INTRODUCING *LAWRENCE V. TEXAS*: SOME BACKGROUND AND A GLIMPSE OF THE FUTURE

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In June of 2003, the Supreme Court made a groundbreaking decision relating to the legal position of lesbians, gay men and other sexual minorities in the United States. This case, *Lawrence v. Texas*,[1] found a Texas criminal law prohibiting sodomy between persons of the same sex[2] to be unconstitutional and thereby, dramatically strengthened claims by sexual minorities[3] for civil rights. The essays in this volume discuss various aspects of this important Supreme Court decision from a range of perspectives. In this introductory essay, I briefly review the legal background against which *Lawrence* was decided and consider several important themes and possible implications of this decision in order to lay a foundation for the essays that follow.

I. BEFORE *LAWRENCE*

The case against Texas's sodomy law focused on two constitutional arguments: privacy and equal protection. My discussion of the legal background of the *Lawrence* decision is divided into two sections focusing, respectively, on each argument.

A. *Privacy*

The United States Constitution, unlike some state constitutions,[4] does not explicitly mention a right to privacy. Over the past forty years, the Supreme Court has interpreted the Constitution to include a right to privacy.

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

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

[3] My focus will be on the rights of lesbians, gay men and bisexuals before and after *Lawrence*. To some extent related in interesting ways to the issues I will be discussing are the rights of transgendered people. For a discussion of the implications of *Lawrence* for transgendered people, see Paisley Currah, *The Other "Sex" in Lawrence v. Texas*, *infra* pp. 321-24.

[4] *See, e.g.*, CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

This process started in 1965 with *Griswold v. Connecticut*.[5] In *Griswold*, which overturned a law prohibiting the use of birth control devices on the ground that it violated the right to privacy of married couples, various justices found the right to privacy in different places in the Constitution: within the "penumbras" and "emanations" of the Bill of Rights,[6] the Ninth Amendment's reservation to the people of certain unenumerated fundamental rights[7] or as "implicit in the concept of ordered liberty."[8] Eight years later, in *Roe v. Wade*, the Court more definitively located the right to privacy in "the Fourteenth Amendment's concept of personal liberty and restrictions on state action."[9] By the late seventies, buttressed by these and other decisions, the right to privacy seemed broad, robust and firmly grounded in the Due Process Clause of the Fourteenth Amendment.[10] Advocates of lesbian and gay rights expected that it was only a matter of time until privacy arguments would be extended to encompass the right to engage in sexual activities with people of the same sex and that such privacy arguments would play a central role in making the case for lesbian and gay rights in the courts.[11]

Some advocates of lesbian and gay rights were confident that the expansion of the right to privacy would take place when the Supreme Court heard the case of Michael Hardwick, who was arrested for engaging in consensual oral sex with another man in his own bedroom[12] in violation of Georgia's sodomy law.[13] Hardwick's primary argument before the Supreme Court was that Georgia's sodomy law was unconstitutional because it violated the right to privacy.[14] In a 5-4 decision, the Supreme Court rejected this

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[5] 381 U.S. 479 (1965).

[6] *Id.* at 484.

[7] *See id.* at 486 (Goldberg, J., concurring).

[8] *Id.* at 500 (Harlan, J., concurring); *see also id.* at 502 (White, J., concurring).

[9] 410 U.S. 113, 153 (1973) (finding a woman's right to chose to have an abortion to be constitutionally protected on privacy grounds).

[10] *Roe* grounded the right to privacy in substantive due process. For a more recent case that deals with substantive due process, see Washington v. Glucksberg, 521 U.S. 702 (1997).

[11] *See, e.g.*, WALTER BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 52-73 (1973); David Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957 (1979); James Rizzo, Note, *Unnatural Acts and the Constitutional Right to Privacy*, 45 FORDHAM L. REV. 1281 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1637 (1974) ("The privacy argument is clearly the best argument and the one that should succeed in securing constitutional protection for the private exercise of consensual homosexual activity."); Note, *Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 533 (1976).

[12] *See* PETER IRONS, *What Are You Doing in My Bedroom?* *in* THE COURAGE OF THEIR CONVICTIONS 392 (1988) (interview of Michael Hardwick).

[13] GA. CODE ANN. § 16-6-2 (1984) ("[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[14] Respondent's Opening Brief at 3, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (arguing that Supreme Court precedent regarding the right to privacy demands a substantial justification for criminalizing consensual sexual intimacies between adults engaged in one's

argument, holding that the privacy right articulated in earlier cases applied only when there was a connection to "family, marriage or procreation."[15] (Of the three current Supreme Court justices on the court in 1986, then-Justice Rehnquist and Justice O'Connor were in the majority, while Justice Stevens dissented.) According to the *Bowers* majority, the constitutional right to privacy does not entail that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription"[16] or the existence of a "fundamental right to homosexual sodomy."[17] Although various state courts, both before and after *Bowers*, have interpreted their respective state constitutions as providing greater privacy protection than the *Bowers* court,[18] federal privacy jurisprudence seemed to hit a brick wall on the issue of homosexual sodomy.

Although there were not a great number of sodomy prosecutions after *Bowers*, the effects of the Supreme Court's decision on lesbians, gay men, and other sexual minorities were far-reaching. *Bowers* was interpreted by various courts as establishing, in essence, the presumptive criminality of lesbians, gay men and bisexuals. For example, in *Padula v. Webster*, the Court of Appeals for the District of Columbia defended the constitutionality of the ban on lesbians and gay men serving in the FBI citing *Bowers*:

> If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.[19]

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bedroom); *see also* Paris Baldacci, *Lawrence and Garner: The Love (or at Least the Sexual Attraction) that Finally Dared to Speak Its Name*, *infra* pp. 289-309 (discussing the briefs and oral arguments in *Bowers* and contrasting them with those in *Lawrence*).

15 *Bowers*, 478 U.S. at 191.

16 *Id.*

17 *Id.*

18 Privacy-based arguments were successful in persuading some state courts to overturn their state's sodomy laws both before *Bowers*—*see, e.g.*, People v. Onofre, 51 N.Y.2d 476 (1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980)—and after—*see, e.g.*, Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) (finding the state's sodomy law unconstitutional both on privacy grounds and on sex-discrimination grounds); Williams v. Baltimore, No. 98036031/CC-1059, 1998 Extra Lexis 260 (Md. Cir. Ct. 1999); Powell v. State, 510 S.E.2d 18 (Ga. 1998) (overturning the sodomy law that was upheld in *Bowers*); Gryczan v. Montana, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Michigan Org. for Human Rights v. Kelley, No. 88-815820 CZ (Wayne County Cir. Ct. July 9, 1990) (unpublished). For further discussion of state court rulings in sodomy cases, see Melanie Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863 (2000).

19 822 F.2d 97, 103 (D.C. Cir. 1987) (upholding the FBI's policy of excluding lesbians, gay men and bisexuals from employment in the agency citing *Bowers*). For similar reasoning, see Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995) ("*Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and

Additionally, state courts, citing sodomy laws, refused to give lesbians, gay men and bisexuals' custody of their children simply on the basis of their sexual orientation.[20] In general, the Supreme Court's ruling that sodomy laws were constitutional coupled with the continued existence of such laws had significant legal and social effects on lesbians and gay men.[21]

B. *Equal Protection*

After *Bowers*, litigators and legal theorists advocating for lesbian and gay rights in the federal courts began the task of "arguing around [*Bowers v.*] *Hardwick.*"[22] In the process, they turned away from privacy arguments[23] and developed equality arguments based on the Equal Protection Clause of the Fourteenth Amendment.[24] Part of the post-*Bowers* litigation strategy involved a shift from a focus on act-based laws (like the repeal of sodomy laws) to laws relating to identities (like providing legal protections against discrimination on the basis of sexual orientation).[25]

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bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class'"); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (citing *Bowers* as one reason for upholding exclusion of sexual minorities from jobs requiring security clearance), Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) (citing *Bowers* in upholding discharge of lesbian from the military); Woodward v. U.S., 871 F.2d 1068, 1076 (Fed. Cir. 1989) (citing *Bowers* in upholding discharge of gay Naval reservist).

