LAWRENCE AND GARNER: THE LOVE (OR AT LEAST SEXUAL ATTRACTION) THAT FINALLY DARED SPEAK ITS NAME

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Undoubtedly, much ink will be expended in penning commentaries on the Supreme Court's decision in *Lawrence and Garner v. Texas.*[1] This is as it should be since by overruling a relatively recent precedent, *Bowers v. Hardwick,*[2] the *Lawrence* Court has effected "a massive disruption of the current social order"[3] and "taken sides in the culture war."[4] In this article, I wish to expend a few drops of ink on but one limited aspect of the *Lawrence* decision: the factual presentation of the gay men before the Court and the protection they sought from the Court as enunciated in the decision[5] and as articulated in submissions to the Court by the attorneys for John Lawrence and Tyron Garner.

As a Clinical Professor of Law, I often have occasion to remind my students that the law is more frequently about facts than legal doctrine.[6] Of

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

[2] 478 U.S. 186 (1986).

[3] *Lawrence,* 123 S. Ct. at 2491 (Scalia, J., dissenting). Indeed, the massiveness of this disruption has already been manifested in the Massachusetts Supreme Court's decision holding that the exclusion of same-sex couples from marriage in that State "is incompatible with [Massachusetts] constitutional principles of respect for individual autonomy and equality under the law." Goodridge v. Department of Public Health, 798 N.E.2d 309, 313 (Mass. Sup. Ct. 2003). Although this case was controlled by the provisions of the State constitution, which are "more protective of individual liberty and equality than the Federal constitution," *id.* at 328, the Massachusetts Court began its analysis by reference to what it viewed as the key holding enunciated in *Lawrence*: "the [United States Supreme] Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." *Id.* at 313.

[4] *Lawrence,* 123 S. Ct. at 2497 (Scalia, J., dissenting).

[5] This brief comment does not seek to comprehensively identify and analyze the hidden factual "determinants" of the justices' view of homosexuality in *Lawrence* as was done regarding the *Bowers* decision in Anne B. Goldstein's seminal article, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988). *See also* Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts,* 71 TUL. L. REV. 529 (1996).

[6] *See, e.g.,* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory,*

course and of necessity, law is about both. However, to reduce legal analysis to abstracted legal principles or doctrines, stripped of their connectedness to and dependence upon the messy factual realities out of which they grow and for which they are supposed to provide some prism of meaning, is to reduce theory to empty-headed abstraction.[7] If such a factual disemboweling is indulged in merely in academic legal scholarship, the harm to real persons might be at most theoretical or educational. However, where it is imposed in actual cases, the harm to real persons and others similarly situated can be personal and profound.[8]

Thus, it may not be inappropriate to briefly consider the decision in *Lawrence*, especially as contrasted with the *Bowers* decision, in light of its

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93 MICH L. REV. 485 (1994). Miller critiques the factual sterility of traditional notions of case theory from a clinical legal education perspective:

> In worshiping the law, [the traditional] notion of case theory ignores context and misconceives the power of important facts—especially the client's life facts.
>
> Traditionalists express too much objectivity about the 'facts' and see a limited universe of case theory.... Although the best of the traditionalists recognize a back-and-forth interplay between legal theory and 'what happened,' facts nonetheless serve a purpose secondary to legal doctrine. Even when 'factual theory' is identified as a piece of case-theory structure, this bipartite structure severs factual theory from legal theory. Stories are subsumed in legal theory, which serves as both the starting point and ending point for case theory. Facts exist simply to be plugged into legal theory, and facts that cannot find a home in some legal element are deemed virtually irrelevant. The process of theory development is quantifiable, neat, and quite sterile.

Id. at 498-500. For a non-clinician's appreciation of the importance of client facts/narrative as the prism through which law is made and interpreted, see William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) and the works cited therein.

