THE SHAG-A-DELIC SUPREME COURT: "ANAL SEX," "MYSTERY," "DESTINY," AND THE "TRANSCENDENT" IN *LAWRENCE V. TEXAS*

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The scene in the courtroom was dramatic this morning, as Justice Anthony Kennedy, his voice trembling slightly, declared that individual decisions concerning the intimacy of physical relationships are a form of liberty protected by the Constitution. [1]

ALL:
To sodomy
It's between God and me
To S & M
La vie Boheme[2]

Prof. Richard Drake Mohr and Robert William Switzer were married on Monday in the wedding chambers at City Hall in Toronto by Cynthia Scott, who is licensed by the province of Ontario to perform weddings.[3]

I. TREMBLING SLIGHTLY INTO THE FUTURE

It is too early to tell whether the *Lawrence v. Texas* decision will stand on a cultural par with *Brown v. Board of Education.*[4] There is already some suggestion that the case is hastening a cultural shift toward greater social acceptance of gays.[5] Unfortunately for cultural change, though, the case has

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[1] *All Things Considered: Supreme Court Overturns Texas Sodomy Law,* (National Public Radio broadcast June 26, 2003) (transcript on file with author).

[2] JONATHAN LARSON, *La Vie Boheme, in* RENT (DreamWorks 1996).

[3] N. Y. TIMES, Nov. 30, 2003 § 9 (Sunday Styles), at 19.

[4] *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003); Brown v. Board of Education, 347 U.S. 483 (1954).

[5] A month after *Lawrence,* the *New York Times* front page reported that, "several network and cable television executives said the Supreme Court's 6-3 decision in June, overruling a Texas sodomy law and legalizing gay sexual conduct, underlined what they already knew: that the nation's attitudes toward gays and lesbians are radically changing." Bernard Weinraub & Jim

no snappy lines, no sound bites, no tag line or catch phrase to stick in our cultural memory. It cuts no grooves to channel the social mind. It provides no metaphors around which social thoughts may be organized and public discourses structured. It contains nothing with the punch and permanence of, say, "one man, one vote."[6]

Whether *Lawrence* has much important or lasting constitutional life is doubtful. Or rather if the case were argued better and written more clearly, it would likely have more constitutional force and endurance than as actually written. As in *Brown*, the Court in *Lawrence* is very unclear about what constitutional standards and tests it is using or what constitutional standards and tests it supports. *Brown* is infrequently cited because it did not articulate a standard for when legal distinctions made with respect to race are legitimate, and when they are not. That standard would be fleshed out in later cases.[7] And as far as the principles in *Brown* itself go, a later court could easily have interpreted the case as one fundamentally about access to education and only incidentally about racial discrimination, just as two generations earlier in *Buchanan v. Warley*, a case which barred overtly race-based zoning ordinances, the Court viewed the constitutional problem at hand primarily as one about property rights and access to free markets and only incidentally about race discrimination.[8] Only retrospectively do we take *Brown* to be a great case. People forget now that its slogans, "[t]he doctrine of 'separate but equal' has no place . . ." and that "[s]eparate [is] inherently unequal," were restricted by qualifiers such as "in the field of public

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Rutenberg, *Gay-Themed TV Gains Wider Audience*, N.Y. TIMES, July 29, 2003, at A1.

[6] *See, e.g.*, Moore v. Ogilvie, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."). The only forceful line in *Lawrence* is the one with which it overturns the Court's earlier constitutional acceptance of laws prohibiting gay sex. "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 123 S. Ct. at 2484, (construing Bowers v. Hardwick, 478 U.S. 186 (1986)). But even as this particular sentence overturns *Bowers*, it renders itself no further useful. It dates itself.

[7] *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964). A racial distinction "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy" *McLaughlin*, 379 U.S. at 196; *see also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("To pass constitutional muster, [racial distinctions] must be justified by a compelling governmental interest . . . .").

[8] *See* Buchanan v. Warley, 245 U.S. 60 (1917). Justice Kennedy's decision in Romer v. Evans, 517 U.S. 620 (1996), is similar to *Buchanan* and *Brown*, when construed as the "Son of *Buchanan*." In *Romer*, Kennedy supposed that there was some right, neither named nor defined, but something like a right of *access* to public institutions (whether governmental or social), which it is illegitimate to deny to any socially recognized group. In *Romer*, the group that was denied such access by Colorado's Amendment 2 just happened to be gays, but it may as well have been hippies or yuppies. *Romer*'s *access* language includes, "seek without constraint," *Romer*, *id.* at 631; "right to seek specific protection," *id.* at 633; "open on impartial terms to all who seek [the government's] assistance," *id.*; "to seek aid from the government," *id.* and in its closing lines, "a state cannot deem a class of persons a stranger to its laws." *Id.* at 636.

education" and in "educational facilities."[9] At its announcement, though, one could have predicted that *Brown* might well have great constitutional force based not so much on its content as on its unanimity. By contrast, the *Lawrence* Court gave the Constitution's imprimatur to gay "lives" and the "homosexual lifestyle" without a vote to spare.[10]

II. CONFUSIONS OF LIBERTY AND EQUALITY

As in *Brown*, the Court in *Lawrence* tends to confuse issues of liberty and issues of equality. Liberty rights address the scope of permissible actions; equality rights address the normative status or dignity of agents. An example will clarify the distinction. When on January 27, 1995, during a weekly press interview, U.S. House Majority Leader Dick Armey called openly gay Congressman Barney Frank "Barney Fag," Frank's liberty was not restricted in any way; he could do as much before as after the slur.[11] But the slur was an insult to Frank and insults are harms to dignity. Frank's moral status was besmirched. The slur treated Frank as less than a full person. It diminished the value of his moral agency, even though it did not prevent Frank from doing anything. Frank was treated inequitably, but not from any want of freedom.

At the level of its prose, *Lawrence* most clearly runs the concepts of liberty and equality rights together in the following three sentences from the summarizing paragraph of the case:

> 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.[12]

It would be natural to take the word "or" epexegetically since the remainder of the sentence leads on to the conclusion about substantive due process rights, but the normative concept operating before the word "or" is equality ("cannot demean"), and after it "liberty" (cannot prevent "their conduct"). Kennedy has unthinkingly switched horses in mid-stride.

On the level of ideas, Kennedy's fundamental confusion of equality and liberty is to think that we must morally admire or at least view as somehow morally redeemable the acts that we take to be the protected choices of agents (in *Lawrence*, "sexual practices" understood as instances of a type—

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9 *See Brown*, 347 U.S. at 483.

10 *See Lawrence*, 123 S. Ct. at 2484.

11 *See* Suzanne Gamboa, *GOP Leader Armey Exits With Head Held High*, SEATTLE TIMES, Nov. 20, 2002, at A4.

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

"homosexual lifestyle"). It appears that Kennedy thinks we have to respect the particular choices and concrete actions of an agent in order to view them as occurring as a matter of right. But this is to misunderstand what deserves, or morally demands, respect. Respect is the moral correlate in others of a person having dignity. It is dignity as attached to and normatively informing personhood that demands respect. On virtually any account of personhood, the *ability* to make choices is going to be part of what it means to be a person. So respecting a person's dignity entails respecting the individual as one who makes choices and decisions and acts upon them, but it does not entail that one admire the choices made and the actions taken. Voltaire's famous quip on free speech stating that he "disapprove[s] of what you say, but [] will fight to the death for your right to say it," provides a useful analogy.[13] The analogical counterpart for the relation of choice to dignity would read, "I disapprove of your choices, but I respect you as one who chooses — as a person, as a site of dignity."

Kennedy's confusion about the proper site of dignity and respect, and his blurring of the distinction between equality and liberty, lead him to try to gussy up and romanticize sex acts in an unneeded and misdirected attempt to make them appear deserving of respect and thereby (in the eyes of his confusion) drawn into the magic circle of liberty. To see sex acts as deserving privacy rights, Kennedy has a felt need to endue them with goodness, where all that should be legally required of an action otherwise protected by liberty rights is that it not violate someone else's right.

III. *LAWRENCE'S* PRIVACY ANALYSIS: A CLOSE READING

One of the questions that the *Lawrence* court poses for itself is whether "convictions for adult consensual sexual intimacy in the home violate [petitioners'] vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?"[14] The Court's answer is yes, but the Court gives no account of how substantive privacy rights are grounded in due process.[15] In addition, the Court's account of how the anal sex that the petitioners were having is to be understood as falling under the

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[13] S.G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (Putnam 1907).

[14] *Lawrence*, 123 S. Ct. at 2476.

[15] Kennedy offers one line on the subject stating that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 2480 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Kennedy fails to give us any test for the role of history in due process determinations. Various accounts of links between privacy and due process are discussed *infra* at note 19 and section VI.B. For an account of constitutional privacy rights that does not turn on the oxymoronic concept of substantive due process, see RICHARD MOHR, GAYS/JUSTICE Ch. 3 (Columbia University Press 1988).

right to privacy is unsatisfactory.[16]

A. *Privacy and Intimacy*

Kennedy's initial framing of the scope of privacy states that, "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[17] By using the word "certain," Kennedy correctly recognizes that not all intimate actions are covered by legitimate liberty rights.[18] Privacy rights protect only some intimate actions and relations. Friendships, for example, are intimate relations, but we do not consider friendships to be covered by privacy rights, so friends are not given the same immunity from compelled testimony against each other that we give priest and penitent, patient and doctor, client and lawyer, and spouses.[19] So intimacy cannot be the differentia by which Kennedy whittles down liberty in general to justifiably protected privacy.