[20] *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (noting that "[c]onduct inherent in lesbianism is punishable as a . . . felony" as factor in denying a lesbian custody of her child); and *Ex Parte* D.W.W., 717 So. 2d 793 (Ala. 1998) (same). *See also* Ruthann Robson, *The Missing Word, infra* pp. 397-409 (discussing *Bottoms* and other similar cases).

[21] *See, e.g.*, Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001); Christopher Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

[22] Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1640.

[23] Some have argued that, *Bowers* aside, privacy-based arguments are limited in what they can offer lesbians and gay men. *See, e.g.*, MORRIS KAPLAN, SEXUAL JUSTICE 17-46, 211-27 (Routledge 1997); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992). For post-*Lawrence* discussion of concerns about privacy-based arguments for lesbian and gay rights, see Richard Mohr, *The Shag-a-delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in* Lawrence v. Texas, *infra* pp. 365-96 (expressing preference for an equal protection argument for gay rights over a privacy-based argument); and Andrew Seligsohn, *Choosing Liberty over Equality and Sacrificing Both: Equal Protection and Due Process in* Lawrence v. Texas, *infra* pp. 411-22 (same). *But see* Nancy Knauer, Lawrence v. Texas: *When "Profound and Deep Convictions" Collide with Liberty Interests, infra* pp. 325-36 (expressing preference for privacy arguments).

[24] U.S. CONST. amend. XIV ("No State shall . . . deny any person . . . the equal protection of the laws.").

[25] For a discussion of the complicated relationship between focusing on sexual acts and focusing on sexual identities, see Janet Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993). For a discussion of the nature of sexual-orientation identities, see EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION (Oxford University Press 1999) [hereinafter STEIN, MISMEASURE]; Edward Stein, *Law, Sexual Orientation and Gender, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, 993-1006 (Jules Coleman & Scott J. Shapiro eds., 2002) [hereinafter Stein, *Law*]. *See also* Jami Weinstein and Tobyn DeMarco, *Challenging Dissent: The*

1. Sexual Orientation as a Suspect Classification

Over one hundred years ago, in discussing the Equal Protection Clause, the Supreme Court expressed doubts that the Fourteenth Amendment would be used to invalidate any sort of discrimination except discrimination by a state against African-Americans.[26] Over the years that have followed, the Court has interpreted the Fourteenth Amendment as requiring skepticism towards statutes that make use of classifications other than race and, on that basis, found many such statutes unconstitutional.[27] Litigators and legal scholars attempting to work around *Bowers* argued that statutes that make use of sexual-orientation classifications, like those that make use of racial and other suspect classifications, should be subject to similar skepticism and scrutiny. If courts give heightened scrutiny to statutes that make use of sexual-orientation classifications, then such statutes will be found to violate equal protection.[28]

Generally, the Supreme Court has articulated some factors that should be considered when determining whether more than a mere rational basis is required to evaluate the constitutionality of a statute that invokes a classification. These factors include whether the classification has historically been used to intentionally discriminate against a particular group,[29] whether the use of this classification bears any "relation to ability to perform or contribute to society,"[30] whether any groups demarcated by this classification lack the political power to combat the discrimination,[31] and whether groups demarcated by this classification exhibit obvious, immutable or distinguishing characteristics that define them as a discrete and insular group.[32] Before *Lawrence*, most courts that considered the question held that

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Ontology and Logic of Lawrence v. Texas, *infra* pp. 423-65.

[26] *See* Slaughter House Cases, 83 U.S. 36, 81 (1872).

[27] *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (interpreting the Fourteenth Amendment as requiring heightened scrutiny for sex); Plyler v. Doe, 457 U.S. 202, 218-23 (1982) (same with respect to alienage); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (legitimacy); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (national origin); and Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (ethnic classification). Some scholars have argued that the enacting Congress intended the Fourteenth Amendment to apply to other classifications besides race. *See, e.g.*, Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988).

[28] Another path to heightened scrutiny under the Equal Protection Clause is to show that the statute affects the state's distribution of fundamental rights. Because *Bowers* explicitly rejected the idea that homosexual sodomy is a fundamental right, attempts to argue around that case have not focused on the fundamental-right path to heightened scrutiny under the Equal Protection Clause.

[29] *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[30] *Id.* at 686.

[31] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985).

[32] Bowen v. Gilliard, 483 U.S. 587, 602 (1987). For discussion of the significance of the immutability of a characteristic, see STEIN, MISMEASURE, *supra* note 25, at 164-228; Stein, *Law, supra* note 25, at 1011-15; Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the*

statutes that make use of sexual-orientation classifications do *not* deserve heightened scrutiny.[33] The few federal courts, which have ruled that sexual-orientation classifications warrant heightened scrutiny, have had their decisions overruled or vacated.[34]

Before *Lawrence,* the closest the Supreme Court came to addressing the question of whether sexual-orientation discrimination by the state deserves heightened scrutiny was in *Romer v. Evans.*[35] *Romer* concerned the constitutionality of an amendment to the Colorado Constitution that prohibited any state action protecting lesbians, gay men and bisexuals from discrimination and, further, repealed various city ordinances prohibiting sexual-orientation discrimination.[36] A six-justice majority found this amendment violated the Equal Protection Clause of the Fourteenth Amendment but did so without reaching the question of whether sexual orientation deserves heightened scrutiny. Rather, the Court held that the amendment failed to pass constitutional muster even under rational review. Justice Kennedy, for the majority, said:

> [T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an

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New Argument from Immutability, 46 STAN. L. REV. 503 (1994); Samuel Marcosson, *Constructive Immutability,* 3 U. PA. J. CONST. L. 646 (2001). *See also* Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. Ct. App. 1998).

[33] *See, e.g.,* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (refusing to grant heightened scrutiny for sexual-orientation classifications in the context of in the context of military's "Don't Ask, Don't Tell" policy); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (refusing to grant heightened scrutiny in the context of the Army's policy of discharging homosexuals); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same in the context of Navy's identical policy); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (refusing to grant heightened scrutiny in the context of the FBI). The exception is *Tanner,* which held that lesbians and gay men are "members of a suspect class to which certain privileges and immunities are not made available." *Tanner,* 971 P.2d at 447.

[34] *See, e.g.,* Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988) (holding that sexual-orientation classifications deserve heightened scrutiny and, under this standard of review, that military's pre-1992 policy of discharging homosexuals was unconstitutional), *vacated and aff'd en banc on other grounds,* 875 F.2d 699 (9th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987) (holding that homosexuals or those perceived as homosexuals deserve heightened scrutiny under equal protection), *rev'd,* 895 F.2d 563 (9th Cir. 1990); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991) (holding that sexual orientation is a suspect classification and thus deserves heightened scrutiny), *rev'd,* 976 F.2d 623 (10th Cir. 1992).

[35] 517 U.S. 620 (1996). Two justices, in a dissent to a denial of a writ of certiorari, did suggest that sexual-orientation discrimination did violate equal protection. Justice Brennan joined by Justice Marshall argued that "discrimination against homosexuals . . . raises significant constitutional issues [for] . . . equal protection analysis." Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied,* 470 U.S. 1009 (1985) (Brennan, J., dissenting).

[36] COLO. CONST. art. II, § 30b (1992) ("Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.").

> exceptional and . . . invalid form of legislation [and] its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.[37]

Thus, while *Romer* did not rule that sexual orientation receives strict or intermediate scrutiny—respectively, the types of heightened scrutiny associated with, for example, race and sex[38] classifications—some scholars view the *Romer* Court as in fact applying a somewhat heightened standard of review, one roughly equivalent to intermediate scrutiny or one in between mere rational review and intermediate scrutiny ("rational review with bite"[39]).[40] Traditionally, the requirement that a statute or state action be rational is very weak and highly deferential; almost any justification is enough to establish rationality.[41] Given how weak the requirement of mere rationality is, many have thought that the Court in *Romer* must have been applying more than the weak rationality requirement. Supporters of this reading of *Romer* might point to an early sex discrimination case, *Reed v. Reed*,[42] where the Court overturned a state law in which men were, all else being equal, chosen over women as executors of estates on the grounds that it was not rational (despite the fact that, in earlier decisions, the Court had held sex-based preferences to satisfy the standard of rational review[43]). After *Reed*, the Court flirted with strict scrutiny for sex classifications before settling on an intermediate standard of review under which the use of sex classifications must be "substantially related" to "important government objectives."[44] The requirement of "important government objectives" is

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[37] *Romer*, 517 U.S. at 632.