[7] *See, e.g.*, BERNARD J.F. LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING 522-23, 577-78, 580-81 (Philosophical Library 1958) (demonstrating that in scientific and heuristic methods, both upper blade of theory and lower blade of data are essential to generating verifiable knowledge and critical understanding).

[8] *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382 (1984) ("[T]he reification critique claims that treating... experiences as instances of abstract rights mischaracterizes them. The experiences themselves are concrete confrontations in real circumstances, rich on detail and radiating in innumerable directions.... The experience becomes desiccated when described" merely as "exercising my rights."); Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 225 (1996) (critiquing abstract distinction between conduct and status used in gays-in-the-military litigation as demeaning to service people, factually absurd, and as encouraging gay and lesbian witch hunts in the military); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1460 (1992) ("The 'personhood' privilege in privacy analysis relies too heavily on an abstract image of the human subject as a *moral* self. The 'personhood' at stake in *Hardwick*, however, calls for a more materialist view of the human subject as an *embodied* self. *Hardwick* powerfully underscores the fact that the interests privacy analysis seeks to defend are initially, and indispensably, *body-generated*. In the instant context, this means simply that the bodies of the actual, empirical individual to whom homosexual sodomy statutes are addressed are not merely a derivative supplement, but the generative substrate of the rights the privacy principle attempts to secure. The rights claimed under privacy doctrine live and move and have their being in the material body of the human subject.") (emphases in original); Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615 (2003) (arguing that factlessness in anti-discrimination jurisprudence distorts and defeats discrimination claims).

factual presentation of the gay men before the Court and the protection they sought. Although such a consideration must of necessity note contrasting positions on some legal doctrines and jurisprudential theories and, indeed, may presume a position regarding such questions,[9] I leave to others an analysis of those matters. In addition, these comments are preliminary and exploratory. I conduct a close reading of the text of the *Lawrence* and *Bowers* decisions (Part I) and the attorney submissions in each case (Part II), with the goal of identifying the factual prism through which the *Lawrence* Court viewed the gay men before it (Part III).

I. THE *LAWRENCE* AND *BOWERS* DECISIONS COMPARED

In reading the *Lawrence* decision side-by-side with *Bowers*, one is struck not only by a difference in understanding, respect and tone regarding gay and lesbian persons, but also with regard to the factual reality of the liberty and equality interests at issue in those cases as they are manifested in the lived experiences of gays and lesbians. Indeed, the statement of the issue in each case – a dead give away to the holding in most decisions – establishes this contrast:

Bowers	*Lawrence*
"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time."[10]	"The question before this Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate contact."[11]

[9] For example: what is the scope of the right of privacy after *Lawrence*? Has the notion of "fundamental rights" been expanded to include same-sex relationships? Has the Court now adopted a rationality-plus standard both in due process and equal protection jurisprudence, at least as regards sexual-orientation-based statutes? Is there any life left in "moral disapproval" as a basis for legislation? Has the Court revised the standards of *stare decisis* as set forth in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)? What are the implications for challenges to laws limiting marriage to sex-discordant persons?

[10] *Bowers*, 478 U.S. at 190.

[11] *Lawrence*, 123 S. Ct. at 2475.

Thus, for the *Bowers* Court, the parties seeking protection were sodomites;[12] for the *Lawrence* Court, they are "persons of the same sex [] engage[d] in certain intimate contact."

But just what is the "intimate contact" for which these same-sexed persons seek protection.[13] In *Bowers*, the majority had no doubt that "respondent would have us announce. . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."[14] However, the *Lawrence* Court rejects *Bowers'* pinched articulation of both the issue and the right at stake:

