior design.¹⁰ Further, in some states to which they might have wished to move, Lawrence and Garner would have had to register as sex offenders.¹¹

The convictions were affirmed in the state appellate courts.¹² Then, incredibly, the United States Supreme Court granted certiorari on a matter that had been addressed fewer than twenty years before, and proceeded to strike down the Texas anti-sodomy law as a violation of the substantive due process guarantee of the Fourteenth Amendment.¹³

There can be no doubt about it: 2003 was a good year for sodomy. *Bowers* was a blight on American constitutional jurisprudence, one that rightly drew endless criticism from commentators spanning the political

9. TEX. PENAL CODE ANN. § 21.06(b).

10. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

11. *Id.* at 581.

12. *See Lawrence v. State*, 41 S.W.3d 349 (Tex. Ct. App. 2001).

13. *See Bowers v. Hardwick*, 478 U.S. 186 (1986); *see also Lawrence* 539 U.S. 558. Oral argument before the Supreme Court was something of a bloodbath. *See Oral Argument of Charles A. Rosenthal, Jr. on Behalf of Texas, Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1702534. Charles Rosenthal, the District Attorney for Harris County, Texas, was ill-equipped to play in the major leagues, stumbling through what was at times an unintelligible argument. Continually turned around analytically, he sometimes seemed to say the opposite of what he must have meant, and he was not prepared to answer basic questions, such as whether gays and lesbians could legally adopt children in Texas. *See id.* at 35. Justice Scalia became so frustrated with Rosenthal's incoherence that he took over for Texas, making the state's strongest arguments from the bench. *See id.* at 31.

Rosenthal's incompetence was so striking that it prompts one to wonder why someone so thoroughly unprepared would find himself representing Texas before the United States Supreme Court. Is it possible that the relevant players in Texas agreed with Justice Thomas that the statute was "uncommonly silly," *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)), yet the politics of the moment required Texas to make a showing of commitment to the prohibition nonetheless? Such bad faith is not inconceivable given the fact that the statute had gone largely unenforced for some time, apparently on the books merely to express disapproval rather than actually to prohibit.

The selection of Rosenthal recalls a similar story that happened when *Brown v. Board of Education* was before the Court. 347 U.S. 483 (1954). Apparently, the Kansas Attorney General was mortified to have the Board of Education of Topeka named as a defendant, as if Kansas were no better than Mississippi or Alabama. For a while, Kansas did not act to defend itself, perhaps imagining that the case and its accompanying embarrassment might simply evaporate if it were ignored. *See Mary Dudziak, The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950-1956*, 5 LAW & HIST. REV. 351, 370-73 (1987). Eventually, the Court instructed Kansas that it had to defend or concede, and Kansas defended. *See id.* To represent the school board at oral argument, Kansas sent a new lawyer who had never once argued before an appellate court, in a case in which opposing counsel was Thurgood Marshall—practically throwing the fight. *See id.*

spectrum.¹⁴ In this Article, I unreservedly cast my lot with the many observers who celebrate *Lawrence v. Texas* as a tremendous advance in civil rights. Rather than be lulled into complacency, however, I also read *Lawrence* with an eye toward the future, scouring the opinion for danger signs, and—I regret to report—I have found five.

By “danger signs,” I mean to suggest that I write as a legal realist in a Holmesian sense, that is, I am interested in *prediction*.¹⁵ What good or bad might come of the *Lawrence* decision? To what use might the opinion be put by courts deliberating on future cases? This, of course, raises in turn the question of what is meant by “good or bad.” In short, I take as my yardsticks the following: “Good” means pro-sex and anti-identity, while “bad” means suspicious of sex (a.k.a. “sex negativity”) and pro-identity. Below, I elaborate on each of these two yardsticks and then measure the *Lawrence* opinion against them.

I. PRO-SEX

A. The Pro-Sex Yardstick

Pro-sex thinking encompasses the views of a number of writers who might also fall under the broad categories of “feminist,” such as Gayle Rubin and Judith Butler, or “queer,” such as Duncan Kennedy and Michael Warner. I borrow from all four, and explain what I take from each in this sub-part.

1. Gayle Rubin

In her classic essay *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*,¹⁶ Gayle Rubin identifies five “ideological formations” relative to sexuality, two of which I rely on in this Article.¹⁷ First, Rubin

14. See, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993) [hereinafter Halley, *Reasoning*]; see Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994); see also RICHARD POSNER, *SEX AND REASON* 341-48 (1992).

15. Oliver Wendell Holmes, *The Path of the Law*, AMERICAN LEGAL REALISM 15 (William W. Fisher et al. eds., 1993) (“When we study law . . . [t]he object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”). “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law . . .” *Id.* at 17.

16. Gayle Rubin, *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 267-319 (Carole S. Vance ed., 1984).

17. The other three are 1) “fallacy of misplaced scale,” in which “everything pertaining to sex [is] a ‘special case’ in our culture,” 2) a “hierarchical system of sexual value,” in

observes that western culture “treats sex with suspicion” and “requires pretexts” for “the exercise of erotic capacity, intelligence, curiosity, or creativity . . . that are unnecessary for other pleasures such as the enjoyment of food, fiction or astronomy.”¹⁸ She calls this tendency “sex negativity” and opposes it.¹⁹ I will examine the *Lawrence* opinion for a tendency to portray sex as fundamentally suspect or requiring justification.

Second, Rubin calls for a highly tolerant and “pluralistic sexual ethics” which would rest on “a concept of benign sexual variation,” in which sexual practices need not “conform to a single standard.”²⁰ Rubin would no doubt find cause for celebration in the *Lawrence* Court’s provision of constitutional protection to a broader range of sexual activity than was protected before it, as do I. The pro-sex inquiry does not, however, end there. Benign sexual variation, at least as I employ the concept, would also require an inquiry into whether the newly protected acts are protected at the expense of imperiling a broader array of acts, or even the same acts committed in other contexts, including places and relationships.

2. Judith Butler

Judith Butler’s description of the “pro-sexuality [position] within feminist theory and practice”²¹ also lends something important to my analysis. “[S]exuality is always constructed within the terms of discourse and power,” Butler explains, so that any “postulation of a normative sexuality that is ‘before,’ ‘outside,’ or ‘beyond’ power is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities for sexuality and identity within the terms of power itself.”²²

I take from Butler the added facet of the pro-sex position that while sex is a site of power relations that are sometimes undesirable from a feminist perspective, it is unhelpful to attempt to insulate sex from power, or to analytically segregate sex that is untainted by power from sex that is tainted by power. Such an attempt at analytical segregation is unrealistic and, as a result, counter-productive in that it diverts our attention from more

which marital, reproductive sex sits at the top of a normative hierarchy; and 3) a “domino theory of sexual peril,” according to which there is a line dividing “sexual order and chaos.” *Id.* at 278-84.

18. *Id.* at 278.

19. *Id.*

20. *Id.* at 283-84.

21. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 30 (1990).

22. *Id.*

plausible avenues to progressive change that are premised on acceptance of the presence of power in sex.²³ Following Butler, I will judge the *Lawrence* opinion based on the extent to which it demonizes the power dimension of sex, and attempts in its analysis to separate out for constitutional protection only that sex which is free of the impurities of power.

3. Duncan Kennedy

Another facet of what I am calling the “pro-sex” position comes from Duncan Kennedy, who, in his essay *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*,²⁴ sets forth an elaborate assessment of the costs and benefits to men and women associated with regulation of the sexual abuse of women, and the resultant relative bargaining power between the sexes. I will borrow only a small piece from Kennedy’s analysis.

Kennedy takes as a premise that the more aggressive a regime’s efforts are to eradicate the sexual abuse of women by men, the more often some instances of enforcement will be overzealous and result in error.²⁵ “There is,” Kennedy explains, “a peculiar symmetry between the burden of excess enforcement and the burden of tolerated abuse. To get rid of one, you have to have the other.”²⁶ This creates “a real conflict of interests” between men and women over the degree to which the legal regime will tolerate abuse or excess enforcement.²⁷ To the extent that abuse is tolerated, “it spares men, abusive and nonabusive, the burden of excess or inaccurate enforcement [as well as] the burden of precautions against the risk of excess enforcement.”²⁸ One implication of this is that “increased enforcement would make men hesitate to take altogether innocent initiatives toward women, [while an increased] tolerated residuum [of abuse] makes women hesitate to take altogether innocent initiatives toward men.”²⁹ Kennedy, who acknowledges that some degree of regulation and some residuum of abuse will always be present,³⁰ is not a libertarian on this issue; he is

23. *Id.*

24. See DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 126-213 (1993).

25. *Id.* at 144.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 137 (“[I]t seems likely that there would be abuse within any conceivable legal system, and clear that even in the complete absence of legal sanctions there would be significant social control of this kind of behavior through other mechanisms.”).

willing to risk a certain amount of excess enforcement because he also believes that, as a heterosexual man,³¹ he has something to gain from women's security, *i.e.*, that "women might fantasize, play, experiment and innovate more, and *perhaps* more happily, if there were less . . . danger [of abuse]."³² The calculus can get complicated, much more so in Kennedy's essay, with lots of costs and benefits to parties who are neither perpetrators nor victims of abuse.