[38] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (striking down a state law that had different age requirements for boys and girls to buy low-alcohol beer after determination of whether the use of "classifications by gender . . . serve[s] important governmental objectives and [is] substantially related to achievement of those objectives").

[39] *See, e.g.*, Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

[40] *See, e.g.*, Lynn [A.] Baker, *Gay Rights and the Courts: The Amendment 2 Controversy: The Missing Pages in the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387 (1997); Matthew Coles, *Continuing the Civil Rights Struggle: Ends and Means: The Meaning of* Romer v. Evans, 48 HASTINGS L.J. 1343 (1997); Kevin [H.] Lewis, *Equal Protection After* Romer v. Evans: *Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 (1997); Cass [R.] Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996).

[41] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993) (rational review standard is highly deferential). This remains true at least in some cases decided after *Romer*. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (applying rational review to a ban on physician-assisted suicide).

[42] 404 U.S. 71 (1971).

[43] *See, e.g.*, Ruth Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 4 (1975) ("In the nation's highest tribunal, until 1971, no legislatively drawn sex line, however sharp, failed to survive constitutional challenges.").

[44] Craig v. Boren, 429 U.S. 190, 197 (1976).

weaker than the very stringent scrutiny applied to classifications based on race, but it is significantly stronger than mere rational review. In recent years, the Court's formulation of the test for laws that make use of sex classifications has gotten stronger and it now seems to be only marginally weaker than strict scrutiny.[45] Just as *Reed* indicated that heightened scrutiny for sex was imminent, some scholars have proposed that *Romer* suggests that somewhat heightened scrutiny for sexual orientation is just around the corner.[46] After *Romer*, however, lower courts have been inconsistent in how they review statutes that make use of sexual-orientation classifications. Applying rational review, some have invalidated laws that discriminate on the basis of sexual orientation,[47] while other courts, applying the same standard, at least in name, have found some instances of discrimination on the basis of sexual orientation to be constitutionally permissible.[48]

Not only was *Romer* unclear about the level of scrutiny it applied to the Colorado amendment, it also left unresolved the status of *Bowers*. Justice Kennedy, writing for the majority in *Romer*, simply did not mention *Bowers*. In his dissent to *Romer*, Justice Scalia described *Bowers* as "unassailable" and chastised the majority for failing to discuss it.[49] Specifically connecting *Bowers* to *Romer*, Scalia argued that:

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[45] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (holding that the justification for laws that make use of sex-based classifications must be "exceedingly persuasive"). For discussion of the meaning of *United States v. Virginia*, see Cass Sunstein, *supra* note 40, at 75. *Cf.* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53 (2001) (upholding an immigration and naturalization provision that imposed different requirements for acquisition of citizenship depending upon whether applicant's mother or the father was a U.S. citizen); Miller v. Albright, 523 U.S. 420 (1998) (same, but without a majority opinion from the Court).

[46] An alternative understanding of the effect of *Romer* combined with *U.S. v. Virginia* and *Miller* might be that the "hard edges of the tripartite division [rational review, intermediate scrutiny, and strict scrutiny] have . . . softened" and, in its place, the Court has adopted an approach of "general balancing of relevant interests." Sunstein, *supra* note 40, at 77.

[47] Among the cases in which courts have used the rational review standard to overturn a law or practice that makes use of sexual-orientation classifications are Stemler v. City of Florence, 126 F.3d 865, 873 (6th Cir. 1997) (holding that selective prosecution based on sexual orientation fails rational review); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that there was "no rational basis for permitting one student to assault another based on the victim's sexual orientation"); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998) (holding that decision not to renew a public school teacher's coaching position based on her sexual orientation fails rational review); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (holding that decision not to rehire a teacher based solely of sexual orientation fails rational review).

[48] *See, e.g.*, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (upholding, under rational review, the constitutionality of a city charter that eliminated anti-discrimination protections for lesbians, gay men and bisexuals); Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992) (finding the federal government's old policy on the employment of homosexuals to be constitutional under rational review); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (finding the military's old policy on homosexuality to be constitutional under rational review); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (same).

[49] Romer v. Evans, 517 U.S. 620, 640 (Scalia, J., dissenting).

> [I]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual[s]. . . . And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct.[50]

Especially in light of Justice Kennedy's failure to respond to this line of argument in Scalia's dissent, the status of *Bowers* after *Romer* was unclear.

2. Sexual-Orientation Classifications as Sex Classifications

Another strategy for arguing around *Bowers* in order to make the case for lesbian and gay rights in the equal protection context is the so-called *sex-discrimination argument*, according to which any form of discrimination on the basis of sexual orientation constitutes sex discrimination. This argument, for example, says that a law prohibiting oral sex between two women, but *not* between one man and one woman, discriminates on the basis of sex because it prohibits a woman from doing something (namely, having oral sex with a woman) that it allows a man to do.[51] A handful of courts in the United States have, on the basis of the sex-discrimination argument, ruled in favor of lesbian, gay and bisexual plaintiffs[52] while other courts have rejected the sex-

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[50] *Id.* at 641 (Scalia, J., dissenting) (emphasis in original).

[51] *See, e.g.*, Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) (finding the state's sodomy law unconstitutional on sex-discrimination grounds, as well as on privacy grounds); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (considering and rejecting the sex-discrimination argument applied to Missouri's sodomy law); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145 (1988) (defending the sex-discrimination argument applied to sodomy laws).

[52] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that prohibitions against same-sex marriage constitute sex discrimination). Although the Hawaii Supreme Court held that Baehr's challenge to Hawaii's marriage law was rendered moot by an amendment to the state's constitution, HAW. CONST. art. 1, § 23 (1998), the case was not explicitly overruled by this decision. *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at 6 (Haw. Dec. 9, 1999). For a brief discussion of what happened in Hawaii, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 512-13 (2001) [hereinafter Stein, *Sex Discrimination*]. Other American courts have accepted the sex-discrimination argument. *See, e.g.*, Lawrence v. State, 14-99-00109-CR & 14-99-00111-CR (Tex. App. Hous. (14th Dist.) June 8, 2000) (holding Texas sodomy law violated the state's Equal Rights Amendment because it impermissibly discriminated on the basis of sex in virtue of applying only to oral and anal sex between people of the same sex,); *Jegley*, 80 S.W.3d 332; Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 29, 1998) (finding, in dicta, that prohibitions against same-sex marriage constitute sex discrimination); Engel v. Worthington, 23 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) (holding that a photographer who refused to publish yearbook pictures of same-sex couples invidiously discriminated on the basis of sex). Of these, only *Jegley* remains good law. The holding of *Brause*, like the holding in *Baehr*, was rendered moot by a Constitutional amendment—ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). The *Engel* opinion was withdrawn by order of the court. *See* Engel v. Worthington, No. S036051, 1994 Cal. LEXIS 558, at 1 (Cal. Feb. 3, 1994) (denying review and withdrawing the opinion by order of the court). The June 2000 *Lawrence v. Texas* opinion was not released for publication in law reports

discrimination argument.[53] While this argument was formulated well before *Bowers*,[54] it captured the attention of legal scholars and gay rights activists after *Bowers*.[55] In fact, while Lawrence's challenge to the Texas sodomy law was working its way through the Texas state courts, an intermediate appellate panel ruled that the sodomy law was unconstitutional in light of the sex-discrimination argument.[56] This decision was, however, withdrawn and overturned by the intermediate appellate court sitting en banc.[57]

II. *LAWRENCE V. TEXAS* IN THE SUPREME COURT

On September 17, 1998, John Geddes Lawrence and Tyron Gardner were arrested in Lawrence's home for engaging in anal sex in violation of Texas's Homosexual Conduct Law.[58] The two men were held over night in

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and was subsequently overruled by Lawrence v. State, 41 S.W.3d 349 (Tex. App.-Hous. (14th Dist.) 2001) (en banc), although that opinion was later overturned on other grounds by the U.S. Supreme Court in Lawrence v. Texas, 123 S. Ct. 2472. *See* discussion *infra* Part II. The sex-discrimination argument was also accepted by one judge in Baker v. Vermont, 744 A.2d 864, 905-15 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) and one judge in Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).