B. Lawrence's *Privacy Argument*

Kennedy's constructive account of privacy, the case's intellectual core, falls within two paragraphs linked by an antecedentless "this."[20] For analytical purposes, I divide the partial paragraphs of this part of Kennedy's decision into three sections:

I: 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 marriage is simply about the right to have sexual intercourse.[21]

IIA: The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the

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[16] *See Lawrence*, 123 S. Ct. at 2476.

[17] *Id.* at 2475.

[18] I take a personal or intimate relationship to be one where the relationship has the character it has due to the distinctness and uniqueness of the individuals involved in the relationship. It is unique because they are unique. In this way, an intimate relation is opposed to a commercial or impersonal relationship, one that is carried out with respect to a role. My purchasing a train ticket is not a personal or intimate relationship because nothing about the uniqueness of the person behind the wicket—or me—bears on the sale.

[19] CONCISE OXFORD ENGLISH DICTIONARY (5th ed. 1964). The dictionary defines "friend" as "one joined to another in intimacy and mutual benevolence independently of sexual or family love." *Id.* at 488.

[20] *See Lawrence*, 123 S. Ct. at 2478.

[21] *See id.*

liberty of persons to choose without being punished as criminals.[22]

IIB: This, as a general rule, should counsel against attempts by the State, or court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults 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.[23]

III: 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.[24]

Before turning to a discussion of the history of homosexuality in America, Kennedy concludes that "the liberty protected by the Constitution allows homosexual persons the right to make this choice," presumably, the choice to let "sexuality find [] overt expression."[25] The case could simply have

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[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *Lawrence*, 123 S. Ct. at 2478. It is possible that "this choice" refers back to "adults may choose to enter upon this [personal] relationship," in which case, there is a suppressed premise, "people in such relationships get to have the sex they want," and then the conclusion follows about the constitution protecting the sex acts of homosexuals. *Id.*

I agree with Justice Scalia that the Court's historical analyses, which take up the bulk of *Lawrence*, are entirely irrelevant to Kennedy's claim that *Bowers* was wrongly decided. *See Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting). To say that the history of social and legal disapproval of homosexuals is not as bad as the *Bowers* court made it out to be is still not to make out a case that gay sex is constitutionally protected under the substantive due process standard articulated in *Bowers*, namely, that the liberties which the Due Process Clause protects are those which are "deeply rooted in the Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

The legal and social evidence to build a case for meeting *this* standard must be drawn from positive law and customs, not simply legal and social silence. Suppose that under its federal postal powers (U.S. CONST. art. I, § 8), Congress passed a law saying that in light of the visual clutter wrought by postmodern architecture, mailboxes on houses must now be painted brown—to help mail carriers identify them. It would be no good to claim, "well, heretofore for ages and ages and ages, we were allowed to paint our mailboxes any color we wanted, so freedom of mail-box colors is deeply rooted in the legal traditions of the country," and so then conclude that the law is an unconstitutional violation of substantive due process.

But then what positive laws and social customs and what level of description of sexual acts would Kennedy use to pitch a history-and-traditions argument? Sodomy in general? What laws and social conventions across the ages have promoted sodomitic acts in America? How about love relations that are non-marital but sexual? Well, in some countries one might find laws and social customs, say, favoring the keeping of mistresses, and perhaps even in Louisiana under Napoleonic law, but this move is not going to work either for *Moore*'s "Nation." For fun with Louisiana law, see Succession of Bascot, 502 So. 2d 1118, 1127-30 (La. App. 4th Cir. 1987) (holding that a man cannot be a "concubine" of another man for the purposes of inheriting as a legally recognized concubine would).

Note the absurdity that would result on this standard if Kennedy took seriously and consistently his flirtation with the view that homosexuality is a social construction of the late 19th century and that before the late19th century the concept of 'the homosexual' did not exist and so too there were no people who were identified, either by themselves or society, as homosexuals prior to this time. *See Lawrence* 123 S. Ct. at 2478-79. Then, to claim for due

stopped at this point, its constitutional point having been made. But the case proceeds, perhaps because the Court is partially aware that the argument so far is quite weak.

C. *Vacuous Claims*

The first thing to note about the privacy passage from the sections of *Lawrence* block-quoted above is that everything in section *II* is vacuous. Section *IIA* tries to give two explanations for why sodomy laws do more than just bar certain sexual acts and it is these extra effects that supposedly make the laws violate Due Process. But the attempts are mere evasions through circularity or, what amounts to the same, the use of conclusory qualifiers. Kennedy's first attempt asserts that the statutes' "penalties . . . touch [] upon the most private human conduct, sexual behavior."[26] But the expressions "sexual acts," sexual "conduct," and "sexual behavior" all have the same denotation, pick out the same things, as the two other uses of "conduct" on the same page show (one in *I*, "sexual conduct," the other in *III*, "intimate conduct"). So, by substitution of equals for equals — "sex acts" for "[sexual] conduct, sexual behavior" — the special problem with sodomy laws turns out to be that they do what they do. The problem with the prohibition of sex acts is that it prohibits sex acts. The radius of this circular argument is quite short.

Kennedy's second attempt to explain the constitutionally invidious

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process analysis that the history of the country since the 18th century is a history of the social and legal embrace of sexually engaged homosexual couples is an analytical falsehood. It is false by the very meaning of the terms used. So too Kennedy's claim "thus early American sodomy laws were not directed at homosexuals" is not an empirical or historical assertion, but an analytic truth, flowing from the very meaning of the term "homosexual." *See Lawrence* at 2478. The social constructionist position automatically rules out that any history-and-traditions argument could be made for homosexual Due Process liberties. In the constructionists' view, homosexuals are new kids on the block, not beloved creatures deeply rooted in the history and tradition of the nation.

A proper response to the historical claims of *Bowers* would not be to dispute the facts trotted out in the case, but to reject the constitutional standard used in it. Not even Kennedy's one gesture toward an analysis of what makes substantive due process substantive does this. "[H]istory and tradition are the starting point *but not in all cases* the ending point of the substantive due process inquiry." *Lawrence*, 123 S. Ct. at 2480 (quoting Kennedy's concurrence in County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). If history is dispositive in some cases, why isn't it also be dispositive in *Lawrence*? If it is because of the substantive account of privacy that Kennedy gives, then the historical portions of the case are irrelevant not just to the *Bowers* test for substantive due process, but also to the legal conclusions reached in *Lawrence*. The historical portions of *Lawrence* aren't even dicta. They are advertising.

The rejection of the *Bowers* substantive due process test could easily have been accomplished by appeal to precedent. Scalia's understanding of the *Bowers* test—always apply the historical test to the most specific possible formulation of an allegedly protected action—was agreed to by only two judges in *Michael H. v. Gerald D.* *See* 491 U.S. 110, 127-28 n.6 (1989). In addition, the whole history-and-traditions test was rejected in Planned Parenthood of Southeastern Pennsylvania v. Casey., 505 U.S. 833, 847 (1992).

[26] *Lawrence*, 123 S. Ct. at 2478.

consequences of sodomy laws reads, "[t]he statute seeks to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[27] The restrictive subordinate clause here is set up to tell us something about the content of the "personal relationship" which will explain why sodomy laws are unconstitutional, but instead it simply states that they are unconstitutional. The subordinate restrictive clause does no restricting. It is a vacuous qualifier. Again the particular badness of sodomy laws goes unexplained.

The antecedentless "this" which begins section *IIB* points back to the fog of these two evasions. And yet this "this" is meant to encapsulate the explanation for why the state's powers are to be restricted. "This, as a general rule, should counsel against attempts by the State, or court, to defining the meaning of the relationship or to set its boundaries."[28]

One last attempt is made in Section *II* to breathe some content into the case's justificatory schema—an appeal to spatial privacies, those that reside in the "most private of places" and "in the confines of the[] home."[29] Yet, Kennedy gives no analysis of the concept, even when he links it specifically to the "home" (*IIA&B*), that would explain why if the privacy in question protects anal sex because it occurs in the home, privacy does not also protect domestic bomb-making. Perhaps implicitly Kennedy is thinking that a functional analysis of the concept 'home' would reveal it as having a supportive role in the "enduring" "personal bonds" off of which (as we shall see) he ultimately hangs the case. Yet even this move would have the personal bonds justify the spread of privacy to the home rather than establish the home as a source of privacy rights. So in the end, Kennedy's appeals to the notion of spatial privacy and the home add nothing to the content of the case. So section *II* could simply have been dropped from the case without loss.

D. *Sex and a Love Unnamed*

It appears then that the case's privacy analysis hangs on just two sentences—Section *I* plus Section *III*: *(I)* "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 marriage is simply about the right to have sexual intercourse." [30] (*III*) "When sexuality finds overt expression in intimate conduct with another

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[27] *Id.* at 2478.

[28] *See Lawrence,* 123 S. Ct. at 2478. "Spatial" privacy was appealed to in the opening paragraph of the case. *See id.* at 2475.

[29] *Id.* at 2478.