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[12] *See* Goldstein, *supra* note 5, at 1079-89 (discussing the *Bowers* Court's view of homosexuality as immoral, criminally harmful, and a manifestation of illness); *see also* Backer, *supra* note 5, at 554-90 (demonstrating judicial construction of homosexual as predator, Pied Piper, Whore of Babylon, and defiler of public space). *See generally* Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401 (2000). A chilling precursor to *Bower's* not too hidden understanding of homosexuality as contagion is found in Justice Rehnquist's dissent of the denial of certiorari in Ratchford v. Gay Lib., 434 U.S. 1080 (1978), which compared gay and lesbian groups' demands to meet on campus with the demands of persons with measles to illegally meet on campus to advocate for the repeal of quarantine laws. Fortunately, by the time of the *Bowers* decision, Justice Blackmun, who joined Rehnquist's dissent in *Ratchford*, himself dissented from the *Bowers* majority's demonization of gays and lesbians. *See Bowers*, 478 U.S. at 199-214 (Blackmun, J., dissenting).

[13] No mention is made in the *Bower's* majority or dissent, or in Hardwick's brief or oral argument about the specific act of "intimate contact." *See generally* Respondent's Opening Brief, Bowers v. Hardwick, No. 85-140, 1986 WL 720442 [hereinafter *Bowers* Respondent's Brief]; Transcript of Oral Argument, Bowers v. Hardwick, No. 85-140, 1986 U.S. Trans. Lexis 74 [hereinafter *Bowers* Oral Argument]. In fact, the "intimate contact" was mutual oral sex. *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 392-402 (Penguin 1988). In *Lawrence*, the decision specifies that it was "anal sex." *See Lawrence*, 123 S. Ct. at 2476; *see also* Petitioners' Brief at 2, Lawrence and Garner v. Texas, No. 01-120, 2003 WL 152352 [hereinafter *Lawrence* Petitioners' Brief].

[14] *Bowers*, 478 U.S. at 191. Justice Burger, in his now infamous concurrence, was even more graphic about the right for which Michael Hardwick sought protection and the inevitable rejection of that claim given "millennia of moral teaching":

> I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy. As the Court notes, the proscriptions againstsodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named' . . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Bowers, 478 U.S. at 196-97 (Burger, J., concurring) (internal citation omitted). *But see* Goldstein, *supra* note 3, at 1081-89 (demonstrating the inaccuracy of Burger's and Justice White's historiography of sodomy laws). The *Lawrence* majority rejected *Bowers'* historical premises regarding sodomy laws as being oversimplified or "at the very least, overstated." *See Lawrence*, 123 S. Ct. at 2478-80.

> That statement [of the issue presented], we now conclude, discloses the [*Bowers*]Court's own failure to appreciate the extent of the liberty at stake. 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. . . The statutes [at issue in *Bowers* and *Lawrence*] do *seek to control a personal relationship* that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[15]

Thus, although the *Lawrence* Court articulates the issue before it in terms of "intimate contact," it did not reduce that concept to the sexual act involved as it had been in *Bowers*. Rather, it contextualizes the sexual act within the rubric of "personal relationship," and analogizes that relationship to the marital relationship. Expanding further on that analogy, the *Lawrence* Court concludes:

> It suffices for us to acknowledge that adults may choose to enter upon this [personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[16]

Thus, a key factual difference between the decisions in *Bowers* and *Lawrence* is that the Court in *Bowers* saw Michael Hardwick and those for whom he was a surrogate as sodomites, perverts, deviants slithering up the steps of the Court demanding constitutional protection to engage in "'the infamous crime against nature'[,] an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"[17] Whereas the *Lawrence* Court views John Lawrence and Tyron Garner, and the protection they sought, in a profoundly different way:

> The case does involve *two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.*

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[15] *Lawrence*, 123 S. Ct. at 2478 (emphasis added). Justice Blackmun, in his *Bowers* dissent, similarly criticized the majority's narrow understanding and articulation of the right at issue. *See Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting). However, rather than comparing that right to the rights of privacy, autonomy and dignity of "married couples," as the *Lawrence* Court does, Justice Blackmun compared it to "the right to be let alone." *Id.*

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

[17] *Bowers*, 478 U.S. at 197 (Burger, J., concurring) (citing 4 WE. BLACKSTONE, COMMENTARIES *215).