[53] *See, e.g., Walsh*, 713 S.W.2d at 510 (rejecting sex-discrimination argument applied to sodomy laws); *Baker*, 744 A.2d at 880 n.13 (rejecting sex-discrimination argument applied to prohibition on same-sex marriage); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974) (same); Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 127-28 (Wis. Ct. App. 1992) (rejecting sex-discrimination argument in context of employment discrimination lawsuit).

[54] Feminist theorists and activists first advanced this argument in the early 1970s. *See* ANDREW KOPPELMAN, GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 169 n.4 (University of Chicago Press 2002) (citing AMAZON EXPEDITION: A LESBIAN FEMINIST ANTHOLOGY (Phyllis Birkby et al. eds., 1973)); TI-GRACE ATKINSON, AMAZON ODYSSEY (Link Books 1974); FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY (Sarah L. Hoagland & Julia Penelope eds., 1988); JILL JOHNSTON, LESBIAN NATION: THE FEMINIST SOLUTION (Simon & Schuster 1973); Anne Koedt, *Lesbianism and Feminism, in* RADICAL FEMINISM 246 (Anne Koedt et al. eds., 1973); Radicalesbians, *The Woman Identified Woman, in* RADICAL FEMINISM 240. Opponents of the Equal Rights Amendment also articulated it. *See* WILLIAM ESKRIDGE, JR., GAY LAW: CHALLENGING THE APARTHEID OF THE CLOSET 219 (Harvard U. Press 1999) (citing 118 CONG. REC. 9096-97 (daily ed. Mar. 20, 1972) (testimony of Prof. Paul Freund against the Equal Rights Amendment)); and *id.* at 9315 (testimony of Sen. Ervin against the Equal Rights Amendment). The argument seems to have been first advanced in a United States court around that same time when two men claimed that the state of Washington's refusal to grant them a marriage license constituted sex discrimination in violation of that state's equal rights amendment. *See Singer*, 522 P. 2d at 1187. For discussion of *Singer*, see WILLIAM ESKRIDGE, JR., CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 162 (Free Press 1996).

[55] *See, e.g.*, Andrew Koppelman, *Why Sexual Orientation Discrimination is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Koppelman, *supra* note 51; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); *see also* Stein, *Sex Discrimination*, *supra* note 52 (raising concerns about the sex-discrimination argument); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. Rev. 519 (2001).

[56] *See Lawrence*, 14-99-00109-CR & 14-99-00111-CR.

[57] *See* Lawrence v. State, 41 S.W.3d 349 (Tex. App. 2001).

[58] Under Texas law, "'[d]aviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration

jail, prosecuted, and found guilty. They challenged their convictions in Texas state court and then in the U.S. Supreme Court.

The questions presented before the Supreme Court in *Lawrence* concerned whether the Texas sodomy law denied the plaintiffs equal protection, whether it violated their right to privacy, and whether *Bowers v. Hardwick* should be overruled.[59] Writing for a five-justice majority and using sweeping and lyrical language, Justice Kennedy found that the Texas sodomy law was unconstitutional on privacy grounds and overruled *Bowers*. He began his opinion as follows:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[60]

Towards the end of the opinion, Justice Kennedy concluded:

> Th[is] case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government . . . . The Texas statute furthers no legitimate state interest, which can justify its intrusion into the personal and private life of the individual.[61]

In between, *Lawrence* explicitly overruled *Bowers* in remarkably clear language considering that *Bowers* had been decided only seventeen years earlier.[62] In particular, Justice Kennedy opined that *Bowers* misstated the scope of the fundamental right at issue when a state criminalizes sodomy: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct

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of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01(1) (Vernon 2003). Under Texas's so-called "Homosexual Conduct" law, "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." § 21.06.

59 *Lawrence*, 123 S. Ct. at 2476.

60 *Id.* at 2475.

61 *Id.* at 2484.

62 *See id.* ("*Bowers* was not correct when it was decided, and it is not correct today . . . *Bowers* . . . should be and now is overruled.").

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."[63] Justice Kennedy also faulted *Bowers* for mischaracterizing the history of sodomy laws in the United States.[64]

Justice O'Connor, writing for herself only, concurred with the result in *Lawrence,* but she reached this conclusion on the basis of the Equal Protection Clause rather than the Due Process Clause. Justice O'Connor would not have overruled *Bowers* (which she had joined) but, rather, applying *Romer*'s "more searching form of rational basis review,"[65] she would have found the Texas law banning "'deviate sexual intercourse' between consenting adults of the same sex, but not... of different sexes"[66] unconstitutional because it was not related to a legitimate state interest. She concluded that:

> A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with [it] runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.[67]

The *Lawrence* majority did not rely on Justice O'Connor's equal protection argument against the Texas sodomy law but it did characterize this argument as "tenable."[68]

Justice Scalia, writing for himself, the Chief Justice, and Justice Thomas[69] dissented, arguing that *Bowers* was correctly decided and that the *Lawrence* majority failed to adequately address the reasoning of *Bowers.* According to Scalia, the Texas sodomy law was justified—both on due process[70] and equal protection[71] grounds—by the reasonable and legitimate moral views of the majority of Texas citizens. Scalia saw the *Lawrence* majority's failure to treat the moral views of citizens as a legitimate state interest as affecting "the end of all morals legislation."[72] Scalia also argued that the result in *Lawrence* will lead to "a massive disruption of the current social order"[73] by "calling in to question"[74] "criminal laws against fornication,

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

[64] *See id.* at 2478-81.

[65] *Id.* at 2485 (O'Connor, J., concurring).

[66] *Id.* at 2488.

[67] *Id.*

[68] *Id.* at 2482.

[69] Justice Thomas joined Justice Scalia's dissent but also wrote separately to say that laws like Texas' sodomy law were "silly" and that "if [he] were a member of the Texas Legislature, [he] would vote to repeal it." *Id.* at 2498 (Thomas, J., dissenting).

[70] *See Lawrence,* 123 S. Ct. 2495 (Scalia, J., dissenting).

[71] *See id.* at 2496.

[72] *Id.* at 2495.

[73] *Id.* at 2491.

[74] *Id.* at 2495.

bigamy, adultery, adult incest, bestiality, and obscenity."[75] Additionally, Scalia criticized the majority for inconsistently adhering to the doctrine of stare decisis. In particular, he contrasted the Court's unwillingness to overrule *Roe v. Wade* in *Planned Parenthood v. Casey*[76] in light of stare decisis with the *Lawrence* majority's "surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers*."[77] Finally, Scalia repeated his charge from *Romer*[78] that the Court was inappropriately "tak[ing] sides in the culture war"[79] by "sign[ing] on to the so-called homosexual agenda."[80]

III. LOOKING BEYOND *LAWRENCE*

In this final section, I discuss some of the legal questions that emerge from *Lawrence* and which are likely to give rise to debate and controversy in the coming years. I suggest that Justice Scalia may be right in thinking that *Lawrence* does portend recognition of same-sex marriage (although the connection may be more because of its social impact than its legal reasoning), but that he is probably wrong in thinking that *Lawrence* will lead to a radical change in the legal status of sex crimes. I also suggest that the most interesting questions after *Lawrence* concern the future application of the reasoning of Justice O'Connor's concurrence.