[30] *Id.*

person, the conduct can be but one element in a personal bond that is more enduring."[31] By the lights of *I*, it appears Kennedy thinks that *Bowers* might well have been rightly decided, if gay sex "acts," "sexual behavior," and sexual "conduct" were viewed as free-standing activities and evaluated constitutionally as such. As freestanding, they would be valueless and nothing would be lost in prohibiting them—or so it would go on this account. For Kennedy sexual behavior is constitutionally protected, not on its own, but because of some relationship that it has to what he goes on to call the "personal relationship[s]" which "homosexual persons" "choose to enter upon."[32] These relationships are contrasted to mere "sexual behavior."[33] It is by moral retrofit that this otherwise unnamed homosexual "personal relationship" justifies the constitutional protection of same-sex "sexual behavior."

So what justifies the retrofit? Kennedy's first effort at explanation is an analogy: homosexual sex acts stand to same-sex personal relationships as "sexual intercourse" stands to "marriage."[34] Kennedy here presumes in fact, if not in definition, that marriage is a relation that has persons of different sexes as its relata, but he can hardly be thinking of procreation as marriage's definitional essence. For if that were the case, then the relation of sexual intercourse to marriage would not provide an explanatory parallel to the relation between gay sexual acts and gay relationships. Kennedy is here clearly thinking of *Griswold v. Connecticut* and the right to contraceptive use that the case granted to married couples.[35] The analogy then is: if Dick and Jane, in the first instance, have a constitutional right to non-reproductive sex (use of contraceptives) because of this sex act's relationship to the constitutional privacy that protects their marital relation, then Adam and Steve have the right to have anal sex because of 1) this sex act's parallel relation to their "personal relationship" and 2) this relationship's comparable standing in their life to the standing that marriage has in the "private lives" of Dick and Jane.

If one throws *Eisenstadt v. Baird* into the constitutional hopper alongside this analogy, one has a good argument for the extension of marital rights to gays under an equal-protection analysis, but the question remains: what *is* the relation between sex and personal relationships that causes privacy protections to spread backward from relationships to sex.[36] Kennedy

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[31] *Id.*

[32] *Id.*

[33] *See Lawrence*, 123 S. Ct. at 2478.

[34] *Id.*

[35] Griswold v. Connecticut, 381 U.S. 479 (1965).

[36] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried couples have the right to use contraceptives because married people do). The argument for gay marriage would

tries to elucidate the relation in section *III* by arguing that, "[w]hen 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."[37] Here Kennedy tries to clarify somewhat the relation between homosexual sexual acts and that 'something greater' in which he wants to constitutionally envelop them—the "personal relationship" "enter[ing] upon" which "homosexual persons" have "the right" to "choose."[38] Scalia quotes the preceding sentence (*III*) in the penultimate paragraph of his dissent as though its sense is perfectly clear, just silly, sentimental, and flirting, in a civilization-destroying way, with gay marriage.[39] But Kennedy's construction "can be but one" is actually very puzzling.

One suspects that Kennedy wants the construction "[homosexual] conduct can be but one element in a personal bond that is more enduring,"[40] to be parallel in a sense to the sentence, "hydrogen can be but one element in a water molecule—the molecule needs must also have oxygen as an element along with its necessary hydrogen component." If so, the sentence is just an oblique way of saying that sex is a necessary condition for whatever the 'enduring' homosexual 'bond' is. In turn, then, the retrofit of constitutional protection from relationship to sexual act is effected across this necessity. The sexual act is protected because it is a necessary condition for the personal relationship.

This sentence so understood would, of course, not have been the first time that Western Civilization has heard its sentiment. It is the Catholic doctrine that a marriage unconsummated is not a marriage at all. "[T]wo people are not really married until they have known each other carnally—after the marriage ceremony, one might add."[41] This doctrine seems to be the hidden determinate in Kennedy's thinking — perhaps not accidentally so since Kennedy is a Catholic.[42]

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run as follows: if it is the case (as *Lawrence* assumes) that the married get to have sodomitic sex because they are married and if it is the fact that the interests of the unmarried parallel the interests of the married which causes the unmarried to be protected by a right to sexual privacy (by *Eisenstadt* equality), then surely if non-married people have an interest in their personal relationships that parallels the interests that married people have in their personal relationship (*à la Lawrence*), then to an even greater degree the right that protects the marrieds' personal relationships—the right to marry—also protects the parallel personal relationships of others. Therefore the right to marry covers gay marriage. *See generally* Richard Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995).

37 *Lawrence*, 123 S. Ct. at 2478.

38 *Id.*

39 *Id.* at 2497-98 (Scalia, J., dissenting).

40 *Id.* at 2478.

41 J. L. MCKENZIE, THE ROMAN CATHOLIC CHURCH 176 (Holt, Rinehart and Winston 1969).

42 Linda Greenhouse, *Ideas & Trends: Evolving Opinions: Heartfelt Words From the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at 3.

IV. TWO BUTS

A. *But One*

But that which is justified by being necessary to the existence of something else that is good is only justified to the extent that it is necessary to that other thing's existence. Fire may be a good thing because it is necessary for the cooking of food in some circumstances, but that fact does not mean that fire is good when it is burning down houses, and it does not mean that the dangerous third element remains good, let us say, protection-worthy, when alternative means of cooking food become available.

Even on the understanding that sex acts are protected because necessary for the sustenance of "personal relationship[s]," Texas' homosexual-specific "deviate sexual intercourse" law does not prevent homosexuals from achieving such relationships. Once one moves beyond viewing sex acts that are open to reproduction as the only allowable form of sex which can sustain marital relationships as personal relationships (as *Griswold* so moved), then one also sees that it is only some sex acts that are needed to support the marital-like bond, not any particular form of sexual behavior—and *a fortiori* not all possible sexual behaviors. Texas' homo-specific "deviate sexual intercourse" law bars lots of sexual acts, like that of one male inserting a dildo into another male's anus, but the statute leaves lots of other types of sexual acts between same-sex couples perfectly legal, like: mutual masturbation, even while smooching; frottage; the sucking of each others' dildos and toes; foot rubs (remember the enforcers' opening conversation of Quentin Tarantino's *Pulp Fiction*), and even anallingus, as long as the "contact" involved does not entail "penetration," and even that is permitted if the tongue is not classed as "an object."[43]

The analysis which argues that sexual acts are protected *to the extent that* they are a necessary part of a personal relationship, also has the unfortunate consequence of failing to protect the sexual encounter the plaintiffs, John Geddes Lawrence and Tyron Garner were actually having when, and for which, they were arrested. It is a lucky thing that the lawyers for Lawrence and Garner kept the men and their relationships under wraps as the case worked its way through the courts. According to Ray Hill, a pioneering gay rights advocate in Houston who knows both men, "[t]he secrecy served the interests of the movement," since "[t]hey are not the kind of people that the lawyers want to comment on the case." [44] Like the sexual encounter for

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[43] *See* TEX. PENAL CODE ANN. § 21.01(1)-(2) (Vernon 2003).

[44] Bruce Nichols, *"We Never Chose to be Public Figures": Houston Men Were Surrounded by Secrecy Throughout Appeal*, DALLAS MORNING NEWS, June 27, 2003, at 19A.

which Michael Hardwick's arrest was upheld in *Bowers v. Hardwick*, the sexual spark to *Lawrence* was casual, and not a part of an enduring relationship.[45] The person with whom Garner *had* had an enduring personal bond was the man who on a false accusation of weapons violations sent the police into Lawrence's apartment where Lawrence and Garner were having anal sex and who had earlier been granted a temporary restraining order against Garner based on charges of sexual battery in their enduring personal relationship.[46] Not a pretty picture.

It is not clear how *Lawrence* protects, if it does, impersonal sexual relations: one-night stands, gloryhole sex, sex in places where the only people present are there for sex, whether it be in the orgy rooms of a bathhouse, the arbors behind rest stops, or along the nocturnal byways of city parks.[47] It is true that sexual encounters in these places might lead to one of Kennedy's enduring personal bonds, but then so might any impersonal voluntary thing, like eyes meeting over a latte machine at Starbucks. Kennedy's analysis of sexual rights based on the "consummation" model has the right to sex legitimately applying only to people "know[i]n[g] each other carnally—after the marriage ceremony, one might add."[48]

B. *Another But*

But alas the logic of "can be but one" actually does not take Kennedy's argument even as far as understanding sexual activity as a necessary condition for marriage-like relations. The verbal phrase in Kennedy's sentence "[homosexual] conduct *can be but one* element in a personal bond that is more enduring"[49] need only have the sense conveyed by the following parallel syntax: "sprinkles can be but one element in a well-decorated cake." This sentence means that sprinkles cannot be the only decoration on a well-decorated cake—there also has to be frosting on the cake in order for the sprinkles to have something to stick to—but a cake can still be well-decorated without sprinkles. One could use dragées, nonpareils, ceramic figurines, or scores of other things. Glorious cakes will still easily be possible without sprinkles. If this "can be but one" is the one that Kennedy is using — and it is all the logic of the expression requires — then nothing relevant seems to

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45 *See id.* "They were never a couple." *Id.* Peter Irons, *Interview with Michael Hardwick* in LESBIANS, GAY MEN, AND THE LAW 125-31 (W. Rubinstein ed., 1993).