One plausible response to the problem of sexual abuse is to favor aggressive regulation of sex, including the broadest possible definitions of rape and harassment, even if that policy tendency might carry costs associated with excess enforcement.³³ Part of what I take to be the pro-sex position is a rejection of this approach. I read the "sexy dressing" calculus to have utility beyond heterosexual relations, to suggest a more general symmetry between the protection of people (not just women) from sexual behavior *and* the protection of people (not just men) from the burdens of excess enforcement. Any regime will have to err on one side or the other.³⁴ An aspect of my pro-sex yardstick, therefore, will require an inquiry into whether *Lawrence* errs on the side of protecting people from some sex at the cost of putting a lot of other sex at risk of exclusion from constitutional protection.

4. Michael Warner

The final dimension of what I take to be the pro-sex position concerns what Michael Warner has dubbed "the politics of sexual shame."³⁵ "Perhaps because sex is an occasion for losing control, for merging one's consciousness with the lower orders of animal desire and sensation, for raw confrontations of power and demand, it fills people with aversion and shame."³⁶ Sex affords no escape from shame for Warner, leading him to

31. *Id.* at 126.

32. *Id.* at 209.

33. *See id.* at 150-54. For reasons that I have not even begun to give a fair hearing here, this sort of law reform agenda might be endorsed by a *radical feminist* or *dominance feminist*, such as Catherine MacKinnon or Andrea Dworkin. *Id.* Kennedy collects the reasoning under the section title *Characterological Discipline* to capture the idea of the total pervasiveness of male domination even within women's consciousness. *See id.*

34. Fran Olsen states a similar premise. *See* Fran Olsen, *A Feminist Analysis of Statutory Rape Law*, 63 TEX. L. REV. 387, 387 (1984). "We want both security and freedom, but seem to have to choose between them." *Id.*

35. *See* MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* 24 (1999).

36. WARNER, *supra* note 35, at 2. Whether the shame of sex is a good thing or a bad thing is a separate question which I do not undertake here. For discussion, see Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 197, 215-18

pose the question not “how do we get rid of sexual shame?,” but rather “what will we do with our shame?”³⁷ To Warner’s chagrin, the all-too-frequent “response to shame seems to be: more shame.”³⁸

It is not so much the primary shame associated with sex that I am concerned with here, but the secondary “more shame.” One manifestation of this secondary shame is what Warner (quoting Theodore Adorno) refers to as “a desexualization of sexuality itself,” exemplified by the distinctly unsexy notion of a “*healthy sex life*”³⁹ as well as by the gay rights movement’s “desexualized identity politics” and its “becoming more and more enthralled with respectability.”⁴⁰ The final facet of my pro-sex yardstick will measure the extent to which the *Lawrence* opinion responds to the primary sort of shame with the secondary sort.

B. Four Signs of Danger for the Pro-Sex Position

1. Standard of Review

The *Lawrence* majority states unequivocally that it is overruling *Bowers v. Hardwick*.⁴¹ This is an extraordinary moment in the decision, not only because of the great personal satisfaction that it brings to the reader when the voice of authority condemns *Bowers* as erroneous, but also because it is so atypical for the Court to candidly proclaim its own error and its determination to reverse course, even while retaining three of the same members it had in 1986.⁴²

In *Brown v. Board of Education*,⁴³ for example, the Warren Court leaves plenty of room to believe that *Plessy v. Ferguson*⁴⁴ was correctly decided in 1896. Rather than condemning “separate but equal” as always having been wrong in principle, Chief Justice Warren reasoned that new, twentieth century psychological data and the increasing importance of public education in the industrial economy demanded the interment of the

(Douglas Crimp ed., 1988).

37. WARNER, *supra* note 35, at 3.

38. *Id.*

39. *Id.* at 22 (emphasis added).

40. *Id.* at 24-25.

41. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

42. The three members are Justice Sandra Day O’Connor (1981-present), Justice Stevens (1975-present), and Chief Justice William Rehnquist (1972-present).

43. 347 U.S. 483 (1954).

44. 163 U.S. 537 (1896).

“separate but equal” doctrine.⁴⁵

As Justice Scalia correctly notes in his dissent,⁴⁶ however, it is not clear that the *Lawrence* Court laid waste to every stone in the *Bowers* edifice. The *Lawrence* majority used the language of *liberty*⁴⁷ to strike down the Texas law, but declined to declare explicitly that sodomy is a *fundamental right* under the Due Process Clause, and apparently declined as a doctrinal consequence, to apply strict scrutiny. The statute, the Court found, lacked a rational basis, applying the lowest standard of review available in Fourteenth Amendment jurisprudence.⁴⁸

In one sense, the decision to strike down the statute as lacking even a rational basis is quite powerful. But in another sense, the application of rational basis review creates doctrinal space for deference to the legislature when the basis for a challenge to a law is *Lawrence*. This has not been lost on lower courts.

Just months after *Lawrence*, the Court of Appeals for the Eleventh Circuit deliberated on the constitutionality of Florida’s total ban on gay adoption.⁴⁹ Among the many arguments offered by the plaintiffs was one urging that Florida’s ban “impermissibly burdens” the “fundamental right to private sexual intimacy” set forth in *Lawrence*.⁵⁰ Rejecting this argument (and all others proffered by the would-be adoptive parents), the Eleventh Circuit observed that “[n]owhere . . . did the Court characterize this right as ‘fundamental,’”⁵¹ nowhere in the opinion is there an “inquiry into the question of whether the . . . asserted right is . . . ‘deeply rooted in this nation’s history,’”⁵² and “the . . . Court never applied strict scrutiny, the proper standard when fundamental rights are implicated.”⁵³ Since the Eleventh Circuit found no fundamental right to be at stake, even in light of *Lawrence*, it declined to decide whether the adoption ban

45. “In approaching this problem, we cannot turn the clock back . . . to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life . . .” *Brown*, 347 U.S. at 492-93. “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation has ill psychological effects] is amply supported by modern authority.” *Id.* at 494.

46. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

47. *Id.* at 562-79.

48. *Id.* at 578.

49. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 805 (11th Cir. 2004).

50. *Id.* at 815.

51. *Id.* at 816.

52. *Id.*

53. *Id.* at 817.

unconstitutionally burdened any such right.⁵⁴

Furthermore, think ahead to the gathering battle over the military policy known as “don’t ask, don’t tell.”⁵⁵ With the ink on *Lawrence* barely dry, Lieutenant Colonel Steve Loomis, who was discharged from the army in 1997 “Under Other than Honorable Conditions” after an arson investigation of a fire at his home resulted in the discovery of photographs and videotapes of men in sexual positions, filed suit.⁵⁶ Relying on *Lawrence*, Loomis might argue that the military’s proscription against sodomy is unconstitutional as a violation of his right to substantive due process. According to the plain language of the *Lawrence* opinion, however, the military rule would be subject only to rational basis review. It is not difficult to imagine, especially in this time of perpetual war, that security,⁵⁷ military morale,⁵⁸ or unit cohesion⁵⁹ would suffice to satisfy the low standard.

While certainly no guarantee, it could be of great service to Loomis (or whatever soldier ultimately brings the Supreme Court challenge that thenceforward will bear his or her name) to have a fundamental right to rely on, triggering the most scrutinizing level of judicial review. Just as the *Bowers* Court declined to find a fundamental right to sodomy, so did the *Lawrence* Court, and some future plaintiff will enter the courtroom with a lot less artillery than he or she might otherwise have had.⁶⁰

54. *Id.* The following summer, the same court deliberated on the constitutionality of Alabama’s ban on the sale of sex toys. *Williams v. Attorney Gen.*, 378 F.3d 1232 (11th Cir. 2004). The first time this case was in the district court, the judge found no fundamental right, but permanently enjoined enforcement of the statute for lack of a rational basis. *Id.* at 1233. After the Court of Appeals reversed, holding that “public morality provided a rational basis,” the district court took a new tack on remand, finding that the ban infringed a fundamental right to sexual privacy, enjoining enforcement for a second time, but this time applying strict scrutiny. *Id.* at 1234. The Court of Appeals reversed once again, stating that “no Supreme Court precedents, including the recent decision in *Lawrence* . . . are decisive on the question of the existence of such a right” and that even though the petitioners in *Lawrence* “expressly invited” the Court to find a fundamental right in that case, the Court “declined the invitation.” *Id.* at 1236. The Court of Appeals went on to explain that it would not, therefore, apply strict scrutiny. *See id.* at 1237.