A. *Marriage*

In a masterful public relations move, Justice Scalia's dissent recast *Lawrence* from a case about the right to engage in consensual sex in the privacy of one's home to a case about the more controversial topic of same-sex marriage. He wrote:

> [T]he Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.[81]

This gloss on *Lawrence* galvanized opponents of lesbian and gay rights and put Justices Kennedy and O'Connor on the defensive about *Lawrence*'s implication for laws restricting marriage to couples consisting of two people

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[75] *Id.*
[76] 505 U.S. 833, 844 (1992).
[77] *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).
[78] 517 U.S. at 652 (Scalia, J., dissenting).
[79] *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).
[80] *Id.* at 2496.
[81] *Id.* at 2497-98.

of the opposite sex. Both the majority and concurring opinions made efforts to declare that the reasoning behind the unconstitutionality of Texas' sodomy law did not lead to the conclusion that limiting marriage to couples consisting of one man and one woman was unconstitutional, but neither provided much support for their respective declarations. Justice Kennedy simply said that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[82] Justice O'Connor had just a bit more to say in response to Scalia's attempt to connect *Lawrence* to same-sex marriage. She contrasted the constitutionality of Texas's sodomy law, for which there is no state interest beyond the illegitimate "moral disapproval of same-sex relations," with marriage laws, for which there are legitimate state interests "beyond mere disapproval of an excluded group," including "promot[ing] the institution of marriage."[83]

Despite the assurances of Justices Kennedy and O'Connor that marriage was not at issue in this case, Justice Scalia's analysis of the connection between *Lawrence* and same-sex marriage led opponents of same-sex marriage to take the offensive. A group of twenty-nine conservative and religious organizations came together to declare the week of October 12-18, 2003, "Marriage Protection Week."[84] Also, shortly after *Lawrence* was decided, Senator Bill Frist,[85] the Majority Leader of the U.S. Senate, (to mention just one prominent supporter) endorsed a proposed amendment to the U.S. Constitution that would define marriage as between one man and one woman and would prevent any state or federal law or constitution from being interpreted as requiring that any of the rights, benefits or obligations bestowed on marriage be in any way granted to same-sex couples.[86] Especially in light of the existence of the Defense of Marriage Act, which, in part, defines marriage so as to disqualify same-sex couples,[87] some of the

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[82] *Id.* at 2484.

[83] *Id.* at 2487-88 (O'Connor, J., concurring).

[84] *See, e.g.*, Mike Allen, *Gay Marriage Looms as Issue: GOP Push for Amendment Is Dilemma for Bush*, WASHINGTON POST, Oct. 25, 2003, at A1; *see also* http://www.marriageprotectionweek.com (last visited Nov. 12, 2003). For an interesting expose of the organizations involved in Marriage Protection Week, see Sean Cahill et al., *"Marriage Protection Week" Sponsors: Are They Really Interested in "Building Strong and Healthy Marriages"?*, *available at*, http://www.ngltf.org/downloads/MarriageProtectionWeek.pdf (Oct. 15, 2003).

[85] *See, e.g.*, Allen, *supra* note 84.

[86] H.R.J. Res. 56, 108th Cong. (2003) ("Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.").

[87] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." And "No State, territory,

rationale for this amendment must be that courts, on the basis of *Lawrence*, will conclude that it is unconstitutional to allow opposite-sex couples, but not same-sex couples, to marry.[88]

The recent decision of the highest court in Massachusetts that it violates that state's constitution to prohibit same-sex couples from marrying[89] further heightened public attention to the issue of same-sex marriage. Although the majority of the Massachusetts court cited *Lawrence* several times, it did not rely on *Lawrence* in reaching its conclusion. Specifically, the court said that, "[w]hether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage . . . is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence*."[90] Relying on its state constitution, the Massachusetts court embraced same-sex relationships based on the following analysis:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all

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or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

88 The breadth of this proposed amendment is remarkable, especially given federalism and the tradition of leaving most matters relating to domestic relations to the states. *See, e.g.*, Sosa v. Iowa, 419 U.S. 393, 404 (1975) ("regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States") Further, the proposed amendment would invalidate various state laws that give any marriage-like benefits to same-sex couples. *See e.g.*, S. 2820, 210th Sess. (N.J. 2004) (creating domestic partner benefits that provide some subset of benefits associated with marriage; passed both legislative branches January 8, 2004; governor's signature expected); VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000) (creating civil unions for same-sex couples that have all the rights, benefits and obligations associated with marriage); 2003 Cal. Adv. Legist. Serv. 421 (Deering) (bestowing on domestic partnerships, starting in 2005, almost all of the rights, benefits, duties and obligations of marriage in California); 1997 Haw. Adv. Legist. Serv. 383 (creating reciprocal beneficiaries which give limited benefits to registered domestic partners). In addition, the proposed amendment would also invalidate various state court decisions that required same-sex couples to receive any (or all) of the legal incidents of marriage, for example, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003) (finding that prohibition on same-sex marriage violates state constitution).

89 *See Goodridge*, 798 N.E.2d at 969 ("refin[ing] the common-law meaning of marriage . . . to mean the voluntary union of two persons as spouses").

90 *Id.* at 948 (quoting *Lawrence*, 123 S. Ct. at 2484).

individuals. It forbids the creation of second-class citizens.[91]

Besides the highest court in Massachusetts, the two other state courts that have considered this issue held that *Lawrence* is not relevant to same-sex marriage.[92] In *Standhardt v. Superior Court*, two men sought an order from a state appellate court compelling a county clerk to issue them a marriage license. They relied, in part, on Justice Scalia's claim that *Lawrence* entails that prohibitions on same-sex marriage are unconstitutional[93] and argued that applying the reasoning under which Texas's sodomy law was found unconstitutional leads to the conclusion that Arizona's failure to issue marriage licenses to same-sex couples is unconstitutional. Explicitly discussing Justice Scalia's dissent, the court said that while *Lawrence* held that the state had no legitimate interest in preventing individuals from seeking fulfillment from same-sex relationships, nothing in the Supreme Court's opinion says or implies that a state has no legitimate interest in limiting marriage to only opposite-sex couples.[94] In *Lewis v. Harris*, several same-sex couples sued various officials of the state of New Jersey arguing that they should be granted marriage licenses. The trial court upheld the exclusion of same-sex couples from marriage. Although that case has been appealed, it is noteworthy that the trial judge distinguished *Lawrence* by limiting its holding to a same-sex couple's right to liberty under the Due Process Clause to engage in consensual sexual activity in the home without government intervention."[95]

The *Standhardt* and *Lewis* courts, focusing on the fact that *Lawrence* overturned Texas's sodomy laws on due process rather than equal protection grounds, upheld their states' prohibitions of same-sex marriages because they found the equality argument, not the due process argument, more relevant to making the case for same-sex marriages. In general, there are many ways one might try to distinguish the decriminalization of private sexual activity, on the one hand, from the public recognition of same-sex relationships and the granting of the panoply of rights and duties associated with marriage, on the other. One can allow that consenting adults have the right to be free from state interference with various sexual behaviors done in private without granting that long-term relationships that may involve such behaviors warrant legal recognition. This seems to be the idea operating in Justice Kennedy's laconic response to Justice Scalia's invocation of the

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91 *Id.*

92 *See* Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Lewis v. Harris, No. MER-L-15-03, 2003 WL 2319114 (N.J. Mercer County Ct. Nov. 5, 2003).

93 *Lawrence*, 123 S. Ct. at 2497-98 (Scalia, J., dissenting).

94 *Standhardt*, 77 P.3d at 457 n.7.