> 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.[18]

Accordingly, the *Lawrence* Court saw itself faced with persons, not mere sodomites, claiming that the government's intrusion into their erotic, sexual life "demean[ed] their existence." The Court's reversal of *Bowers* is articulated using this same factual and theoretical lens:

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

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[18] *Lawrence*, 123 S. Ct. at 2482 (emphasis added). The Court in this key passage uses Lawrence and Garner's sexual act, anal intercourse, as shorthand for all "sexual practices common to a homosexual lifestyle." Of course, sodomy is also a common a practice among heterosexuals. In any event, the *Lawrence* Court does not use sodomy in the reductionistic and condemnatory manner employed by Justice Scalia in his *Romer* dissent. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)). Rather, the *Lawrence* Court uses "sodomy" as symbolic of gays and lesbians' "private lives," the criminalization of which "demean[s] their existence" and is an impermissible attempt to "control their destiny." *See Lawrence*, 123 S. Ct. at 2482. I would hope that this affirming integration of gay and lesbian persons with, but not limited to, their bodies, desires and erotic acts will lay to rest the concerns expressed in reams of academic literature about essentializing gay and lesbian identity by defining it in terms of sodomy. *See, e.g.*, Nan D. Hunter, *Life after* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 543-46 (1992); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1621-27 (1993). Prof. Cain correctly calls for a "nonbifurcation" strategy, *id.* at 1627-40, noting that:

> Although it is true that gay men and lesbians as a class are more than the sex that they do, there is a certain degree of absurdity to making legal arguments in favor of gay and lesbian rights that ignore sex .... [T]he post-Hardwick emphasis on status will de-emphasize the importance to gay men and lesbians of what is most important in their lives: the love and affection they feel for their partners.

Id. at 1641. *See also* Mazur, *supra* note 8, at 237-39 (arguing that status/conduct distinction is "demeaning" and "factually absurd"); Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, TUL. L. REV. 81, 145-46 (2001) ("The status/conduct distinction harms gay and lesbian equality because it, as does *Dale's* dissection of identity and speech, situates equality upon a narrow and artificial premise: the faulty notion of sexual identity as a fixed, sterile, clinical, and biological quantity that is separable from expression and action. Gay and lesbian litigative acquiescence in the status/conduct distinction tacitly [and, at times, openly] legitimizes discrimination against gay and lesbian conduct, when such conduct actually defines and constructs sexual identity. Equal protection of gay and lesbian 'status' but not lived experiences (including sexual intimacy and outness) is an empty form of equality."); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability*, 46 STAN. L. REV. 503, 546-66 (1994) (articulating a similar critique regarding essentialist/constructivist divide: "The differences will remain, but will, I hope, be irrelevant to the arguments and descriptive claims pro-gay litigants will need to make in court."). *Id.* at 456 n.177 (emphasis in original); Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 658 (2002) ("it appears that courts will embrace a social constructionist understanding of a trait [e.g., race, ethnicity, sexual-orientation] when they view that trait as also having essentialist components"). *Lawrence's* reintegration re-eroticizes gay and lesbian life and calls it good, something to be respected and to be accorded dignity. Earlier criticism of the *Bowers* litigation and decision had urged just such an affirming approach. *See, e.g.*, Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

> private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent *demeans the lives of homosexual persons.*[19]

But how does criminalization of "homosexual conduct . . . demean[ ] the lives of homosexual persons"? In the sentence immediately following the passage quoted above, the *Lawrence* Court first focuses its attention on the "demeaning" effects of criminalization itself:

> The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction. This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.[20]

However, in critiquing and rejecting the majority's statement of the issue in *Bowers,* the *Lawrence* Court uses the term "demean" regarding a more fundamental diminishment of personal life than the "stigma" of criminalization: "[t]o 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] But why does the reduction of the privacy claim to "the right to engage in certain sexual conduct" demean heterosexual and homosexual couples? Because, as the Court highlights in its reliance on *Planned Parenthood of Southeastern Pa. v. Casey*:[22]

> [P]ersonal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and

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19 *Lawrence,* 123 S. Ct. at 2482 (emphasis added).