55. *See* 10 U.S.C. § 925 (2003).

56. Complaint, *Loomis v. United States*, No. 1:03-01653 (Fed. Cl. July 7, 2003).

57. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *see Hirabayashi v. United States*, 320 U.S. 81 (1943).

58. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989).

59. *See Aaron Belkin, Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS-U.S. ARMY WAR COLLEGE J., Summer 2003, at 108.

60. *See also United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), challenging an airman’s sodomy conviction under *Lawrence*. This court observed that *Lawrence* contains language to support either the position that there is a fundamental right to engage in private, consensual sexual conduct triggering strict scrutiny, or the position that there is no such

But the opinion is not unambiguous on this point. It is still plausible to construct an argument that the *Lawrence* Court *implicitly* created a fundamental right to sodomy or to private, consensual sexual activity generally.⁶¹ One could argue that the Court followed a thread that began with *Meyer v. Nebraska*⁶² and *Pierce v. Society of Sisters*⁶³ (the early substantive due process cases from the 1920's), continued through *Griswold* (in which Justice Douglas introduced the right to privacy, famously created by penumbras and emanations from various Bill of Rights guarantees),⁶⁴ as well as *Eisenstadt v. Baird*⁶⁵ and *Roe v. Wade*⁶⁶ (extending the right to individual reproductive choices), leading triumphantly to *Lawrence*. This telling would locate sodomy squarely in the so-called "zone of privacy,"⁶⁷ a zone protected in the manner of a fundamental right.⁶⁸

But it is equally possible that *Lawrence* will be understood to have *eroded* the right to privacy, bringing it down to rational basis level protection and depriving it of its formerly fundamental nature. It could also be seen as a continuation of *Planned Parenthood v. Casey*,⁶⁹ which can be read to have already dragged the right to privacy down from its fundamental status. It might be understood to have resulted in *tiers* of

fundamental right and that rational basis review applies. *Id.* Still, finding that the airman's conduct occurred with a service member of a lower grade, the court determined that "consent might not easily be refused" on facts such as the ones presented by this case, thereby distinguishing *Marcum* from *Lawrence* and leaving *Marcum* unprotected by the holding in *Lawrence*. *Id.*

61. *See, e.g.*, Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004). Tribe maintains that "the strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious . . ." *Id.* Tribe states that "to search for the magic words proclaiming the right protected in *Lawrence* to be 'fundamental,'" and to "assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice [of explicitly declaring a standard of review and to] overlook . . . passage after passage" in which the Court mentions substantive due process, liberty, and so on. *Id.* Obvious though it may be to Professor Tribe, it is apparently less obvious to the lower courts that so far have employed the language of *Lawrence*. *See, e.g.*, *Marcum*, 60 M.J. at 198.

62. 262 U.S. 390 (1923).

63. 268 U.S. 510 (1925).

64. 381 U.S. 479, 484 (1965) (finding that the right to privacy protects married couples using contraception).

65. 405 U.S. 438 (1972) (extending the right found in *Griswold* to protect unmarried persons procuring contraception).

66. 410 U.S. 113 (1973) (finding that abortion was protected by the right to privacy).

67. *Id.* at 152-53.

68. *Id.* at 155.

69. 505 U.S. 833 (1992).

privacy, in which the right to use contraception, for example, sits in the top tier while sodomy occupies some inferior position. Finally, it could be read to leave intact the *Bowers* Court's total breaking off of sodomy from the rights elaborated in the privacy line of cases. The battle to characterize the right at stake in *Lawrence* might have been avoided by an unambiguous judicial declaration that sodomy is a fundamental right triggering the strictest level of judicial review. Instead, sodomy is left vulnerable to a high level of judicial deference to majoritarian regulation, running counter to Rubin's guiding principles of sex positivity and benign sexual variation.

2. Consent

The second matter that warrants attention is the Court's stated reliance on the fact of Lawrence and Garner's mutual consent to engage in anal intercourse⁷⁰ and, relatedly, its relentless assurances that no minors were harmed in the making of this case.⁷¹

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 be easily refused This case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.⁷²

It is perfectly understandable that the fact that Lawrence and Garner were two grown men, each apparently with the desire to have sex with the other, served to assuage any discomfort that the justices might otherwise have felt and inconceivable that the case would have come out as it did if it had involved allegations of coercion. This case contains no such allegations, however, and that made it a good one on the facts from the perspective of the impact litigator. But consent is a legal concept that could easily fail that same litigator on a different day.

Consider, for example, the quandary posed by cases involving sado-masochistic sex, such as the *Case of Laskey, Jaggard & Brown v. United Kingdom*,⁷³ decided by the European Court of Human Rights. Three British men were criminally charged with assault and related offenses "relating to sado-masochistic activities that had taken place over a ten-year period."⁷⁴ As the European court concedes:

These activities were consensual and were conducted in private for no

70. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

71. *Id.*

72. *Id.*

73. 24 Eur. Ct. H.R. 39 (1997).

74. *Id.* at 41.

apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any “victim” to stop an “assault”, and did not lead to any instances of infection, permanent injury or the need for medical attention.⁷⁵

All three defendants were convicted and sentenced to prison under British law.⁷⁶ They appealed to the European Court on the grounds that their convictions violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁷ arguing that because “all those involved in the sado-masochistic encounters were willing adult participants,” and because there were no serious injuries sustained as a result of the decade of encounters, consent should constitute a defense against the charges.⁷⁸ The government of Britain urged that consent not be considered a defense because the sado-masochistic activities posed a danger to the public health and morality.⁷⁹

Not only did the European Court find for Britain, it did so while expressly distinguishing the facts from those of cases that “have previously been examined by the Court concerning consensual homosexual behavior in private between adults where no such [sado-masochistic] feature was present.”⁸⁰ The European Court did not appear to question the truth of the defendants’ contention that all participants in the encounters consented, but nonetheless treated consent as irrelevant, or at least outweighed by the government’s authority to interfere when it expresses a concern over the “potential for harm.”⁸¹ Consent does not save behavior that courts experience as “extreme.”⁸²

Furthermore, the same week it decided *Lawrence*, the U.S. Supreme Court sent a case called *Limon v. Kansas* back to Kansas for

75. *Id.* at 41-42.

76. *Id.* at 42.

77. This article provides in relevant part as follows:

1. Everyone has the right to respect for his private. . . life

2. There shall be no interference by a public authority with the exercise of this right except. . . [as] is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 8, 213 U.N.T.S. 222.

78. 24 Euro. Ct. H.R. at 43, 48.

79. *Id.* at 47.

80. *Id.* at 48.

81. *Id.* at 59.

82. *Id.* at 40.

reconsideration.⁸³ This case involved Matthew Limon, an eighteen-year-old, mentally disabled male and the fourteen-year old male whom he fellated in the group home in which they both resided.⁸⁴

Kansas law contains a so-called “Romeo and Juliet” provision, which radically mitigates the penalty for statutory rape that occurs between a teenage boy and girl who are four or fewer years apart in age.⁸⁵ Matthew Limon and his sexual partner were three years and one month apart.⁸⁶ Their sex was, according to both boys, consensual.⁸⁷ But as one commentator remarked, the provision containing the mitigated penalties “applies only to Romeos and Juliets, not to Romeos and Mercutios.”⁸⁸ Matthew Limon was sentenced to seventeen years in prison.⁸⁹ He had already served two when the Court sent his case back to Kansas.⁹⁰ If one of the boys had been female, the maximum sentence would have been fifteen months.

In spite of specific instructions from the United States Supreme Court to reconsider Limon’s case “in light of *Lawrence*,”⁹¹ the Kansas Court of Appeals found *Lawrence* distinguishable⁹² due to Justice Kennedy’s emphasis on the fact of *Lawrence* and *Garner*’s both having been adults. “[C]hildren are excluded,”⁹³ the Kansas court found. “Because the present case involved a 14-year-old developmentally disabled child, it is factually distinguishable from *Lawrence*.”⁹⁴

The *Lofton* court, deliberating on Florida’s gay adoption prohibition,

83. *Limon v. Kansas*, 539 U.S. 955 (2003).