95 *Lewis*, 2003 WL 2319114 at *23.

specter of same-sex marriage.[96]

Had Justice O'Connor's concurrence in fact been the opinion of the Court, the implications for same-sex marriage might have been more significant, O'Connor's attempt to distinguish same-sex marriage from sodomy laws notwithstanding. Justice Scalia, in response to O'Connor's brief comments about same-sex marriage, says:

> Justice O'Connor seeks to preserve [laws limiting marriage to opposite-sex couples] by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in [making sodomy a crime] could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society."[97]

Justice Scalia's criticism of Justice O'Connor's attempt to insulate prohibitions on same-sex marriage from the equal protection argument she embraced in *Lawrence* seems on the mark. It is not clear what legitimate justification a state can give for prohibiting same-sex couples from marrying while prohibiting similarly situated heterosexual couples from marrying, especially if marriage laws are subject to the "more searching" scrutiny that Justice O'Connor subjected Texas's sodomy law. When courts in Hawaii and Vermont closely scrutinized their marriage laws, neither found any legitimate state interest for prohibiting same-sex couples from marrying.[98]

Aside from finding the equal protection argument "tenable," the majority opinion in *Lawrence* does not directly lead to a constitutional argument for same-sex marriage. It does, however, undercut the relevance of the view of a majority of citizens in a state that something is immoral, a consideration that has played an important role in supporting the prohibition of same-sex marriage. Justice Scalia is concerned that without reliance on public morality, there remains no strong argument against same-sex marriages that will survive constitutional scrutiny. In particular, Scalia concedes that encouraging procreation, another favorite argument of opponents of same-sex marriage, is not a good argument. He asks, "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the

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

97 *Id.* at 2496 (Scalia, J., dissenting) (quoting and discussing *id.* at 2488 (O'Connor, J., concurring)).

98 *See* Baker v. Vermont, 744 A.2d 864, 881-86 (Vt. 1999) (finding Vermont's proffered justifications do not constitute a "reasonable and just" basis for excluding same-sex couple from marriage); Baehr v. Miike, 1996 WL 694235, at * 21 (finding Hawaii's failed to demonstrate that its exclusion of same-sex couples from marriage had compelling state interest and was narrowly tailored).

Constitution'? . . . Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."[99]

Scalia is, I think, right to be concerned that, after *Romer* and *Lawrence*, the arguments against same-sex marriage are dramatically weakened. Starting with *Loving v. Virginia*, the Supreme Court has several times affirmed the existence of a fundamental right to marry.[100] Although courts have upheld some restrictions on this fundamental right, for example, restricting the number of people a person can be married to at the same time[101] and restricting prison guards from marrying inmates,[102] these restrictions have been justified by appeal to a compelling state interest. Attempts to justify the prohibition on same-sex marriage by appeal to religion, tradition, or by claiming that same-sex couples are less stable or less capable parents than opposite-sex couples fail to provide a compelling state interest. Finally, another favorite argument of opponents of same-sex marriage, known as the definitional argument, which says that same-sex couples cannot marry simply because marriage is *defined* as being between one man and one woman,[103] has been persuasively answered.[104] No wonder Scalia feels that *Lawrence* undercuts all of the good arguments against same-sex marriage. No wonder that opponents of same-sex marriage feel the need to turn to a constitutional amendment to prevent its spread.[105]

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

[100] Loving v. Virginia, 388 U.S. 1 (1967) (overturning law prohibiting interracial marriages because, *inter alia*, it violated the fundamental right to marry). *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (overturning law putting restrictions on marriage for prisoners on ground it violated the fundamental right to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (overturning law putting restrictions on marriage for people in arrears on child support obligations on ground that it violated the fundamental right to marry).

[101] *See, e.g.*, Reynolds v. U.S., 98 U.S. 145 (1879) (upholding polygamy prosecution).

[102] *See* Keeney v. Heath, 57 F.3d 579 (7th Cir. 1995) (upholding rule that prohibited prison guards from becoming socially involved with prisoners against challenge that it violated right to marry).

[103] *See, e.g.*, Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 689-90 (Ky. Ct. App. 1973).

[104] *See* Baehr v. Lewin, 852 P.2d 44, 61-63 (Haw. 1993) (rejecting the definitional argument as "circular," "tautological" and "unpersuasive"); ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 53, at 89-104.

[105] The recent success of legal challenges to the exclusion of same-sex couples from marriage in Canada such as Halpern v. Canada, 65 O.R.3d 201 (Ontario 2003), might also fuel concern among opponents of same-sex marriage. *See, e.g.*, *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting) (referring to the "judicial imposition of homosexual marriage" in Canada). The reference to Canada is somewhat ironic because in the same dissenting opinion Justice Scalia scolds the majority for discussing legal change in other countries. *See id.* at 2494-95 (Scalia, J., dissenting) (discussing *id.* at 2483 (citing international cases that have rejected the reasoning of *Bowers*)).

B. *Other "Sex Crimes"*

Justice Scalia argues that the logic of *Lawrence* undermines all (or most) other sex crime laws.[106] It is not at all clear why *Lawrence* undermines laws against non-consensual sex, including laws prohibiting adults from having sex with minors who are unable to consent, laws outlawing sex with animals, as they are unable to consent, and laws prohibiting significantly older family members from having sex with younger family members because family dynamics would make consent problematic. The state clearly has compelling reasons beyond the moral disapproval of its citizens for laws that prohibit non-consensual sexual activities, namely that such laws protect the non-consenting party (e.g., a young child, an animal, or a young family member) from harm. Justice Kennedy specifically says that his reasons for finding Texas's sodomy laws unconstitutional do not extend to laws prohibiting non-consensual sexual activities.[107] Even if Scalia is right in thinking that *Lawrence* undermines the "ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation,"[108] there are still compelling state interests that support laws against non-consensual sex.

It is even harder to know what Justice Scalia is talking about with respect to masturbation. So far as I can tell, there are no laws against a person masturbating at home, in the private, using nothing but his or her own hands.[109] Unless Justice Scalia is thinking about two people engaging in mutual masturbation or the use of vibrators, dildos and other sexual devices, he is wrong to think that laws against masturbation are at risk of being overturned in light of *Lawrence* simply because no such laws exist.

However, Justice Scalia's concerns about the constitutionality of laws against prostitution, incest, adultery, fornication (that is, sex between unmarried persons) and the use of sexual devices after *Lawrence* may be well founded. It is possible to distinguish adultery from fornication and sodomy between people of the same-sex on the ground that there may be direct third

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[106] *Id.* at 2490 (Scalia, J., dissenting) (listing "bigamy, . . . adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" as the sex crime laws that would be undermined by the logic of *Lawrence*).

[107] *Id.* at 2484.

[108] *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting).

[109] *See, e.g.*, Angela Holt, *From My Cold Dead Hands:* Williams v. Pryor *and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 944 (2002) ("Unlike sodomy and adultery, masturbation itself has never been criminal in this country."). When state laws mention masturbation, they do so in the sense of one person touching *another* person's genitalia. *See, e.g.*, CAL. WELF. & INST. CODE § 6600.1 (West 2003) (making it a crime for an adult to masturbate a child under the age of four). States also mention it in context of defining public masturbation as obscene. *See, e.g.*, GA. CODE. ANN. § 3-3-41 (2002). For an interesting historical and legal discussion of masturbation, see Geoffrey Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221 (2001).

party harms involved with adultery, specifically harms to the spouse or children of the married person who engages in adultery. These third party harms could provide compelling reason for laws against adultery even if, after *Lawrence*, public moral sentiments constitute a compelling state interest. In contrast, it is hard to see how laws against fornication can be justified after *Lawrence*. If it is unconstitutional to criminalize consensual, private sexual activity between two people of the same sex, then surely it is unconstitutional to criminalize consensual, private sexual activity between two people of the opposite sex.[110] It also seems that laws prohibiting the use of sexual devices will probably be held unconstitutional after *Lawrence*.[111] In contrast, laws against incest[112] and prostitution[113] are potentially distinguishable from laws against same-sex sodomy. Justice Scalia's slippery slope is neither as evenly sloped nor as slippery as he thinks.[114]

C. *Equal Protection Arguments*

Lawrence leaves for another day how the Court would deal with a case of sexual-orientation discrimination that solely raises equal protection concerns. That the *Lawrence* majority found Justice O'Connor's equality argument "tenable,"[115] combined with the fact that the five Justices who joined the majority opinion in *Lawrence* were, along with O'Connor, in the majority in *Romer*, suggests that equal protection arguments concerning discrimination on the basis of sexual orientation have a promising future with the Court, at least as it is currently constituted. Justice O'Connor's use

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[110] The only slightly plausible argument that might justify such a distinction would be to say that, in a regime in which only sex between married couples is legal, an opposite-sex couple, unlike a same-sex couple, has a way to have sex without breaking the law, namely, an opposite-sex couple can get married. This difference might justify treating laws prohibiting sex between two people of the same sex differently than two people of the opposite sex and thus justify finding same-sex sodomy laws unconstitutional to be consistent with finding fornication laws constitutionally permissible. This type of argument for finding same-sex couples to be legally different from similarly situated opposite-sex couples, applied to other contexts, has been accepted by various courts. *See, e.g.*, Irizarry v. Bd. of Educ., 251 F.3d 604 (7th Cir. 2001) (upholding employment benefit plan that provides domestic partner benefits to unmarried same-sex couples but not to unmarried opposite-sex couples because the latter can get married while the former cannot); Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (same).