46 *See* Nichols, *supra* note 44, at 19A. The article describes Garner and the restraining-order grantee merely as "roommates," but it is clear from the article that they were more than that. At a minimum, they were what in the gay world are called "fuck buddies." *See id.*

47 For an argument that such places should be considered private, see MOHR, *supra* note 15 at, 104-05.

48 MCKENZIE, *supra* note 41, at 176.

49 *Lawrence*, 123 S. Ct. at 2478.

follow from the sentence for the constitutional protection of sexual behavior. With "can be but one" so understood, Kennedy is making a weak claim about the relation between sex acts and "personal relationships." Sex is something that couples *might* choose as a medium for their relationship, but they could use virtually anything else for this purpose. They could use shopping together, running a business together, putting together picture puzzles, feeding each other chocolates, or even robbing banks together, like Bonnie and Clyde. Allan Bloom thinks reading Great Books together is just the thing for intimacy.[50] Cribbage has held together more long-term relationships than sex has. There are endless possibilities, and surely not all are ones that we take to be constitutionally protected because they fulfill this role for a couple. Even on the consummation model, it is only a single act of sex that is necessitated by marriage.

V. MORE ROMANCE, AND SOME MYSTERY

Another indicator that Kennedy is romanticizing sexual relations can be seen in his choice of precedents by reference to which he thinks *Bowers* should be overturned. He mentions *Griswold v. Connecticut*,[51] *Eisenstadt v. Baird*,[52] *Roe v. Wade*[53] and *Carey v. Population Services Int'l*,[54] but tellingly, he fails to mention *Stanley v. Georgia*,[55] the case that gave Americans the right to possess and use pornography in their own homes. *Stanley* was the case that Justice Blackmun took as key to his four-justice dissent in *Bowers* and was the case that redeemed Justice Brandeis' famous account of the right to privacy in his dissent to *Olmstead v. United States*.[56] *Stanley* block-quoted the *Olmstead* dissent's main ideas into Constitutional law:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> > "The Makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone . . . ."

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50 ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 344 (Simon and Schuster 1987).

51 381 U.S. 479 (1965) (holding that privacy rights protect married couples' access to contraceptives).

52 405 U.S. 438 (1972) (holding that privacy rights protect unmarried people's access to contraceptives).

53 410 U.S. 113 (1973) (holding that privacy rights cover access to abortion).

54 431 U.S. 678 (1977) (holding that privacy rights cover minors' access to contraceptives).

55 394 U.S. 557 (1969) (holding that privacy rights cover the possession and use of pornography in one's own home).

56 227 U.S. 438 (1928) (holding that privacy rights do not cover telephone conversations).

> These are the rights the appellant is asserting in the case before us . . . [T]he right to satisfy his intellectual and emotional needs in the privacy of his own home.[57]

Masturbatory acts are not romantic, and wonderful as they are, they are not intimate relations between persons. And so Kennedy simply passes over *Stanley*'s very strong justifications for sexual privacy—that privacy in sex is part of our having sovereignty over our sensations and control over the means by which we meet our emotional needs. It appears that, as written, *Lawrence* in fact does not protect at least one element in the parade of horribles, which Justice Scalia believes will lead to the "massive disruption of the current social order" — the right to masturbation.[58]

Rather than appealing to the concrete and clear resources available from *Stanley*, Justice Kennedy, when reprising *Lawrence*'s two core privacy paragraphs at the conclusion of the case's privacy discussion, appeals to the breezier reaches of constitutional justifications found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[59] Kennedy states that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."[60] When the Court appeals to concepts like the transcendent, mystery, and destiny to justify constitutional claims, it simply undercuts its own legitimacy, for without more these terms are contentless fronts for religious claims.[61] Scalia rightly parodies this easily parodied *Casey* passage, calling it the "famed sweet-mystery-of-life passage."[62] More importantly, he is correct to point out that *Casey* is confusing the choice to act with the carrying out of an action in accordance with the choice. This confusion is common enough, for in English the past tenses "chose" and "decided" frequently serve as synecdoches for the actions taken in accordance with a choice or decision, for example, in asking and answering the question, "Why did Columbus end up in America? Because he chose to sail west." One could have answered more simply and clearly with "Because he sailed west." But the result is that *Casey* and *Lawrence* confuse beliefs and actions. The Constitution protects all beliefs, but if, in accordance with the "sweet mystery" rationale, it also derivatively protects all actions about which one might have beliefs, then the Constitution permits everything and the

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57 *Stanley*, 394 U.S. at 564-65 (quoting *Olmstead*, 227 U.S. at 478 (Brandeis, J., dissenting)).

58 *See Lawrence*, 123 S. Ct. at 2490-91 (Scalia, J., dissenting).

59 505 U.S. 833.

60 *Id.* at 2481 (quoting *Casey*, 505 U.S. at 851).

61 *See id.* at 2475, 2477, 2481, 2484.

62 *Id.* at 2489 (Scalia, J., dissenting).

rule of law is meaningless. The "sweet mystery" passage with which Kennedy concludes his privacy discussion is an embarrassing muddle.

VI. WHAT *SHOULD* KENNEDY HAVE DONE?

A. Casey *and the Body*

Casey does in fact provide the best ground on which to mount an argument for overturning *Bowers*, but not for the reasons Kennedy gives. *Casey* explicitly states that it is offering *two* separate, though sometimes intersecting, justifications for the right to abortion.[63] It is not surprising that *Casey* tries to reach out to multiple sources for its justification, since the right to abort is a right that is hard to reduce simply to a right to have sex, a right to contraception,[64] or, prospectively, a right to "a personal bond that is more enduring."[65] One justification for the right to abort, a justification which *Casey* titles "personal autonomy," appeals to the notion of people defining themselves in their own terms—" her own conception of her spiritual imperatives" and "personal decisions concerning . . . the meaning of . . . " life, the universe, and everything.[66] This line of thought reaches its end in the cloud-cuckoo-land of the sweet-mysteries passage.

The other source of justification appeals to something more earth-bound, the distinctive role of a person's body in free actions. *Casey* provides several different formulations of this justification, which it twice succinctly summarizes simply as "bodily integrity."[67] The right in play, which includes the right to allow a doctor to enter you, is also described as "the right to physical autonomy" and "the urgent claim[] of [a person] to retain the ultimate control over . . . her body."[68] These assertions of rights are a genuinely new constitutional development.[69]

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[63] *Casey*, 505 U.S. at 857. ("*Roe* stands at an intersection of two lines of decision, but in whichever doctrinal category one reads the case, the result for present purposes is the same.").

[64] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services Int'l, 431 U.S. 677 (1977).

[65] *See Lawrence*, 123 S. Ct. at 2478.

[66] *See Casey*, 505 U.S. at 852-53, 857.

[67] *Id.* at 849, 857.

[68] *Id.* at 869, 884.

[69] As precedent for the constitutional right to control one's body, *Casey* cites two cases where the asserted right was effective. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (barring the forced stomach pumping of a suspect as a violation of substantive due process, because it "illegally break[s] into the privacy of the petitioner") and Winston v. Lee, 470 U.S. 753 (1985) (holding that a bodily search for a deeply buried bullet was unconstitutional even though the search was likely to produce incriminating trial evidence). But in *Rochin* what may really have mattered — what made the break-in an illegal one — was not a privacy concern so much as the sense that forced stomach pumping "shocked the conscience." *See Rochin*, 342 U.S. at 172. The operative notion in *Winston* was that the search in question was unreasonable, thus failing even the weakest levels of constitutional protection. In neither case then did the right

At both points where *Casey* asserts a right to "bodily integrity," it claims that this right is to be found within *Roe v. Wade* itself.[70] This linking of bodily integrity and the right to abortion should come as a surprise to anyone who has actually read *Roe*, for the case explicitly denies that it is basing the right to abortion on a more general right to control one's body.

> In fact, it is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right to privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past."[71]

For authority in *Roe*, Blackmun cited two cases where the state was allowed to invade the bodies of citizens, in one case through forced inoculations, the other through forced sterilization.[72]

The forced sterilization case is now widely considered to be one of the Court's most embarrassing judgments ever, with Justice Holmes famously screaming that "[t]hree generations of imbeciles are enough."[73] Turning away from any appeal to a right of bodily control, Blackmun tried to define the privacy right in question in *Roe* as pendent from central personally affecting interests.[74] So on the point of the constitutional status of the body, *Casey* is not a continuation of *Roe* but instead marks a sharp shift in constitutional doctrine. In fact, a 180-degree turn, one that occurred after *Bowers*. It is with reference to this dimension of *Casey*, the right to control one's body, not to *Casey*'s sweet mysteries of life that Kennedy should have

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asserted in *Rochin* and *Winston* exist at the strength it had in *Casey*. *See Casey*, 505 U.S. at 849. *Casey* significantly ups the ante of these cases, even as it itself avoids the language of "fundamental rights." Boldly, *Casey* also cites as precedents for the right to control one's body cases where the asserted right was easily overridden by other considerations. *See Casey*, 505 U.S. at 857 (citing Washington v. Harper, 494 U.S. 210 (1990) and Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990)). *Cruzan* held that parents acting as proxies for their comatose child cannot engage the patient's right to die unless the patient has left clear and convincing evidence of such a wish. *See Cruzan*, 497 U.S. at 336. The source of the liberty right in *Cruzan* was left entirely unarticulated, though, citing *Bowers*, the case ruled out that the specific right was to be thought of as a privacy right. *See id.* at 279 n.7. *Harper* held that it was permissible for the state to administer anti-psychotic drugs to a prisoner without a hearing. *See generally* Washington v. Harper, 494 U.S. 210 (1990). Even more so than for *Rochin* and *Winston*, *Casey* must be viewed as a structural overhaul of these 1990 cases if they are to serve as justifications for a right to bodily control that means anything.