84. David Stout, *Justices Void Prison Term Given Gay Teenager in Kansas*, N.Y. TIMES, June 27, 2003, available at <http://www.nytimes.com/2003/06/27/politics/27CND-SCOTUS.html?ei=5070&en=fe9d555>.

85. See KAN. STAT. ANN. § 3522 (2002).

86. *State v. Limon*, 83 P.3d 229, 243 (Kan. App. 2004).

87. *Id.*

88. Michael Bronski, *The Other Matthew*, BOSTON PHOENIX, Feb. 20, 2003, available at <http://www.bostonphoenix.com/boston/news%5Ffeatures/other%5Fstories/documents/02704491.htm>.

89. Stout, *supra* note 84.

90. *Id.*

91. *Limon v. Kansas*, 539 U.S. 955, 955 (2003).

92. *State v. Limon*, 83 P.3d 229, 234 (Kan. App. 2004). Interestingly, the state supreme court’s initial decision, which was appealed to the United States Supreme Court the same term as *Lawrence*, found *Bowers* to be controlling. *Id.* The purported reversal of *Bowers* in *Lawrence*, however, was then found by the intermediate appellate court of the state not to be pertinent. *Id.*

93. *Id.*

94. *Id.* This case is not over yet. There is still a possibility of a reversal in the state supreme court, in a federal district court acting pursuant to its habeas power, or in the United States Supreme Court.

made similar use of the limiting language in *Lawrence*. After reciting Justice Kennedy's remark that *Lawrence* "[did] not involve minors,"⁹⁵ the Eleventh Circuit reasoned that "[h]ere, the involved actors are not only consenting adults, but minors as well,"⁹⁶ and concluded that "*Lawrence* does not control the present case."⁹⁷ The court seems not to have noticed an important distinction that might have removed the *Lofton* case from the domain of *Lawrence*'s exclusion: while adoption plainly involves minors, it bears no connection to minors engaging in sexual activity. One might query whether the specter of the homosexual pedophile lingers between these lines of text.

Additionally, in *Marcum*,⁹⁸ a recent case out of the Court of Appeals for the Armed Forces challenging the military prohibition against sodomy in light of *Lawrence*, the court thwarted the convicted service member's efforts based on consent. Though the facts indicate willing and drunken participation by the defendant and accuser in same-sex sexual activity, the accuser was of a lower military grade than the defendant, providing a slim but apparently adequate basis upon which to distinguish *Marcum* from *Lawrence*.⁹⁹ Noting that a lower-ranking service member "might be coerced," the court rejected *Marcum*'s challenge under *Lawrence*, despite nothing in the record to indicate coercion.¹⁰⁰

Even where neither age nor position is the issue, same-sex touching seems to strike some people as less consensual than heterosexual touching of the same character. Recall the delayed vote on V. Gene Robinson's appointment to the position of bishop in the Episcopal Church following charges that he had inappropriately *touched the arm* of a male parishioner at a meeting several years before.¹⁰¹

Gay and transsexual panic defenses to murder lend themselves to a similar analysis. For example, despite clear evidence of strangulation, self-proclaimed heterosexual William Palmer was acquitted of charges that he

95. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 805, 817 (11th Cir. 2004).

96. *Id.*

97. *Id.*

98. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (challenging, unsuccessfully, an airman's sodomy conviction under *Lawrence*). Finding that the airman's conduct occurred with a service member of a lower grade, the court determined that "consent might not easily be refused" on facts such as the ones presented by this case, thereby distinguishing *Marcum* from *Lawrence*.

99. *Id.* at 207-08.

100. *Id.* at 208.

101. Monica Davey, *Gay Bishop Wins in Episcopal Vote; Split Threatened*, N.Y. TIMES, Aug. 6, 2003, at A1.

murdered Chanelle Pickett, a pre-operative male-to-female transsexual, whom he met in a known transsexual hangout in Boston and took home.¹⁰² Witnesses said he frequented the bar and had dated several pre- and post-operative transsexuals, but Palmer claimed that he did not know what he was getting into, and that he panicked when he was confronted with Pickett's penis.¹⁰³ In a verdict that left the Boston transgender community in despair, Palmer was convicted of only simple assault and battery, an offense carrying a maximum penalty of two-and-a-half years.¹⁰⁴ The impression that Palmer was defrauded by Pickett, that he did not really *consent* to the particular encounter in which he found himself, appears to have rescued him from a murder conviction. Palmer was the one on trial in this case, but his panic, or perhaps *regret*, was taken by the jury as something like an absence of consent, almost as if it were Pickett on trial for an illegal touching.

The concept of consent is subject to manipulation. It *might* help in the next case, but it also might provide a convenient way to distinguish the next case from *Lawrence*.¹⁰⁵ Furthermore, consent is often seen as compromised where same-sex encounters are concerned. The limiting language of Justice Kennedy's opinion poses a distinct threat to a pro-sex agenda in that it tends to err on the side of protecting people from sex and imagines that some sex occurs outside of power.

3. Privacy

The third point concerns the concept of privacy. Calling sex "the most private of human conduct"¹⁰⁶ and the home "the most private of spaces,"¹⁰⁷ the *Lawrence* Court "acknowledge[d] that adults may choose to enter upon this [sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."¹⁰⁸ Though *Lawrence* does not explicitly invoke the "right to privacy," the Court points out more than once that the case "does not involve public conduct."¹⁰⁹

But, as the right-wing Family Research Council recognized in its brief in

102. Francie Latour, *Sibling Decries Murder Acquittal. Verdict is Assault in Transsexual's Death*, BOSTON GLOBE, May 3, 1997, at B1.

103. *Id.*

104. *Id.*

105. Olsen, *supra* note 34, at 387.

106. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

107. *Id.*

108. *Id.*

109. *Id.* at 560 (stating that "this case does not involve . . . public conduct or prostitution"); *see id.* at 578 (reiterating that "it does not involve public conduct or prostitution").

support of Texas, states criminalize all sorts of private behavior.¹¹⁰ It is hard to imagine a viable position that would confer absolute immunity upon all conduct that happens within the home.¹¹¹ Some desirable uses of state power require a willingness to intrude.

Privacy is granted to activities that the justices can tolerate; we learned in *Lawrence* that a majority of them can tolerate sodomy. Like consent, however, privacy is malleable. Intolerable acts, wherever performed, may still fall outside of its purview, as acts deemed domestic violence or child abuse often do.¹¹²

Foundational to privacy is the classical liberal notion propounded by John Stuart Mill a century-and-a-half ago in his essay *On Liberty*:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like¹¹³

Of course, Mill's formulation leaves unanswered the question of what can fairly be said to "affect" others.¹¹⁴ Imagine a same-sex couple kissing at the movies, and maybe groping a little. This conduct is routinely tolerated when engaged in by heterosexual pairs, but sensibilities may differ where same-sex couples are involved. If a same-sex movie-going couple is charged with, say, some variety of lewdness, the two might allege unequal treatment, pointing to *Lawrence* to bolster their position.

But the couple committed the offense not in private, but in a movie

110. Brief of Amici Curiae of the Family Research Council, Inc. at 4-5, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470066.

111. See Olsen, *supra* note 34, at 392.

112. *But see* Eisenstadt v. Baird, 405 U.S. 438 (1972) (illustrating that the obverse is also true: tolerable acts performed in public spaces may be protected by the right to privacy, such as purchasing contraception).

113. JOHN STUART MILL, *THREE ESSAYS: ON LIBERTY* 92-93 (1869).

114. See *id.* at 95. Mill only gets more conflicted in the details. For example, he states, "[t]here is a degree of folly [that] may be called . . . depravation of taste, which, though it cannot justify doing harm to the person who manifests it, renders him necessarily and properly a subject of distaste, or . . . even contempt." Mill continues, "[w]e have a right . . . to act upon our unfavourable opinion . . . not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it." *Id.* A few pages later, Mill then states, "if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead." *Id.* at 98-99. How might Mill's guidelines play out in the hypothetical discussed next in the main text? See *id.* at 120-23 (revealing that Mill runs into difficulties applying his theory to prostitution and gambling).

theater.¹¹⁵ A hostile Court could draw an easy line here, thanks to the *Lawrence* Court's reliance on privacy. The movie-goers will have to fight it out instead over the meaning of lewdness.