[111] For recent cases on laws prohibiting the sale of sexual devices, see Pleasureland Museum v. Balanow, 288 F.3d 988, 997 (7th Cir. 2002) (remanding constitutional challenge on vagueness grounds to law that prohibits sale of devices "designed or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of themselves or others"); Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001) (upholding statute prohibiting the commercial distribution of sexual devices on ground that it is rationally related to legitimate government interest in public morality).

[112] *See* Brett McDonnell, *Is Incest Next?*, *infra* pp. 337-63.

[113] *See, e.g.*, Sylvia Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. Rev. 523 (2000) (arguing that criminal sanctions against people who offer sex for money should be repealed).

[114] *See, e.g.*, McDonnell, *supra* note 112.

[115] *See Lawrence*, 123 S. Ct. at 2482.

of the phrase "more searching" review and Justice Kennedy's endorsement of O'Connor's argument as "tenable" provide support for the prospect that *Romer* will lead to heightened scrutiny for laws that make use of sexual-orientation classifications just as *Reed* led to heightened scrutiny for laws that make use of sex classifications.[116] However, because Justice O'Connor was only speaking for herself and the majority opinion did not actually rely on *Romer* in overturning *Bowers*, a narrow reading of *Romer* is still consistent with *Lawrence*, that is, it is consistent with *Lawrence* to read *Romer* as saying that laws that make use of sexual-orientation classification are subject to rational review and that only when such laws are very broad or clearly based on animus will they be struck down on equality grounds.

Aside from marriage cases, there are two cases working their way through the court system that might lead courts to address the equal protection issue that *Lawrence* left unresolved. One involves a Florida law prohibiting homosexuals from adopting and the other is a Kansas law that treats sex between minors of the same sex more harshly than sex between minors of the opposite sex. At issue in *Lofton v. Kearney*[117] is a provision of Florida adoption law stating that, "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[118] Under Florida law, lesbians and gay men are, by virtue of their status as homosexuals, statutorily prohibited from adopting. Plaintiffs, gay men who are foster care parents or legal guardians of children they wish to adopt, are challenging the constitutionality of the statute on equal protection and due process grounds. The trial court, in a pre-*Lawrence* decision, granted Florida's motion for summary judgment. With respect to the plaintiffs' equal protection argument, the court applied rational review and found the homosexual adoption provision rationally related to the legitimate state interests of providing a stable and non-stigmatized home environment and of providing children with proper gender role models.[119] With respect to the plaintiffs' due process argument, the court found that "the existence of strong emotional bonds between [the] plaintiffs [and the children that they wish to adopt] does not inherently grant them a fundamental right to family privacy, intimate association and family integrity"[120] and thus the court was unwilling to "extend to th[e] relationships [between each plaintiff and the child he wishes to adopt] the liberty interest granted to biological parents in the care,

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116 *See infra* text accompanying notes 42-46.

117 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *affirmed*, Lofton v. Sec'y of Dept. of Children & Family Serv., No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004). (*Lofton* was decided as this issue was going to press. The implications of this decision, which may be appealed, have not been fully integrated into this article.).

118 FLA. STAT. ch. 63.042(3) (2003).

119 *See Lofton*, 157 F. Supp. 2d at 1382-85.

120 *Id.* at 1379.

custody, and control of their children."[121]

Plaintiffs appealed to the Court of Appeals for the Eleventh Circuit. In its pre-*Lawrence* brief before the Eleventh Circuit, Florida argued that the exclusion of gay people from adopting was justified by the state's moral disapproval of homosexuality and its interest in the welfare of children, specifically providing them stable homes with a mother and a father.[122] After the decision in *Lawrence*, plaintiffs filed a supplemental brief. They argued, first, that *Lawrence* completely forecloses Florida's use of its citizens' moral disapproval of homosexuality as a justification for the homosexual adoption provision.[123] Second, they argued that justifying Florida's law by appeal to the welfare of children, fails even the most deferential standard of review, in part, because the law is motivated by "an intense hostility towards gay people"[124] and, in part, because Florida has not claimed and cannot show that keeping lesbians and gay men from adopting would in any way lead to more children being adopted by married heterosexual couples.[125] The plaintiffs also raised *Lawrence*-based due process arguments in their appeal.

The Eleventh Circuit rejected the plaintiffs' arguments and, specifically, some aspects of their reading of *Lawrence*. First, in rejecting the plaintiffs' various privacy-related arguments against the Florida ban on adoption homosexuals, the court opined that *Lawrence* did not "identify[] a new fundamental right to private sexual intimacy."[126] Second, in rejecting the plaintiffs' equal protection challenge to the Florida ban, the court applying rational review, held that "there are plausible rational reasons for the disparate treatment of homosexuals . . . under Florida adoption law."[127] The appellate court did seem to implicitly accept that, after *Lawrence*, moral disapproval of homosexuality does not provide a justification for a law that discriminates on the basis of sexual orientation. Instead, the court upheld the Florida adoption ban on the grounds that the legislature could have been reasonably motivated by the state's interest "in placing adoptive children in homes that will provide them with optimal developmental conditions."[128] In its application of rational review, the *Lofton* court read

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[121] *Id.* at 1380.

[122] Appellant's Opening Brief at *15-16, Lofton v. Sec'y of Dept. of Children & Family Serv., No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004).

[123] Appellant's Supplemental Brief at *5-6, *Lofton v. Sec'y of Dept. of Children & Family Serv.*, No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004)., *at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=13180&c=104 (last visited January 14, 2004).

[124] *Id.* at *19.

[125] *See id.* at *7.

[126] *Lofton*, 2004 WL 161275 at *9.

[127] *Id.* at *14.

[128] *Id.* at *12.

Romer narrowly,[129] ignoring the possible relevance of *Lawrence* to *Romer*.

A case that is more likely to push the equal protection argument applied to sexual orientation is *Limon v. Kansas*.[130] Matthew Limon, at the time aged 17, engaged in consensual oral sex with a 14 year old boy. He was prosecuted for violating Kansas's criminal sodomy law, which prohibits sodomy (which includes oral sex) with a child who is between the ages of 14 and 16.[131] Kansas punishes this crime with a presumptive sentence of 55 to 61 months for a first offense, 89 to 100 months for a second offense, and 206 to 228 months for the third offense. Under Kansas' so-called "Romeo and Juliet" law, the penalties for voluntary sodomy between two teenagers of the opposite sex are dramatically reduced *if* the older teenager is less than nineteen years old and the age difference between the two teenagers is less than four years.[132] For acts within the purview of the Romeo and Juliet law, the first and second offense of voluntary sodomy result in presumptive probation, while the third offense carries a maximum sentence of fifteen months.[133]

Limon was sentenced to 206 months in prison followed by five years of supervised release. Had Limon's sexual partner been a 14-year-old girl, he would have been subject to a maximum sentence of fifteen months. Limon appealed his conviction and argued that Kansas's statutory scheme concerning sodomy between teenagers violates the Equal Protection Clause by discriminating on the basis of sexual orientation and sex. Limon also challenged his conviction and sentencing on Eighth Amendment grounds. The Kansas Court of Appeals upheld Limon's conviction citing *Bowers*:

> The impact of *Bowers* on our case is obvious. The United States Supreme Court does not recognize homosexual behavior to be in a protected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently.[134]

After the Kansas Supreme Court denied review, Limon petitioned for a writ of certiorari, which the Supreme Court granted. One day after it decided *Lawrence*, the Court vacated and remanded the Kansas Court of Appeals decision.[135] On remand, Limon once again argued that Kansas sodomy law and the Romeo and Juliet law together violate the Equal

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129 *Id.* at *17 (describing *Romer* as involving a "unique factual situation").