[70] *Casey*, 505 U.S. at 849, 857 ("[I]t is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with . . . bodily integrity.").

[71] *Roe*, 410 U.S. at 154.

[72] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (forced inoculations); Buck v. Bell, 274 U.S. 200 (1927) (forced sterilization).

[73] *Buck*, 274 U.S. at 207; *see also* Robert Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981).

[74] *See Roe*, 410 U.S. at 152-53.

and could have cleanly reversed *Bowers*.

B. *The Body and Substantive Due Process*

Casey asserted that, "the urgent claims of [a person] to retain the ultimate control over . . . her body," are "claims implicit in the meaning of liberty."[75] Here *Casey* makes a blind reference to *Palko v. Connecticut* and the case's high objective standard for a substantive liberty interest being held constitutionally protected by the Due Process clauses of the Fifth and Fourteenth Amendments, clauses which on their face protect only the legal procedures.[76] The *Palko* standard is that any class of actions will be protected by the Due Process clauses if permission to perform them is "found to be implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[77] The rationale behind this test's use of process to protect substance is that if in every circumstance it would be unjust to prosecute an action, then there is no circumstance in which a law against the action could be duly processed.[78]

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[75] *Casey*, 505 U.S. at 869.

[76] *See* Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

[77] *Id.*

[78] Three years before *Palko*, the Court in *Snyder v. Massachusetts* used this very style of explanation to clarify what non-explicit but fundamental rights were contained within the general but vague right of due process. *See* Snyder v. Massachusetts, 291 U.S. 97, 122 (1934). "Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof." *Id.* This passage gives an objective, conceptual standard rather than a historical one for what counts as a fundamental right. And it glosses an earlier much quoted passage to the effect that non-explicit due process rights are those whose violation would "offend [] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105. This gloss shows that, contra Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977), Bowers v. Hardwick, 478 U.S. 186, 192 (1986), and Reno v. Flores, 507 U.S. 292, 303 (1993), the original understanding of fundamental rights under due process did not have historical data as part of the criteria for what was to be counted as a fundamental right despite the reference to "tradition." I suggest that *Snyder* is using "tradition" in its primary sense and also its religious sense to refer to truths *as transmitted*, not to what establishes truth. The primary sense of "tradition" is "1. The action of handing over (something material) to another; delivery, transfer (Chiefly in *Law*)." OXFORD ENGLISH DICTIONARY, (2d ed. 1989); *see also id.* at sense 6. These senses contrast with what is now the most common sense of the term "tradition":

> 5.a. That which is [] handed down; a statement, belief, or practice transmitted (esp. orally) from generation to generation. b. More vaguely: A long established and generally acceptedcustom or method of procedure, having almost the force of a law; an immemorial usage; the body (or any one) of the experiences and usages of any branch or school of art or literature, handed down by predecessors and generally followed.

Id. The view that fundamental rights are those activities whose approval would be found, by historical survey, to have been held by consensus and for a very long time, basically does away with rights altogether. It allows entrenched majorities to determine both what the laws are and what one's rights against the force of law are. A right, if it means anything is a claim by those in a (democratic) minority against those in the (democratic) majority.

The right to control one's body meets *Palko*'s very high, objective test.[79] For such control is part and parcel of human agency and a precursor to any other actions being free. The body is the foundation for a person's being in the world, for projecting herself into the world through actions, and for instilling value in things. The body is not merely necessary for existence and action—as food, shelter, and a kidney machine might be—but also is part of that *in virtue of which* a person is and acts. If a person is to be free in any of her actions, she must have control of her own body—not in the sense of doing *with* it as she will, but doing *to* it as she will—so that it is hers. In order that an action is one's own, it is not enough that the action be the product of one's intentions. For one's intentions are presented not merely by and through but inextricably *with* one's body. Therefore, if one's acts are to be one's own, one's body as well as one's intentions must be one's own.

Another route to the same conclusion is to notice that a person's body is not just one more damn thing in the world that she might have or own, but rather has a special value and standing as that in virtue of which she possesses other things and as the chief means by which other things come to have value. "My body" has a wholly different status than even "my house." A house belongs to its owner because he built it with his body, or bought it with the fruits of the labor that his body provided him. An unappropriated object in the world becomes one's own as one mixes one's labor with it, for it would then be unjust for anyone else to take it. No one else in this circumstance deserves it.[80] The body is not merely a necessary condition for one's appropriating what is one's own, it is also the chief causal condition for appropriation. If one speaks of one's body as "mine," it is nevertheless not subject to the same restraints and controls as other things that one owns, for it is morally and causally prior to their being one's own.

A person's body is therefore not available to the government for its legitimate projects in the way her (other) property is. Government cannot prevent the individual from valuing herself and possessing herself and yet still suppose that she is not merely a tool of and for government, but has her own projects and values that take precedence. If there are any substantive liberties, a person has a right to instill value in herself and possess herself.

A very powerful right to privacy then is generated by and over the body because of its special status in one's projects, values, and very presence in the world. Only when control of one's body is protected, does one have a right to bodily integrity, and only then is one a person. Neither justice nor liberty

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[79] For a full-dress treatment of the claims made in this and the next four paragraphs, see MOHR, *supra* note 15, at 117-23.

[80] For a careful defense of this version of the labor theory of property acquisition, see L.C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS Ch. 4 (Routledge 1977).

would exist if persons were not, at law, held sovereign in the control of their bodies. This constitutional claim is what Kennedy should have asserted and could have asserted if he had attended more closely to *Casey*'s constitutional analysis, an analysis of which he himself was one of the three signatories.[81]

This understanding of rights and the body would also have cleared up the issue of whether impersonal sexual encounters of the sort actually had by Lawrence and Garner are protected by privacy and whether masturbation is protected by privacy. It would also clarify that non-married heterosexuals have a liberty right to sodomy, an issue that goes unaddressed in *Lawrence.*

VII. HETEROSEXUAL SODOMY AND EQUAL PROTECTION

As written, *Lawrence*'s analysis leaves open the question whether non-married heterosexuals have a right to sodomy. The state has a strong interest in promoting marriage.[82] Would it be okay for the government to permit homosexual sodomy, but prohibit heterosexual sodomy among the unmarried? Such a law could be viewed as a way of shepherding non-married heterosexuals into marriage (traditionally conceived) as an enduring personal relationship into which they may enter but homosexual couples may not. Such a law would certainly pass rational basis muster for a variety of reasons. First, its end, the promotion of marriage, is more than legitimate. Second, some heterosexuals might actually spring for the carrot of sodomy provided by marriage, and so actually get married, and so too the law is rationally related to this end. Finally, the law is not prejudicial against a socially marked group and does not use an impermissible means to achieve its end. Unless sex acts themselves are free-standingly protected by the right to privacy, it seems that Kennedy's analysis of privacy really has no answer to this conundrum, of which the case is blithely, and perhaps for self-protection needfully, unaware.

VIII. GAYS AND EQUAL PROTECTION

What about equal protection rights for gays in *Lawrence*? In *Romer*, Kennedy dismissed out of hand attempts to show that a state constitution's drawing distinctions with reference to homosexuals had a legitimate goal and in some way might have lead to the goal.[83] But at least in that case he acknowledged that such attempts had been made. In *Lawrence*, he doesn't even do that. He doesn't dismiss, because he never even entertains, possible state interests. In a cast-off line in *Lawrence's* summarizing paragraphs, after

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[81] *See Casey*, 505 U.S. at 843.

[82] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding a state's favored treatment of traditional marital relations).

[83] *See Romer*, 517 U.S. at 625-26, 635.

Bowers had already been reversed, Kennedy stated rawly, without example or analysis, that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[84]

Kennedy could at least have pointed out that the position taken by Scalia's dissent on this issue was incoherent. In *Lawrence*, Scalia recycled the view from *Bowers* that laws can be sufficiently justified simply by registering "moral choices" or in *Bowers*' phrasing, "the law is constantly based on notions of morality" and some "laws represent[] essentially moral choices."[85] But *Bowers* tips its hand on this issue since it glosses "moral choice" simply as "majority sentiments."[86] Scalia gives no indication at all in *Lawrence* that he is appealing to any other more elaborate notion of what counts as "moral choices."[87] But then, since all democratically enacted laws register "majority sentiments," all laws would, on this account, have legitimate goals—the enforcement of moral choices. Further the sanctions that attach to breaking laws might conceivably cause some people to obey the laws—act in accordance with majority sentiments—and so, all laws will also be rationally related to this goal of enforcing majority sentiments. So the *Bowers* test is vacuous as a reading of the right to equal protection. By its test, all laws protect equally. Further the test is incoherent because it fails to meet a criterion of what a right is. If a right means anything, it is an immunity that a democratic minority holds against a democratic majority. On the *Bowers* account, when it comes to the right to equal protection, majorities both pass laws and determine what rights are.