The Massachusetts Supreme Judicial Court recently had occasion to construe its "open and gross lewdness" statute¹¹⁶ in *Commonwealth v. Quinn*.¹¹⁷ Patrick Quinn lowered his pants in front of a crowd of girls not far from their parochial school in Boston, exposing not his genitalia, but his thong and buttocks.¹¹⁸ A police officer arrested Quinn for open and gross lewdness, upon which Quinn exclaimed: "You stupid mother fucker you don't have indecent exposure. I didn't pull my prick out. I only pulled down my pants. It's not against the law to pull your pants down and show people your thongs."¹¹⁹

Quinn's eloquent defense led him to the state's highest court, which considered the question of whether "exposure or attempted exposure of genitalia [is] an essential element of an open and gross lewdness offense."¹²⁰ Notwithstanding the asserted permissibility of such attire on public beaches,¹²¹ the answer, the Massachusetts court determined, is *no*.¹²² Exposure of Quinn's buttocks was sufficient to bring him under the purview of the lewdness statute because under the circumstances—outside a parochial school rather than at the beach—his conduct caused "alarm or shock."¹²³

Will the parent with young children in the movie theater fret over the public display of same-sex affection and its potential shock to young eyes? Will the judge sympathize and find that the couple's conduct was in fact shocking? What conduct should be understood to "affect" others? In the case of the movie-going couple charged under one of a variety of lewdness statutes, what indeed?

Privacy necessarily excludes some conduct, leaving it unprotected

115. See *supra* Part I.B.4. Privacy has a non-spatial element as well, as the *Lawrence* Court makes clear. *Lawrence v. Texas*, 539 U.S. 558, 562(2003). That aspect of privacy is close to the concepts of autonomy and dignity as the Court uses those terms.

116. MASS. GEN. LAWS ch. 272, § 16 (2003).

117. 789 N.E.2d 138 (Mass. 2003).

118. *Id.* at 140.

119. *Id.* at 142.

120. *Id.* at 140.

121. *Id.* at 147.

122. *Id.* The Court's decision prompted one local paper to run the headline "One Thong Doesn't Make a Right." Heidi Masek, *One Thong Doesn't Make a Right*, W. ROXBURY BULL. (West Roxbury, Mass.), June 5, 2003, at 1.

123. *Quinn*, 789 N.E. 2d at 144-45. The Massachusetts court also found that Quinn did not have fair notice that the statute would be so construed, and therefore freed Quinn from prosecution for this incident. *Id.* at 146.

against the vagaries of public prejudice, but ultimately, whether the prohibited conduct occurs in private or public, it will be subjected to a test of moral approbation.¹²⁴ This poses a threat from the pro-sex perspective because it could provide an opportunity and a rationale for narrowing the range of tolerated sexual activity in favor of protecting other sensibilities.

The *Limon* and *Lofton* courts already have exploited factual differences between their cases and *Lawrence* regarding privacy. The concurring judge in *Limon* reasoned that “*Lawrence* involved two consenting adults having sexual relations in the privacy of their home. This case involves an adult having sex with a minor in a state-run facility.”¹²⁵ Similarly, the *Lofton* court stated that

[t]he decision to adopt a child is not a private one, but a public act [P]rospective adoptive parents are electing to open their homes and their private lives to close scrutiny by the state Accordingly, such intrusions into private family matters are on a different constitutional plane than those that “seek[] to foist orthodoxy on the unwilling by banning or criminally prosecuting” nonconformity.¹²⁶

Privacy might intuitively seem a conceptual friend to civil rights litigators trying to advance rights associated with sex and family, but as these examples illustrate, it is no guarantee.

Two final points regarding privacy. First, Aaron Belkin and Melissa S. Embser-Herbert have shown how privacy rationales have been turned around on gays in the military. Expressing a “right” to shower and bunk free from the leering eyes of gay fellow soldiers, opponents of gays in the military cite privacy in support of anti-gay exclusion.¹²⁷

124. I have made a similar argument in the context of child abuse. See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 27-28 (2001) (arguing that “the label ‘child abuse’ represents the point at which the sphere of parental autonomy bumps up against the needs of the community; it is the boundary around the acceptable range of family diversity.”).

125. *State v. Limon*, 83 P.3d 229, 241 (2004).

126. *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 810-11 (11th Cir. 2004) (quoting *Califano v. Jobst*, 434 U.S. 47, 55 n.11 (1997)).

127. Aaron Belkin & Melissa S. Embser-Herbert, *A Modest Proposal: Privacy as a Rationale for Excluding Gays and Lesbians from the U.S. Military*, 27 INT’L SECURITY 2 (2002). This turnabout on privacy resembles some other turnabouts in equality argumentation. For example, in *United States v. Virginia*, Virginia defended the male-only admission policy at its state military academy, VMI, on diversity grounds: “diversity” in this argument referred to a diversity of educational programs, rather than to an integrated environment. So-called “states’ rights” arguments strike me similarly: by framing the state’s position in terms of rights, even as the state’s position runs contrary to a federally protected individual right to something like equal protection or due process, the states’ rights proponents appropriate some of the rhetorical power that might otherwise have belonged solely to the individual seeking federal rights protection from state infringement.

Secondly, privacy carries a special danger when gay people rely on it. It is difficult to tell where privacy ends and closetedness begins.¹²⁸ It is difficult to tell when privacy promotes respect for same-sex relations, and when it suggests that those who engage in same-sex relations ought to be ashamed and wish to hide. This brings me to the next matter.

4. Dignity

Ubiquitous in Justice Kennedy's opinion is newfound judicial respect for gay dignity and angst over the degradation of gay people and their sex:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.¹²⁹

[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.¹³⁰

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.¹³¹

I have no doubt that all of this is well-intended, humane, and empathetic, but we do not know that Lawrence and Garner went to Lawrence's house to have some dignity; we do know they went to have some sex. They may also have hoped for a "personal bond [that would be] more enduring," but they may not have, and I do not see why that fact should be pertinent to their claim.¹³²

518 U.S. 515, 516 (1996).

128. See, e.g., Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1455 (1992). See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 777-79 (1989), for the idea that protection provided for same-sex sodomy by the concept of privacy comes at a cost. The protection is granted on the grounds that sexual activity is central to one's "personhood." See *id.* The close link asserted between conduct and personhood by this formulation weds those who engage in the conduct to gay identity, something that might not be desirable at all times to all people who wish to engage in the act. See *id.*

129. *Lawrence v. Texas*, 539 U.S. 558, 566 (2003).

130. *Id.* at 568.

131. *Id.* at 572.

132. In fact, Lawrence and Garner never claimed to have been in a long-term relationship. Still, that they *might have* acquires a fair amount of mileage in this case. The possibility of an enduring bond is the face of the operation, though the one-night stand gains constitutional protection, as well.

Perhaps some discussion of vocabulary would be helpful here. *Dignity* is in vogue at the moment. The new European Constitution, yet to be ratified, guarantees Europeans their dignity,¹³³ as do the existing German and South African constitutions.¹³⁴ German and South African history leave little mystery as to why dignity was thought to be a key principle necessitating a constitutional warranty, and Europe as a whole is no doubt following suit for the same reasons.¹³⁵ The text of the Canadian Charter of Rights and Freedoms does not contain a dignity guarantee, but it nonetheless turns up in Canadian constitutional jurisprudence from time to time.¹³⁶ Human rights activists often advocate for a universal right to human dignity¹³⁷ that could be invoked to indict acts of torture, starvation, genocide, and other types of brutality.

But *dignity* can also refer to something we might find less basic, less universal, and less suitable to constitutional guarantee, as in “sit up straight, cross your legs, and try to look dignified.” The coronation of the queen, no doubt, is a dignified affair. A pie-eating contest is not. Michael Warner sets forth an analogous pair of meanings:

One is ancient, closely related to honor, and fundamentally an ethic of rank. It is historically a value of nobility. It requires soap The other is modern and democratic. Dignity in the latter sense is not pomp and distinction; it is inherent in the human. You can't, in a way, not have it.¹³⁸

To the extent that dignity as it is used by the *Lawrence* Court is merely that which is inherent in our human impulse toward physical intimacy, sex is dignified by tautology. This creates an interesting paradox: If, as Warner maintains, shame is inherent in sex, and dignity is inherent in the human,

133. 2004 O.J. (C 310) 1, art. I-2 (“The Union is founded on the values of respect for human dignity . . .”).

134. Grundgesetz (GG) (German Const.) art. 1 (“Human Dignity is inviolable. To Respect and Protect it is the Duty of all State Authority.”); S. AFR. CONTS. (Act 108 of 1996) ch. 1, 1(a) (“The Republic of South Africa is one, sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms”).