130 Kansas v. Limon, 123 S. Ct. 2638 (2003), *remanded to*, 83 P.3d 229 (Kan. App. Jan. 30, 2004).

131 *See* KAN. STAT. ANN. § 21-3505(a)(2) (2003).

132 *See* § 21-3522(a).

133 *See* § 21-3522(b)(2).

134 *Limon*, No. 85-898, slip op. at 12, 41 P.3d 303 (Kan. Ct. App. 2002).

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

Protection Clause by imposing harsher punishments based on sexual orientation and sex.[136]

The differential impact of the Kansas statutory scheme on Limon compared to a young man of Limon's age who engaged in oral sex with a young woman of the same age as Limon's sexual partner seems extreme and unjustifiable. Although Limon emphasized *Lawrence* in his briefs, he did not argue that the criminalization of sex between teenagers violates the right to privacy. Rather, his two primary arguments were the sex-discrimination argument and the equal protection argument concerning sexual-orientation discrimination made by Justice O'Connor in *Lawrence*. As discussed above, six justices are sympathetic to Justice O'Connor's sexual-orientation discrimination argument. On the other hand, Justice Scalia's dissent is the only Supreme Court opinion to address the sex-discrimination argument for lesbian and gay rights, and he was highly critical of that argument.[137] However, if the Kansas courts wish to overturn the statutory scheme at issue in *Limon* without having to pursue the sexual-orientation discrimination argument of Justice O'Connor's concurrence, they may embrace the sex-discrimination argument.[138]

As this article was going to press, a panel of the Kansas intermediate

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[136] Appellant's Opening Brief at 4, Kansas v. Limon, 83 P.3d 229, *available at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=13655&c=41 (last visited January 14, 2003).

[137] *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting). Scalia characterized the sex-discrimination argument as follows:

> To be sure, [the Texas sodomy law] does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violatethe law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

Id. Scalia acknowledged the analogy to *Loving v. Virginia*, which held that there can be discrimination even where the law can be described as applying equally. He then went on to distinguish *Loving* as follows:

> A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race .... No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are 'immoral and unacceptable.'

Id. Scalia's dismissal of the sex-discrimination argument, which was mentioned in the briefs before the Court in *Lawrence* but not highlighted by Lawrence's lawyers, is rather cursory. For more detailed analysis of the sex-discrimination argument, see Koppelman, *supra* note 51; Koppelman, *supra* note 54; Law, *supra* note 55; and Stein, *Sexual Discrimination*, *supra* note 52.

[138] *See* Stein, *Sexual Discrimination*, *supra* note 52, at 506 (noting that some courts may find it politically and ideologically more palatable to strike down laws that discriminate on the basis of sexual orientation on the grounds that these laws discrimination on the basis of sex).

appellate court affirmed Limon's conviction.[139] In the majority opinion, Judge Green held that the use of sexual-orientation classifications in the Kansas sodomy statutes has a rational basis and, therefore, passes constitutional muster.[140] He specifically distinguished *Lawrence* of two grounds.[141] First, *Lawrence* did not involve sex with children, while *Limon* did. Second, *Lawrence* was a due process case while *Limon* is an equal protection case. Applying the rational basis test, Judge Green cited the state's legitimate interest in, *inter alia*, protecting children, encouraging procreation, and the prevention of sexual transmitted diseases.[142] In so doing, he distinguished *Romer* from *Limon*, on the grounds that Romer involved sexual-orientation classifications, while the Kansas statutory scheme is concerned with the ages of the victim and the perpetrator and the nature of the sexual acts, not either's sexual orientation.[143]

Judge Pierron dissented. He agreed with the majority that rational review is the applicable standard for Limon's constitutional challenge. Applying that test, he found that several of the justifications offered in defense of the Romeo and Juliet exception in the state's sodomy law were nothing less than legislative disapproval of homosexuality, which, as *Lawrence* made clear, is constitutionally impermissible.[144] Of two remaining justifications for the law—encouraging marriage and procreation—he said these "are very odd justifications for having much greater criminal penalties for a male performing oral sodomy on a male minor than for a female performing the same act on the same minor."[145] Judge Pierron found it "incomprehensible that this law has anything to do with encouraging marriage and procreation between the victim and the assailant, or anyone else."[146] With respect to the connection between the Kansas statute and the prevention of sexually transmitted diseases, the dissent acknowledged "a facial connection between penalizing consensual criminal sexual relations with a minor and concerns about venereal diseases," but denied the existence of any justification for the "much greater criminal punishments for . . . homosexual acts than for . . . heterosexual acts."[147] Judge Pierron concluded that the provision under which Limon was sentenced is "blatantly

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139 *See generally* Kansas v. Limon, 2004 Kan. App. Lexis 110.

140 *Id.* at *3.

141 *Id.* at *9-13.

142 *Id.* at *13-22. The concurring opinion also upheld that Kansas statutory scheme as rational, but only because the statute could be justified as a way to "protect children from increased health risks associated with homosexual activity." *Id.* at *41 (Malone, J., concurring).

143 *Id.* at *28-31.

144 *Limon*, 2004 Kan. App. Lexis at *53-54 (Pierron, J., dissenting).

145 *Id.* at *57.

146 *Id.*

147 *Id.*

discriminatory [and] does not live up to American standards of equal justice."[148]

CONCLUSION

Lawrence is clearly a landmark decision for lesbian and gay rights, even if it does not go far enough. In overruling *Bowers*, *Lawrence* removed the stigma of presumptive criminality from lesbians and gay men. *Bowers* did not explicitly establish that lesbians and gay men should be presumed to be criminals but it validated that stigma and did so in a way that reverberated through state and federal courts and into the other branches of federal, state and local government. The legal reasoning of *Bowers* did not require many of the negative repercussions that case had for lesbians and gay men. Rather, many of the harsh effects of *Bowers* came from its underlying assumptions and attitudes, as reflected in its tone, its language and its historical analysis.[149] Perhaps, similarly, the most important legacy of *Lawrence* does not follow directly from its legal reasoning. In overturning *Bowers*, *Lawrence* displaces *Bowers*' narrow view of the right to privacy, arguably broadening it into a right to intimate association,[150] and removes the major impediment to achieving heightened scrutiny for sexual-orientation classifications

More significantly, *Lawrence* manifests a newfound respect for lesbians, gay men and bisexuals, their relationships, their families and their community institutions. Although the Massachusetts court in *Goodridge* did not rely on *Lawrence* when it ruled on same-sex marriage, the ethical underpinnings of the majority and concurring opinions of *Lawrence* clearly influenced the *Goodridge* court. This aspect of *Lawrence*'s legacy for lesbian and gay civil rights may prove to be its most significant achievement.

However, recent rulings in *Limon* and *Lofton* suggest that some federal and state courts will resist this newfound respect for sexual minorities. *Lofton* and *Limon* show that Justice O'Connor's equal protection argument, which all six justices who joined *Romer* seem to accept, may need to be more explicitly developed and endorsed by the Court before it becomes the law of the land. To resolve important constitutional questions concerning the rights of sexual minorities, the Supreme Court has more work to do. Perhaps the *Lofton* or *Limon* case may eventually provide the Court with the occasion for continuing the legacy of *Lawrence*. But for now, these decisions show that, after *Lawrence*, there remains a great deal of work to be done to achieve full equal rights for lesbians, gay men and other sexual minorities.

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148 *Id.* at *65.

149 *See, e.g.*, ESKRIDGE, GAYLAW, *supra* note 53 at 149-73. For a discussion of the historical analysis of *Bowers*, see *Lawrence*, 123 S. Ct. at 2478-80.

150 *See, e.g.*, Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).