Scalia's *Lawrence* dissent provided an easy target. The Court could have taken the "majority sentiments" view of state interests off the Constitutional table, but it punted. This failure means that even with sodomy laws off the books, judges will still be able to claim that in some way gays are immoral and in consequence bad role models and so take their kids away, fire them as teachers, and the like. Judges can simply cite *Barnes v. Glen Theatre, Inc.*,[88] which with a nod to *Bowers* as its only justification, holds that the enforcement of morality is not just a legitimate but even a substantial state

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[84] *Lawrence*, 123 S. Ct. at 2484.

[85] *Id.* at 2490 (Scalia, J., dissenting); *see also Bowers*, 478 U.S. at 197.

[86] *See Bowers*, 478 U.S. at 197.

[87] Scalia gives no hint that he is, even tacitly, holding a natural law position as a grounding for morality. One major liberal critic thinks that appeals to natural law doctrines keep laws, which discriminate against gays from being held irrational and aimless under a rational basis analysis. *See generally* A. KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW Ch. 4 (University of Chicago Press 2002). Koppelman believes that natural law arguments are faulty, but he thinks that people who hold them are not necessarily exhibiting irrational prejudices against gays. *See id.* at 72-93.

[88] 501 U.S. 560 (1991).

interest.[89] *Lawrence* could have blocked this whole line of thinking, but failed to do so.

On the other hand, if one remembers just how low the rational basis bar is placed, it is not difficult to come up with legitimate state interests that Texas' homo-specific sodomy law might advance. One might say that while no state interest in procreation is advanced by allowing homosexuals to commit sodomy, since all homo-sodomitic acts will be non-reproductive, yet within the state's strong interest in procreation, it can find a role for heterosexual sodomy, for sometimes-sodomitic acts are necessary precursors to procreative acts. For example, suppose a man can only become erect through oral sex, but then once aroused can be fully engaged in coitus. The instrumental role of sodomy in coitus then grounds a distinction drawn with respect to a legitimate state interest, and in some individuals advances that interest, and so Texas' law passes a rational basis equal protection challenge.[90]

Or there are more straightforward classical health and safety concerns that could be appealed to, like the role of homosexual sodomy in the spread of AIDS:

> A growing number of gay and bisexual men in the United States are engaging in risky sex with partners they meet on the Internet, raising fears that the AIDS virus could be poised for a major comeback *in the group hardest hit* by the epidemic, according to two new studies presented at the 2003 National H.I.V. Prevention Conference.[91]

That Texas' homo-specific sodomy law would be over- and under-inclusive in certain ways relative to the state interest is irrelevant under rational basis review since "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[92] In other words, a law will be upheld if in *some* possible world—no matter how remote from the actual one—the law could advance the legitimate interest. Only a law whose means were self-contradictory would fail the test.

Scalia could easily have appealed to such health and safety concerns in his dissent, but he wanted to put all of his eggs in the single basket of morality, claiming that a whole host of laws are "sustainable only in light of *Bowers*' validation of laws based on moral choices."[93] But for Scalia's examples of such laws, a Jesuitical mind would have no problem coming up with rationales that appeal to neutral principles and do not simply rely on

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89 *Id.* at 569.

90 I owe the example to Fred Suppe from a conversation we had in 1985.

91 *Risky Sex Raises AIDS Concern*, N. Y. TIMES, July 30, 2003, at A12 (emphasis added).

92 McGowan v. Maryland, 366 U.S. 420, 426 (1961) (upholding Sunday closing laws).

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

majority sentiments. Laws against bigamy, same-sex marriage, adult incest, prostitution, adultery, fornication, and bestiality all might help promote health by possibly impeding the spread of AIDS.[94] Laws against masturbation and obscenity help prevent carpel tunnel syndrome. That such laws would be wildly over- and under-inclusive does not matter.

IX. EQUAL PROTECTION AND THE CULTURAL WARS

Kennedy passes over actually answering the question of whether Texas' law prohibiting homosexual sodomy, but not heterosexual sodomy, was "born of animosity toward the class of persons affected," for he appears to have larger fish to fry.[95] In discussing the impact of *Romer v. Evans* and its equal protection analysis, Kennedy launches equal protection law on a new, extraordinary trajectory into the cultural wars, where Supreme Court rulings are now to be made depending on how the Court thinks the public will perceive its decisions.

A. *Invalidating Neutrally Worded Laws*

Kennedy worries whether a law that was neutrally written between heterosexual sodomy and homosexual sodomy would pass constitutional muster.[96] He holds that even if Texas' sodomy law were written in such a sexual-orientation neutral way, it would still be culturally read as stigmatizing homosexuals, and so the Court would have to knock it down as a constitutional violation of some sort, for the law would have a disparate impact on the dignity of gays. Kennedy states that "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[97] Now, it has long been the case that even neutrally worded laws are to be held unconstitutional if the *intent* of the

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94 *Researchers Have New Theory of Origins of AIDS Virus*, N. Y. TIMES, June 13, 2003, at A29.

95 *Lawrence*, 123 S. Ct. at 2486 (Kennedy quoting from his opinion in *Romer*, 517 U.S. at 634). In her concurrence, O'Connor answers in the affirmative the question of whether possible animosity against gays is operating in Texas's deviate sexual intercourse law. But her answer is not based on any study of the attitudes of the people who passed the law or their constituents, but entirely on the fact that the law had been so little enforced. She states that "because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior." *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring). But Texas' predecessor sodomy law, which barred both heterosexual and homosexual sodomy was also rarely enforced, and we certainly could not, from that state of affairs, conclude that the law was prejudicial against both heterosexuals and homosexuals.

96 "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Lawrence*, 123 S. Ct. at 2482.

97 *Id.*

law (or of its enforcement) is aimed at harming some distinct group, but since the 1970s, it has been firm equal protection doctrine that a law with an unintended dispersed *impact* against even racial groups does not trigger any unusual constitutional concern.[98] So Kennedy's move here, if it is to be taken seriously, would be big news. The Court would have to monitor even neutrally written laws to see if the culture reads the law non-neutrally and if so, rule it unconstitutional for that reason. The result is peculiar since the law is damned both if it does and if it does not draw a distinction with respect to a group. And in cases of laws newly made neutral, the Court will have to read the new law like tea leaves, trying to foresee how society in the future might receive and interpret the meaning of the law. Here judges must join the ranks of haruspices.

B. *Cultural Perceptions of Neutral Judicial Rules*

More importantly, Kennedy holds that the need for the Court to pay attention to cultural perceptions rather than neutral rules applies not only to laws, but also to court decisions themselves. He claims that if the Court were to let stand a state's distinction in sexual orientations within its sodomy laws, the culture will read the Court's action as stigmatizing homosexuals, and that reading is not to be permitted.[99] So it seems the courts have to take into account how their decisions will be read culturally as one of the grounds on which they base their decisions, and sometimes, at least, this ground will be dispositive. Even if neutral principles dictated *Bowers*' result—in consequence, say, of judges using a "history and tradition" standard for due process or not believing in substantive due process at all—the result is nevertheless wrong, because of what the nation will make of the decision.[100] Scalia is right. The Court, by its own say so, has abandoned a commitment to neutral principles and "has taken sides in the cultural wars," claiming that it

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[98] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). *But see* Washington v. Davis, 426 U.S. 229 (1976).

[99] *Lawrence*, 123 S. Ct. at 2482 ("*Bowers*' continuance as precedent demeans the lives of homosexual persons.").

[100] The specific stigmas that Kennedy thinks attach to homo-specific sodomy laws are all irrelevant to the equal protection analysis at hand. "[I]t remains a criminal offense with all that imports for the dignity of the person charged." *Lawrence*, 123 S. Ct. at 2482. But this assertion could be made of *any* law. Kennedy continues, "[j]ust this term we rejected various challenges to state laws requiring the registration of sex offenders." *Id.* Had these cases gone the other way, would Bowers still be good law? Are we to believe that the amount of constitutional protection one gets under one constitutional provision is to depend upon how much one gets under another? If so, every past constitutional ruling is thrown into doubt by each new one. Kennedy continues, "[t]his [policy of registering sex offenders] underscores the consequential nature of the punishment . . . attendant to the criminal prohibition. Further more the Texas criminal conviction carries with it the other collateral consequences always following a conviction. . . ." *Lawrence*, 123 S. Ct. at 2482. This concern is an Eighth Amendment issue, not a equal protection issue, and in any case, applies equally to all laws.

had to do so, lest some group be stigmatized.[101] Here the Court fundamentally misunderstands its role in constitutional cases. The Court is not an agent of state power but the determiner of the limits of state power.[102]

If we were to take Kennedy seriously in *Lawrence* the case would have major import for future gay equality cases. Would a Court decision upholding the military ban on gays by appeal to neutral principles nevertheless be culturally viewed as stigmatizing gays. Obviously, yes. Therefore the Court may not uphold the ban. Bans on gay marriages—ditto. But Kennedy's extravagance here seems motivated simply by the drive to overturn *Bowers* and is so peculiar that it will likely vanish with *Bowers*.

What *should* Kennedy have done? He should have taken his insight from *Romer*, that gays tend to be excluded from basic institutions of American life, and added to that insight what he takes to be obvious in *Lawrence*, that gays are demeaned by many social stigmas, and then gone on to hold that legal distinctions drawn with reference to a person being gay are presumptively suspect and can only be sustained if they are substantially related to an important state interest (as in the case of distinctions drawn with respect to gender)[103] or are necessary to a compelling state interest (as in the case of race).[104] Then Kennedy's equal protection analysis in *Lawrence* would have had some importance.