135. See James Q. Whitman, *On Nazi “Honour” and the New European “Dignity,”* in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS [PIN CITE?], 243-73 (Christina Joerges & Navraj Singh eds., 2003). This essay actually disclaims the common perception, offering a contrary view that the German concept of dignity follows from a longstanding German idea about honor, with a history that can be traced back to a tradition of dueling and through the populism of the Nazi era. *Id.*

136. See, e.g., Attorney Gen. v. M. & H., [1999] S.C.R. 1348 (Can.).

137. See, e.g., *The Universal Declaration of Human Rights*, BASIC DOCUMENTS ON HUMAN RIGHTS 21 (Jan Brownlie ed., 1994).

138. WARNER, *supra* note 35, at 36.

presumably including human sexuality, then “only when this indignity of sex is spread around the room, leaving no one out, and in fact binding people together, [can we begin to see] the dignity of the human.”¹³⁹ The paradox is “dignity in shame.”¹⁴⁰

But dignity-speak is meant to do something else in *Lawrence*, or it would not have been necessary for Justice Kennedy to mention the possibility that Lawrence and Garner’s activity *might* have been but one facet of a “personal bond . . . more enduring,” thereby distinguishing one kind of sex (the kind that takes place within an enduring relation) from another kind (the kind that doesn’t). The *Lawrence* Court’s use of dignity raises the following questions: Did the *Bowers* Court really “demean [Hardwick’s] claim” by treating it as if it were *merely* a claim about sex? Why does sex—just sex, with or without a “personal bond . . . more enduring”—lack the vitality to sustain a right on its own? And why do we have to dress sex up in pretty clothes for court? Sex is not—as my mother might say—the coronation of the queen.¹⁴¹ It’s time we admitted it. Why the pretense?

I raise the issue because I fear that the answer is shame.¹⁴² I fear that the insistence on the dignity of gay sex is in bad faith, that gay rights advocates as well as sympathetic justices “protest too much,”¹⁴³ thereby betraying their own dark suspicions and collaborating, ultimately, in the politics of shame.

The pretense that sex is dignified (according to the non-tautological meaning) runs contrary to the anti-shame (secondary type) facet of the pro-sex position. The *Lawrence* opinion could have done more good by regarding sex as dignified in its tautological and paradoxical sense.

139. *Id.*

140. *Id.*

141. Warner writes:

It might as well be admitted that sex is a disgrace. We like to say nicer things about it: that it is an expression of love, or a noble endowment of the Creator, or liberatory pleasure. But . . . [i]f the camera doesn’t cut away at the right moment, or if the door is thrown open unwontedly, or the walls turn out to be too thin, all the fine dress of piety and pride will be found tangled around one’s ankles.

Id.

142. *See supra* Part I.A.

143. WILLIAM SHAKESPEARE, *HAMLET*, PRINCE OF DENMARK Act III, scene ii (1601) (“The lady protests too much, methinks.”).

II. ANTI-IDENTITY

A. The Anti-Identity Yardstick

As a distinct, but not wholly unrelated matter, I take as another yardstick that rationales that entrench an injured gay identity do damage, even where principles of equality appear to have been served. This idea comprises several interrelated parts. Here I rely on three additional thinkers, Michel Foucault, Wendy Brown, and Friedrich Nietzsche, because together they illuminate the danger of identity-based argument.

To begin with, we should be attuned to a judicial decision's exertion of power through classification. When Homer Plessy appealed his conviction under the Louisiana railway segregation statute, for example, he argued that the railway company unlawfully maintained authority under the statute to classify him as black instead of white.¹⁴⁴ The Louisiana court rejected his argument, finding that as long as Plessy was in fact black (and implicitly finding that he was) the railway could classify him as such for purposes of assigning him to the black car.¹⁴⁵ It was based on this assumption that the court considered (and rejected) Plessy's equal protection claim. The equality claim makes sense only if Plessy is already black; definition of the categories and placement of people in them are necessary analytical steps in an equal protection context. In taking those steps, the Court exerts power by effectively defining blackness and whiteness. "Disciplinary power," as Foucault explained, "manifests its potency, essentially, by arranging objects,"¹⁴⁶—that is, by classification.

Intuitively appealing though they may be, equality arguments require classifications, in this case, gay and straight.¹⁴⁷ They also require that the categories relied upon be defined in a way that seems analytically coherent, sometimes at the expense of the more complicated facts on the ground, as was the case for Homer Plessy, who, it seems, would have preferred not to have to assert his equality with white people, but rather his non-differentiation from them.

An important re-enforcement mechanism to the process of classification

144. *Ex parte Plessy*, 11 So. 948, 951 (La. 1892); see also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 26 (1995) (analogizing between classification by race in *Plessy* and classification by sex under contemporary sex discrimination law).

145. *Ex parte Plessy*, 11 So. at 951.

146. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 187 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) [hereinafter FOUCAULT, *DISCIPLINE*].

147. *Id.*

is the dispensation of penalties and rewards.¹⁴⁸ Individuals subjected to the tandem of these two institutional practices might be disciplined into conformance with the norms of their class.¹⁴⁹ So, for example, a judicial decision or line of case law might reward claimants with legal victory for performing the role of the injured gay subject (while punishing the failure to do so with defeat).¹⁵⁰ This might easily result in litigators' premising future actions on the existence of people identified as injured gays.

By exercising the power of classification and rewarding members of an injured class for their dutiful performance of the role of injured subjects, equality-based legal victories *produce* parties who understand themselves as objects in the subordinate category, the category whose objects are said to be equal to the objects in the super-ordinate category. As Foucault warned, "[w]e must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses' In fact, power produces; it produces reality; it produces domains of objects" ¹⁵¹ And these domains are not arranged neutrally, but hierarchically (*i.e.*, producing subordinates),¹⁵² leading Wendy Brown to ask whether a claim for legal protection of an identity-group "discursively entrenches the injury-identity connection."¹⁵³

The later Foucault of *The History of Sexuality*¹⁵⁴ is less devoted to the idea of hierarchy in favor of a more complex and diffuse understanding of power. It was the later Foucault who described power as a "multiplicity of force relations immanent in the sphere in which they operate"¹⁵⁵ and as always entailing resistance.¹⁵⁶ According to this later Foucaultian conception, power does not merely consist in "the sovereignty of the state, the form of the law, or the overall unity of a domination,"¹⁵⁷ but as sometimes coming "from below,"¹⁵⁸ as part of "the interplay of

148. FOUCAULT, DISCIPLINE, *supra* note 146, at 180.

149. *Id.* at 184.

150. *Id.* Foucault's idea about reward and punishment was closely tied to promotion or demotion in rank, and so was even more entwined with classification than it is in my presentation. *See id.* at 179-84.

151. FOUCAULT, DISCIPLINE, *supra* note 146, at 194.

152. *Id.* at 182.

153. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 21 (1995).

154. *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1978) [hereinafter FOUCAULT, SEXUALITY].

155. *Id.* at 92.

156. *Id.* at 95.

157. *Id.* at 92.

158. *Id.* at 94.

nonegalitarian and mobile relations.”¹⁵⁹

Following this idea, it would not make sense to regard even an injured or subordinated identity group as lacking in power. Wendy Brown’s above-quoted passage continues: “Might . . . protection [of an injured identity group] codify within the law the very powerlessness it aims to redress?”¹⁶⁰ I agree with Brown’s general idea here, but have to quibble with the word “powerlessness.” Gays may be subordinates in a hierarchical binary, but they are surely far from powerless. The question is not whether they have any power, but what is the nature of the power they face as well as of the power/resistance they exercise?¹⁶¹

While the Foucault of *Discipline and Punish* illuminates the productive power of classification and the mechanisms of reward and punishment, the later Foucault of power/resistance leads to the last component of the concern animating the anti-identity yardstick. When reading a line of case law such as *Bowers* and *Lawrence*, we should examine it not only for the nature of the power exercised *on the claimants* (through classification, reward and punishment, and production of subordinates), but for power/resistance in its relational sense.¹⁶² In particular, I will be looking for the nature of the power/resistance exerted from below—i.e., from the subordinated claimants that seek liberation from the anti-sodomy laws.

In *The Genealogy of Morals*,¹⁶³ Nietzsche complains of *ressentiment*, or the elevation of “*reactive* feelings . . . to a position of honour.”¹⁶⁴ By *reactive*, Nietzsche means feelings of rancor that arise out of injury and weakness.¹⁶⁵ He was particularly concerned with the law’s granting revenge to injured parties “as if justice were at bottom merely an extension of the feeling of injury,”¹⁶⁶ but I take his point a bit more broadly to describe the character of a source of “power from below” in Foucaultian terms. The question then, finally, asked in application of the anti-identity yardstick, is whether litigators interested in combating unjust sex laws will find that, in the particular discourse of that battle, their own greatest source of power/resistance lies in *ressentiment*, specifically in this case, in serving

159. *Id.*

160. BROWN, *supra* note 153, at 21.

161. FOUCAULT, SEXUALITY, *supra* note 154, at 97. “[T]he question that we must address [is] . . . [in] a specific type of discourse . . . what were the most immediate, the most local power relations at work?” *Id.*

162. *Id.* at 95.

163. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Douglas Smith trans., 1996) (1887).

164. *Id.* at 54.

165. *Id.*

166. *Id.*

up an injured, gay client, thereby entrenching (Brown, now) the injured gay identity.¹⁶⁷

One could be unoffended by the phenomenon of *ressentiment* in general and of the injured gay identity in particular. Admittedly, there is a certain arbitrary subjectivity to my distaste for it. The strongest pitch to the unoffended is this: classification, production of subordinates, penalty and reward, and the power of *ressentiment* do not amount to a one-time progression which might head somewhere better later, but to a cycle. After *ressentiment* comes classification again—followed again by reward and the reproduction of identity. If one has a hope for gay liberation or gay equality, it seems to me utterly unattainable so long as one is required to continue being gay to have it.

Where there is a choice,¹⁶⁸ therefore, I favor constitutional reasoning that protects sexual acts rather than groups defined by sexual identity.¹⁶⁹ Alliance around acts would serve both a pro-sex and anti-identity agenda. (This is why I said at the beginning of this Part that the anti-identity yardstick is not wholly unrelated to my pro-sex yardstick.) The final piece of my analysis will be an assessment of the decision's tendency to submit to this cycle.

B. Danger Sign for the Anti-Identity Position

The final danger sign might not yet seem obvious. Since *Lawrence* was decided not on equal protection grounds, but on substantive due process grounds, the first alert to the anti-identity position—classification—is unnecessary. Only Justice O'Connor argued in her concurrence that the statute ought to have been struck down as violative of the Equal Protection Clause.¹⁷⁰ Remarking (quite improbably) that she is "confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society,"¹⁷¹ Justice

167. Cf. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (pin?), 117-18 (David Kairys ed., 3rd ed. 1998).

168. It is not clear to me that there is always a choice. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitutional provision that isolated sexual orientation as a basis upon which the state and its subdivisions were bound to deny certain legal protections).

169. Halley, *Reasoning*, *supra* note 14, at 1744-72.

170. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (O'Connor, J., concurring).

171. *Id.* at 584. Justice O'Connor's remark is improbable—even inexplicable—because, as the main opinion states, nine of the thirteen states that maintained prohibitions against sodomy at the time *Lawrence* was before the Court prohibited the conduct for different-sex

O'Connor urged the Court not to reach the substantive due process issue.¹⁷²

Fortunately, five members declined to dispose of the matter under the Equal Protection Clause. If the Court had done as Justice O'Connor wished, states that wanted to continue to criminalize sodomy could merely have redrawn their statutes in sex-neutral terms, as Justice Kennedy notes in his opinion for the majority.¹⁷³ The homophobia animating those prohibitions might more easily have been swept under the carpet and equality-based legal challenges would have had to travel the more difficult road of alleging uneven enforcement—or we might have seen a later due process challenge anyway. The majority's decision to strike down the statute on due process grounds avoids this pitfall.

But there would have been another down-side to an equal protection-based decision that Justice Kennedy does not discuss: it would have had a disciplinary effect in the Foucaultian sense.¹⁷⁴ *Bowers* already punishes litigators with a virulent and shaming rebuke to the fundamental rights claim made in that case. If litigators had gained an equal protection victory in *Lawrence*, the pair of cases would have sent litigators the unmistakable message that to get a big win, they have to frame their claims in the mode of gay identity.

Now here's the rub: the majority's due process reasoning did not manage to avoid this hazard entirely. Notice what is never said in *Bowers* and is only barely acknowledged in *Lawrence*: the act of sodomy and the identity of being gay are not perfect corollaries.¹⁷⁵ While the *Lawrence* Court managed to differentiate state sodomy laws that prohibit only same-sex sexual acts from those that were drafted without regard to the sexes of the participants,¹⁷⁶ there is no real effort to disaggregate the conduct of sodomy from the identity of being gay, and the opinion contains a good deal of slippage between the two concepts.¹⁷⁷ This slippage suggests a certain inextricability of homosexuality from sodomy. By failing to extricate the two concepts and even suggesting their inherent interrelatedness, the Court engaged a close cousin of equal protection. The opinion therefore contains the promise of reward for essentially the same

as well as same-sex couples.

172. *Id.* at 578.

173. *See id.* at 576.

174. FOUCAULT, DISCIPLINE, *supra* note 146.

175. *See* Halley, *Reasoning*, *supra* note 14, at 1722.

176. *See* *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting) (addressing state sodomy laws that prohibit same-sex sexual acts).

177. *See* *Lawrence v. Texas*, 539 U.S. 558, 560 (2003). "This case does involve two adults who . . . engaged in sexual practices common to the homosexual lifestyle." *Id.* at 560.

identification of litigants as injured gay subjects.

Of course, it is true that Foucault took pains to confine his explanation of reward and punishment to institutions such as schools and armies that rank individuals, and to distinguish this idea about reward and punishment from the work of courts, which “operate[] not by differentiating individuals, but by specifying acts . . . by bringing into play the binary opposition of the permitted and the forbidden.”¹⁷⁸ In the case of sodomy, however, the Court behaves more like a school, in that the reward entrenches the categories of gay and straight, not merely of offender and non-offender *vis a vis* a forbidden act. The case can be read to have categorized Lawrence and Garner, not merely as persons guilty of committing the prohibited conduct, but as the *type of people* who commit such conduct, granting them their equality *as gay people*, quietly defining gay people *as people who commit sodomy*.¹⁷⁹

Almost as if it were an equal protection victory, *Lawrence* has created the possibility of a trap: only by occupying the subordinate category, will the “gay-litigant-seeking-equality” be rewarded with victory, but the “gay-litigant-seeking-equality” also delivers himself or herself to the legal system *as gay*, that is, *as subordinate* in the gay/straight binary.

Lawrence, then, presents the same danger that an equal protection-based decision would have presented. Litigators concerned with unjust sex laws might easily have learned, through the mechanisms of reward and punishment, to deliver their clients to the legal system as gay, thereby relying on and reinscribing their subordination, taking a calculable step forward, but also an incalculable step back.

Only one person in this story made a serious effort to raise the point that the identity of gay and the practice of sodomy are not entirely coextensive. Believe it or not, it was District Attorney Rosenthal.¹⁸⁰ In an effort to undermine Lawrence and Garner’s equal protection claim, Rosenthal said at oral argument:

[T]here’s nothing in the record to indicate that these people are homosexuals. They’re not homosexuals by definition if they commit one act. It’s our position that a heterosexual person can also violate this code if they [sic] commit an act of deviate sexual intercourse with another of

178. FOUCAULT, DISCIPLINE *supra* note 146, at 183.

179. The only way around this that I can conceive would have been an equal protection rationale where the classifications were not gay and straight, but people who commit sodomy and people who do not. This strikes me as interesting but unlikely.

180. Oral Argument of Charles A. Rosenthal, Jr. on Behalf of Texas, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1702534.

the same sex.¹⁸¹

At this point, Justice Scalia could be heard to say “I’m confused,”¹⁸² but don’t believe for a minute that he really was.

A primary target for critics of *Bowers* was Justice White’s framing of the question before the Court: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”¹⁸³ Commentators blasted the Court for this articulation because it exhibited what Justice Blackmun in dissent described as “willful blindness.”¹⁸⁴ The Georgia statute at issue in *Bowers* did not specify the sexes of the participants¹⁸⁵ but Justice White feigned blindness to the plain language of the Georgia law, as well as to a heap of undeniable facts on the ground that would have caused a great deal of trouble for the categories upon which his analysis relied.

First, sodomy, defined as oral sex, anal sex, or penetration with an object,¹⁸⁶ encompasses acts that are available to and engaged in by different-sex pairs.¹⁸⁷ Second, some who claim a gay identity and engage in sexual activity with persons of the same-sex do not engage in acts included in most definitions of sodomy.¹⁸⁸ Third, as DA Rosenthal observed, someone who identifies as heterosexual and does in fact engage predominantly in heterosexual activity can surely engage in *an act* of homosexual sodomy.¹⁸⁹ The messy reality of sexual identities and practices had to be excluded from the *Bowers* Court’s line of sight. If it had been admitted, the neat categories of homosexual and heterosexual would have crumbled and the misleadingly seamless procession from sodomy-the-conduct to homosexuals-the-people would have come apart.