X. *LAWRENCE'S* PAY OFF

One hates to run the risk of sounding like the mother complaining to the lifeguard who has just saved her child from drowning that the guard failed to retrieve the child's hat, *but* as *Lawrence* stands, gays have won, but won little, from the case. Kennedy's privacy analysis does not even tell us that laws which "unduly burden" gays' rights to have sex must be overturned. That—a law placing an "undue burden upon a right"—was the relatively weak test used in *Casey* for determining what abortion regulations would be barred.[105] A law like the ban on gay military service or any other law which requires gay celibacy as a condition of employment would seem to substantially burden the right to sex, all the more so in light of *Casey's* claim that "[t]he proper focus of constitutional inquiry is the group for whom the

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

102 In race law, the Court made the same mistake of casting itself as a state actor in Shelley v. Kraemer, 334 U.S. 1 (1948) (barring racially keyed restrictive covenants).

103 *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that females may not be given an advantage over males when states designate an age at which it becomes legal to drink near-beer).

104 *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (holding that prejudices against mixed race children may not be given judicial effect when it comes to assigning custodial rights).

105 *See Casey*, 505 U.S. at 874 (discussing the "undue burden" test).

law is a restriction, not the group for whom it is irrelevant."[106] Through its silence, *Lawrence* doesn't even give gays the protections, which *Casey* gave to those who sought abortions.

Scalia correctly points out that as far as the tests actually used in *Lawrence* are concerned, discriminations against gays have only to pass the test that all legal distinctions have to pass, namely, that they are rationally related to some legitimate state interest.[107] Laws are only struck down by this standard when, as in *Lawrence* itself, courts are grossly negligent in considering the possibilities. Ironically, if O'Connor's concurrence had been the opinion of the Court, gays would actually have gotten more constitutional traction than Kennedy's opinion gives, even though her concurrence would not have overturned *Bowers*.[108] Admittedly O'Connor does not articulate a clear standard, but she would have the court apply "a more searching [than usual] form of rational basis review to strike down laws" which draw distinctions with regard to social groups whose defining characteristic is not the product of the law itself.[109] Hippies and the mentally challenged are groups which exist independently of laws affecting them, but the group of people whose tax rate is over 18% or who drive on the wrong side of the road do not exist as a group independently of laws that draw distinctions with respect to them. Such enhanced equal protection review would apply to gays and at least give good grounds for holding over-inclusive and under-inclusive laws unconstitutional—and these determinations are the nuts and bolts of most constitutional cases. It is under these conditions that gays would reasonably expect to regularly win future cases.[110]

For all of its talk of illegitimate stigmas directed against gays, *Lawrence* fails to clarify whether the state now has a compelling interest in barring discrimination against gays as it does in the case of women and racial minorities.[111] If such an interest had been articulated, the Court could overcome its past rush to have the First Amendment protect private sector discrimination against gays, and overturn *Hurley v. Irish-American Gay, Lesbian*

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106 *Id.* at 894.

107 *See Lawrence*, 123 S. Ct. at 2488-89 (Scalia, J., dissenting).

108 O'Connor is explicit that she would not overturn *Bowers*. *See id.* at 2484 (O'Connor, J., concurring). Her analysis would only overturn laws that treated same-sex and different-sex sodomy differently. *See id.*

109 *See id.* at 2485.

110 And perhaps see some past cases overturned, like, San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) (ruling that use of phrase "Gay Olympics" is a trademark violation of the U.S. chartered U.S. Olympic Committee and raises no constitutional issues).

111 *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (stating that Minnesota has a "compelling interest in eradicating discrimination against its female citizens"); Bob Jones University v. United States, 461 U.S. 574, 604 (1983) (finding that "eradicating racial discriminations in education" is "compelling" and "overriding" governmental interest).

and Bisexual Group of Boston, Inc.[112] and *Boy Scouts of America v. Dale.*[113]

Ironically, probably the most helpful thing to emerge from *Lawrence* for future gay litigation comes from Justice Scalia's dissent, a passage where he provides an eminently quotable explanation of why procreation cannot constitute the ground for barring gays from marrying. Scalia rhetorically queries, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."[114] He also helpfully points readers to legal progress in Canada, even citing the case in which, two weeks earlier, Ontario's highest court had ruled that the Province must let gays marry and do so starting on the very day the ruling came down, a ruling which the Canadian Government chose not to appeal.[115] But of the opinion of the Court in *Lawrence* as written, we may say in the words of Tallulah Bankhead "There is less in this than meets the eye."[116]

XI. SLIGHTLY TREMBLING REDEMPTIONS

In *Lawrence*, Kennedy can bring himself to use the phrase "anal sex," but love among gay couples goes unnamed, leaving the impression that it is unnamable. Instead, gay love is blanched into "personal relationship" and given the status of a love that dare not speak its name among Christian people.[117] By way of contrast, remember the rhetoric of the paean to

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[112] 515 U.S. 557 (1995) (holding that all parades have core First Amendment protections, which trump civil rights legislation that otherwise would protect gays from private sector discrimination).

[113] 530 U.S. 640 (2002) (holding that a First Amendment right to "expressive association" trumps state anti-discrimination statutes protecting gays from private sector discrimination).

[114] *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).

[115] *Id.* at 2497 (citing Halpern v. Toronto, 172 O.A.C. 276 (2003)).

[116] *See* Oxford Dictionary of Modern Quotations 22 (Oxford University Press 2002). Bankhead whispered the sentence to the literary critic Alexander Woollcott while they were viewing a revival of Maurice Maeterlinck's symbolist play *Aglavaine and Selysette.* The Eleventh Circuit has already found all the chinks in *Lawrence*'s armor and has held that under *Lawrence* gays now have no more strengthened rights under either due process or equal protection analysis than they would have had had *Lawrence* never been written. *See* Lofton v. Sec'y of Dept. of Children & Family Serv., No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004), 22-27 (upholding Florida's statutory ban on sexually active homosexuals adopting children).

[117] In writing Lawrence, Kennedy might profitably have had in mind Allan Bloom's distinction between relationships and love affairs:

> 'Relationships,' not love affairs, are what [students] have. Love suggests something wonderful, exciting, positive and firmly seated in the passions. A relationship is gray, amorphous, suggestive of a project, without a given content, and tentative. You work on a relationship, whereas love takes care of itself. In a relationship the difficulties come first, and there is a search for common grounds. Love presents the illusions of perfection to the imagination and is forgetfulof all the natural fissures in human connection.

BLOOM, *supra* note 50, at 124.

heterosexual marriage with which Justice Douglas concludes *Griswold*. He invokes the concepts of the "noble" and the "sacred"—twice—to make heterosexuals feel glorious about themselves.[118] Apparently their having power isn't enough, they need glory too. Kennedy plays out an American anxiety. In contemporary American culture, having to think about gay love is more frightening than having to think about guys buttfucking.[119] Even as Kennedy tries to be gay supportive, he can't make the leap of understanding that really matters. He has no inkling of the splendidness of gay love.

Still, *Lawrence* is better than *Bowers*. In the coda to *Lawrence*, Kennedy casts the case as a redemptive moment in the history of constitutional law:

> Had those who drew and ratified the Due Process Clauses [] known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.[120]

Who is the "we" in Kennedy's "us" here? Well, one suspects that in the first instance Kennedy is thinking of himself. When in 1987 he was elevated from the Ninth Circuit Court of Appeals to replace Justice Powell on the Supreme Court, he brought with him a solidly anti-gay record. In all four of the gay cases in which he had a recorded vote as a circuit court judge, he voted against gays.[121] These cases covered military policy, privacy, employment, family issues, and immigration.[122]

In *Singer v. U.S. Civil Service Commission*, he upheld the firing of an openly gay federal civil servant on the grounds that employing an openly gay person was holding the government up to shame.[123] In *Lawrence*, Kennedy says just the opposite, that "[t]he State cannot demean [homosexuals']

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118 *See Griswold*, 381 U.S. at 485-86.

119 *See* DAVID MAMET, EDMOND 89-106 (Grove Press 1983). Mamet's play *Edmond* depicts what it takes to be the inevitable downward spiral to hell that lays before a(ny) male who takes even one tiny step beyond the bounds of hetero-martial monogamy. *Id.* In the closing scenes of the play, at the lowest level of hell, our hero Edmond, as the ultimate act of abjection, falls in love with a fellow prisoner, an act which the play views as far more degrading to Edmond than his being raped by a prisoner. *Id.*

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

121 *See Reagan Appoints Antigay Judge to Supreme Court*, 1987 LESBIAN/GAY LAW NOTES 69 (December 1987) ("Kennedy has been characterized in the press as 'moderate,' but seems such on our issues only by comparison to Rehnquist, Scalia and White.").

122 *See* Society for Individual Rights v. Hampton, 528 F.2d 905 (1975) (federal employment); Singer v. U.S. Civil Service Commission, 530 F.2d 247 (1976) (federal employment); Beller v. Middendorf, 632 F.2d 788 (1980) (upholding ban on gays in the military); Sullivan v. Immigration and Naturalization Service, 772 F.2d 609 (1985) (holding gay relationships do not count for possible hardship exceptions to INS deportation orders).

123 *See Singer*, 530 F.2d at 247.

existence."[124] In *Beller v. Middendorf*,[125] Kennedy's opinion upheld the Defense Department's ban on gays from the armed forces based not on anything gays do, but on the disruptions possibly caused by other people's dislike of gays. In fact, his opinion provided the wording for the Department's exclusionary policy from 1981 to 1993.[126] And perhaps most surprising to the reader of *Lawrence*, Kennedy's opinion in *Sullivan v. Immigration and Naturalization Service* upheld the deportation of a gay man, claiming that the deportation's destruction of the man's twelve-year marital-like relation with his life-partner would not count as an "extreme hardship," a condition that, by statute, would have barred the deportation.[127] With no independent analysis, Kennedy simply adopted the I.N.S.' conclusion that the relationship either counted for nothing in its own terms or should be analogized to a relationship of commercial dependence.[128] In 2003, Kennedy held the opposite in *Lawrence* by stating that the "enduring" and "personal bond[s]" of gay couples now have constitutional recognition.[129]

So it appears that in his own life, Kennedy has compressed into a mere eighteen years the span between "blind" " times" past and "later generations" possessed of "insight" into the "more specific" "components of liberty."[130] Gays and our supporters should hope that the rest of the nation crosses over this bridge as quickly.[131]

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

125 *See Beller*, 632 F.2d at 788.

126 *Id.* at 811. In *Beller*, Kennedy wrote:

> The Navy can act to protect the fabric of military life, to preserve the integrity of the recruitingprocess, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own.

Id.; *see also* MOHR, *supra* note 15, at 96. In 1993, the Department of Defense directive was replaced by a federal statute mandating a policy of "don't ask, don't tell" for gays in the military. *See* 10 U.S.C.A. § 654 (1995).

127 *See Sullivan*, 772 F.2d at 609-611.

128 The dissent in *Sullivan* had given Kennedy the opportunity to come to a different conclusion arguing that "this failure [of I.N.S. and so of Kennedy] to recognize Sullivan's emotional hardship is particularly troublesome because he and Adams have lived together as a family." *Sullivan*, 772 F.2d at 612.

129 *See Lawrence*, 123 S. Ct. at 2478.

130 *See id.* at 2484.

131 Another member of the *Lawrence* majority, Justice Souter, seems also to have undergone a conversion on gay issues. In 1987, three years before he replaced Justice Brennan on the U.S. Supreme Court, while serving as a justice on the Supreme Court of New Hampshire, Souter joined what is one of the most egregious anti-gay court decisions of all time. The opinion upheld a ban on gay adoption and foster parenting on the ground that gays would cause the children in their care to become gay. For its rationale, the case appealed to nothing but anti-gay stereotypes, especially the stereotype that gayness is a corruptive contagion. But what was most shocking was that the premise that being gay is so evil that it has to be prevented at all costs was taken by the justices as so obvious that the premise is never actually stated in the opinion. *See* Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

ADDENDUM, FEBRUARY 2004:

HETEROSEXUAL TRIUMPHALISM IN THE LOWER COURTS

By January 2004, the weaknesses of *Lawrence* as a vehicle for gay legal progress were becoming apparent in the lower courts. Sorry to say, the Cassandra-like predictions of this article are coming true. Because *Lawrence* skirted articulating any clear principles, two important lower court cases have treated *Lawrence* as though it were limited to its facts and contained no implications for other areas of gay law.[132] The cases held that under *Lawrence* gays now have no more strengthened rights under either due process or equal protection analyses than they would have had had *Lawrence* never been written. Tellingly: neither case felt any post-*Lawrence* compunctions about asserting Heterosexual Supremacy as the major premise for their anti-gay conclusions.

The eleventh circuit upheld a Florida statute barring all adoptions by gay people.[133] Florida is the only state in the country to have such a law, and even Florida allows gays to serve as foster parents and guardians. The court's substantive due process analysis denied a claim that a long-term guardianship relation would de facto create a gay family with the guardian and ward having the same protected status as parent and child. To reach this conclusion, the court, citing Scalia's dissent in *Lawrence*, asserted that *Lawrence* announced no new fundamental rights.[134]

In sustaining against equal protection challenge the Florida law's explicit discrimination against gay people, the court cites *Barnes v. Glen Theatre, Inc.* as supporting a claim that the law *could* be upheld simply as promoting public morality.[135] So understood, the law's legitimacy would lay in its signaling to society: heterosexuals good, gays bad, or at least, heterosexuals good, gays less than good. It will be remembered that *Bowers v. Hardwick* was *Barnes'* sole surety that public morality was a legitimate (indeed substantial) state interest.[136] But ultimately the eleventh circuit rested its rational-basis analysis on a claim that barring gays from adopting helps the state "in providing heterosexual role modeling" and, in a phrasing

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132 *See* Lofton v. Sec'y of Dept. of Children & Family Serv., 2004 WL 161275 (11th Cir. Jan. 28, 2004) (upholding Florida's statutory ban on sexually active homosexuals adopting children). *See generally* Kansas v. Limon, 2004 Kan. App. Lexis 110 (upholding sexual-orientation specific Romeo and Juliet law).

133 *See generally Lofton*, 2004 WL 161275.

134 *See id.* at *23 (quoting *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting)).

135 *See id.* at *30 n.17 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (upholding against first amendment challenge Indiana's law requiring female strippers in bars to wear pasties and G-strings)).

136 *See Barnes*, 501 U.S. at 569.

that echoes the cadences and vocabulary of Chief Justice Burger's concurrence in *Bowers*, "nor has the accumulated wisdom of several millennia of human experience discovered a superior model" to heterosexuality.[137] At heart the argument is no different than the raw appeal to "public morality." The poorly hidden major premise is: gays aren't as good as heterosexuals. And then the argument runs: people should be good; when people make people, they make them like themselves; therefore, heterosexuals, not gays, should make people.

The other case, announced two days after the first, is perhaps more startling. In it, a lad was given a sentence of 206 months in prison for giving another lad head. Under Kansas's sexual orientation specific "Romeo and Juliet law," had one of the two lads been a lass, the sentence would been only 13 to 15 months. In February of 2002, a Kansas appeals court upheld the 206-month sentence.[138] Kansas' supreme court declined to hear an appeal of the sentence. The U.S. Supreme Court took the case under advisement, and then the day after *Lawrence* was announced, vacated the opinion and remanded the case for "further consideration in light of *Lawrence*."[139] Despite the instruction that *Lawrence* was relevant to the case, on remand the Kansas appeals court failed to probe any possible implications of *Lawrence* for the case at hand. In particular, it failed to see any possible analogies to the role that *Eisenstadt*-equality played in *Lawrence* — an equality that seemed to make distinctions in different groups' access to sexual acts more than minimally suspect.[140]

Astonishingly, the court admitted that it had originally upheld the 206-month sentence "relying primarily upon *Bowers v. Hardwick*."[141] But with *Bowers* now reversed and declared wrongly decided to begin with, the Kansas court marched right on ahead as though *Bowers* were still good law. It upheld the Romeo and Juliet law's discrimination against gays on the ground that the discrimination could be understood as a measure aimed at "protecting and preserving the traditional sexual mores of society" and "prevent[ing] the gradual deterioration of the sexual morality approved by a majority of Kansans."[142] Here the claim of heterosexual superiority is coupled with the stereotype of gays as a corruptive contagion. It is not just

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[137] *See Lofton*, 2004 WL 161275 at *32; *see also Bowers*, 478 U.S. at 196 (Burger, C.J., concurring) ("[H]omosexual conduct [has] been subject to state intervention throughout the history of Western Civilization." To protect homosexual acts "would be to cast aside millennia of moral teaching.").

[138] *See* Kansas v. Limon, No. 85-898, slip op. at 12, 41 P.3d 303 (Kan. Ct. App. 2002).

[139] *Limon*, 41 P.3d 303 (Kan. Ct. App. 2002) *vacated by* 123 S. Ct. 2638 (2003).

[140] *See generally* Eisenstadt v. Baird, 406 U.S. 438 (1972) (holding, on equality grounds, that if the married have a right to contraception, then the unmarried do too).

[141] *See Limon*, No. 85-898, slip op. at *2.

[142] *Id.* at *6.

that across the registers of goodness gays have a lower standing than heterosexuals, but gays actually make things worse off for their betters. Like viruses and vampires, gays make others worse by being around them; they make them like themselves, the undead, the unmoral.

One would think that these premising claims of Heterosexual Supremacy would fly in the face of *Lawrence*'s assertion that gay people "are entitled to respect for their private lives. The state cannot demean their existence."[143] But since Kennedy failed to convert this assertion into a constitutional test, a conservative judge could simply dismiss it as just so much dicta or window dressing. It will be interesting to see what the Supreme Court does when its spurned remand revisits it on appeal. The single time before that such a sequence unspooled in a gay case, the Supreme Court did not shine. After announcing *Romer*, the Court vacated an opinion of the Sixth Circuit and remanded its case to be reheard in light of *Romer*. The Sixth Circuit had upheld a city charter amendment that barred the Cincinnati City Council from passing gay rights legislation. On remand the Sixth Circuit disregarded *Romer* and upheld the law again.[144] And the Supreme Court? It punted — refusing to hear the case on appeal. Sic transit . . . .

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

144 *See* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).