When the *Lawrence* Court cites to scholarly criticism of *Bowers*, it cites to Charles Fried,¹⁹⁰ the libertarian former Solicitor General under Ronald

181. *Id.*

182. *All Things Considered with Nina Totenberg* (NPR radio broadcast, Mar. 26, 2003). This comment was not recorded in the transcript of oral argument.

183. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

184. *Id.* at 205 (Blackmun, J., dissenting).

185. *See id.* at 188 n.1.

186. *See, e.g.*, TEX. PENAL CODE ANN. § 21.06 (Vernon 2003). Statutory definitions differ, of course. The Georgia statute at issue in *Bowers* did not include penetration with an object. *See* GA. CODE ANN. § 16-6-2 (1984).

187. Halley, *Reasoning, supra* note 14, at 1722.

188. *Id.*

189. *Id.*

190. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing C. FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST HAND ACCOUNT 81-84 (1991)).

Reagan, and to Richard Posner,¹⁹¹ the well-known libertarian legal economist. Critics who targeted the conflation of sodomy and gay identity are not cited by the *Lawrence* Court—at least not on this point.¹⁹²

More importantly, although the Court explicitly disclaimed reliance on the Equal Protection Clause, equality principles figure prominently in Justice Kennedy's opinion, often deeply entangled with his due process reasoning. Here are some of Justice Kennedy's words:

The liberty protected by the Constitution allows homosexual persons the right to make this choice.¹⁹³

Persons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do.¹⁹⁴

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.¹⁹⁵

Of course, I favor legal protection of the sexual practices at issue, whether engaged in by different or same-sex pairs, and I agree that anti-sodomy laws have created opportunities for anti-gay harassment, discrimination, and violence, just as Justice Kennedy observes. My concern lies rather with the persistent refusal, even by the *Lawrence* Court, to acknowledge the prevalence of acts of sodomy among people with wide-ranging sexual preferences and identities.¹⁹⁶ The confused entanglement so brutally promoted by Justice White in his framing of the issue in *Bowers* is left undisturbed in *Lawrence*, even as the *Lawrence* Court reaches for the Due Process Clause, rather than the Equal Protection Clause.

The Court is not the only one to blame for this ongoing offense. The Associated Press report that came out within minutes of the *Lawrence* decision began as follows:

The Supreme Court struck down a ban on gay sex Thursday, ruling that the law was an unconstitutional violation of privacy. The 6-3 ruling reverses course from a ruling 17 years ago that states could punish homosexuals for what such laws historically called deviant sex. Laws forbidding homosexual sex, once universal, now are rare.¹⁹⁷

191. *Id.* (citing POSNER, *supra* note 14, at 341-50).

192. *See, e.g.*, Halley, *Reasoning*, *supra* note 14.

193. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

194. *See id.* at 575.

195. *Id.*

196. *See* Edward Laumann et al., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE U.S.* 98-99 (1994).

197. Associated Press, *Supreme Court Strikes Down Texas Law Banning Sodomy* (June

But as the *Lawrence* Court explains in its history of sodomy proscriptions, laws forbidding *sodomy* were once more common (though far from universal),¹⁹⁸ not laws forbidding homosexual sex! The story treats sodomy and homosexual sex as synonyms. Worse still, they might easily have taken the language right out of a gay rights organization's press release.¹⁹⁹ This case was described from the outset as a gay rights victory, exactly what it would have been if the statute had been struck down on equal protection grounds. It was, however, struck down as a violation of substantive due process, making it much more than a gay rights victory, or at least it can be described as more.

It was a victory for sex. It was a victory for everyone who wants to engage in oral or anal sex or live in a country where other people can do those things even if they themselves do not have the desire.

The muddled equation of sodomy and gay identity should not be accepted uncritically, partly because to do so is to acquiesce to Justice Scalia's reasoning in his *Romer* dissent.²⁰⁰ It must be constitutionally permissible, Scalia reasoned, to discriminate against gay people since "*the conduct that defines the class [is] criminal.*"²⁰¹ It is not unconstitutional to discriminate against bank robbers, right?²⁰² The conduct defines the class. As long as the military continues to proscribe sodomy, for example, and sodomy is equated with same-sex sex, it is difficult to imagine that people identified as gay will be well-treated in that institutional setting.

But in addition, the facts on the ground, as discussed above, are more complex than an easy procession from sodomy to gay identity would allow. Civil rights litigators should not permit it. They should drag heterosexual sodomy out of the closet, acknowledge the diversity of sexual orientations and practices, and insist that this case was a victory for everyone.

By relying on the Due Process Clause, the Court awarded a victory to those on the side of sex, but it was an ambiguous one. It is important now to be careful what this case comes to stand for. Litigators should extract the potential for alliances that regard sexual acts as central,²⁰³ and resist the

26, 2003).

198. *Lawrence*, 539 U.S. at 568.

199. Press Release, Lambda Legal News Release, Landmark Ruling for Gay Civil Rights: U.S. Supreme Court Strikes Down Texas "Homosexual Conduct" Law (June 26, 2003), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1281> ("U.S. Supreme Court today struck down Texas's 'Homosexual Conduct' law, which criminalizes oral and anal sex by consenting gay couples . . .").

200. *Romer v. Evans*, 517 U.S. 620, 636 (1996).

201. *Id.* at 641 (Scalia, J., dissenting) (emphasis added).

202. *See id.*

203. Halley, *Reasoning, supra* note 14, at 1731.

lure of relying on gay identity as the only launching pad for legal challenges to unjust sex laws.

CONCLUSION

Lawrence v. Texas contains a landmark ruling that will change the lives of people who might otherwise have faced criminal prosecution and public humiliation, and who might have been harassed or brutalized by police, prison guards, or fellow inmates. It has the potential also to change the lives of parents who have been denied custody of or visitation with their children because they were presumed criminals, and of people who would have been discriminated against in a host of employment or other contexts²⁰⁴ while courts that might have helped them rested instead on the poisonous precedent of *Bowers v. Hardwick*.²⁰⁵

It is a great moment, but I would hate to see pro-sex litigators or constituencies become complacent. I would hate to see them make the mistake of believing that words that bring them so much joy today could

204. *Watkins v. Unites States Army*, 875 F.2d 699 (9th Cir. 1989).

205. *See* 478 U.S. 186 (1986). Another significant cause for optimism that we can take from *Lawrence* is that it speaks to a larger change in the world around us, just as *Romer* did, and just as every other civil rights victory in the nation's history has. Contrary to Justice Scalia's contention that the Court has acted on attitudes prevalent among the legal elite but incompatible with the mainstream, the Court has never behaved in that way. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). It has never held the country hostage to views utterly out of step with the rest of the electorate. This is not to say that it has never decided a divisive issue. We are all familiar with President Eisenhower's deployment of the 101st Airborne Division into Little Rock, Arkansas to enforce the integrationist dictates of *Brown*. *See EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965, PART II: FIGHTING BACK* (Blackside, Inc. 1987). The Court also faces acrimonious protest every year on the anniversary of *Roe v. Wade*. BBC News Online, *U.S. Abortion Debate Intensifies* (Jan. 22, 2003), at <http://news.bbc.co.uk/2/hi/america/2663071.htm>.

Judges, though, are human beings like the rest of us. They panic in wartime, just like the majority of the electorate, as evidenced by the disgraceful decision in *Korematsu v. United States*, 323 U.S. 214 (1944), and they also usher in change that is already on its way, such as when the first equal protection victories for women who had faced sex discrimination came down at exactly the same time that the second wave feminists were shuttling the Equal Rights Act through Congress and the state legislatures. *E.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973); Twiss Butler & Paula McKenzie, Nat'l Org. for Women, *21st Century Equal Rights Amendment Effort Begins* (Mar. 11, 2005), at <http://www.now.org/nnt/01-94/era.html> (last visited Mar. 13, 2005). Notwithstanding Justice Scalia's charge that *Lawrence* was a rogue decision issued by a Court that has signed onto the "homosexual agenda," the Court, as the old saying goes, has no army. *See Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting); *see also* Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 70 ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."). If the nation were not primed for this decision, history tells us, we would not have gotten it.

not possibly bring them pain tomorrow. There has been ample time to revel in *Lawrence*'s advances, but sodomy's future remains uncertain. Legal actors interested in maximizing the room for benign sexual variation, minimizing the suspicion and politics of shame that plague sex, and interrupting the cycle that reproduces the injured gay identity should take legal realist stock of this case's conceptual pillars. They should confront boldly the fact that these concepts already have been turned around to disadvantage people who engage in sodomy and reconceptualize where possible to avoid future hazards. My call is for vigilance so that the next generation can experience a victory like *Lawrence*.