20 *Id.* (internal citation omitted).

21 *Id.* at 2478 (emphasis added).

22 505 U.S. 833 (1992).

> education . . . "involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At 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 compulsion of the State."[23]

Thus, the *Lawrence* Court views John Lawrence and Tyron Garner as "[p]ersons in a homosexual relationship . . . seek[ing] autonomy for these [intimate personal and relational] purposes, just as heterosexual persons do," and concludes that "[t]he decision in *Bowers* would deny them this right."[24] Accordingly, a central concern in *Lawrence* is the petitioners' demand that their personal "dignity" be not just tolerated, but protected and respected.[25] In order to assure such respect, the Court rejects the option of striking down the Texas statute solely on equal protection grounds:

> Equality of treatment and *the due process right to demand respect for conduct protected by the substantive guarantee of liberty* are linked in important respects, and a decision on the latter point advances both interests. If 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.[26]

So, Justice Scalia's estimation of the "massive disruption" of what he takes to be settled notions of "the current social order"[27] may not be far off the mark. The *Lawrence* Court makes clear that gays and lesbians may

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[23] *Lawrence*, 123 S. Ct. 2481 (quoting *Casey*, 505 U.S. at 851). The *Lawrence* Court also notes that *Casey*'s more expansive view of the privacy right involved in "intimate and personal choices" had "cast the [*Bowers*] holding into even more doubt." *See id.* at 2481.

[24] *Id.* at 2482.

[25] Indeed, the Supreme Judicial Court of Massachusetts in *Goodridge* interpreted the central holding in *Lawrence* as "affirm[ing] that the core concept of common *human dignity* protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." *Goodridge*, 798 N.E.2d at 313 (emphasis added); *see also* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) (finding that the Northern Ireland "buggery" statute "constitutes a continuing interference with the applicant's right to *respect for his private life* (which includes his sexual life) within the meaning of Article 8 (1) [of the European Convention on Human Rights]"). *Id.* at ¶ 41 (emphasis added). The *Lawrence* Court cites *Dudgeon* twice and notes other decisions of the European Court of Human Rights rejecting *Bowers* and following *Dudgeon* and similar decisions of other nations' courts. *See Lawrence*, 123 S. Ct. at 2481, 2483 (citing Brief of Amici Curiae Mary Robinson et al. at 9-15, Lawrence v. Texas, No. 02-102, 2003 WL 164151).

[26] *Lawrence*, 123 S. Ct. 2482 (emphasis added).

[27] *Id.* at 2497 (Scalia, J., dissenting).

"demand respect," not for an abstract right of privacy, but for the very "conduct," oral and anal sex – and other variations of non-reproductive sex that could be included within the term "sodomy"[28] – which only seventeen years earlier had driven the *Bowers* majority apoplectic! It may be correct, as Justice Scalia notes, that the *Lawrence* majority "does not overrule *Bowers*' holding that homosexual sodomy is not a 'fundamental right.'"[29] However, as noted above regarding its restatement of the issue in the case, the *Lawrence* majority effects an even more fundamental protection of gay and lesbian sexual activity by contextualizing acts of oral, anal and other sodomies as part of gays' and lesbians' lived experience and holding that the Constitution protects their right to chose to engage in such acts:[30] "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. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[31]

II. THE SUBMISSIONS IN *BOWERS* AND *LAWRENCE* COMPARED

Many factors account for this sea change. There can be no doubt that the political, social and cultural advances of gays and lesbians during the intervening years informed the *Lawrence* Court's view of gays and lesbians. However, I limit my observations here to commenting on one of the factors that affected the Court's changed perspective: the submissions to the Court of Lawrence and Garner's attorneys as compared to the submissions of the attorneys in *Bowers*.

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[28] *See* Ruthann Robson, *Crimes Against Lesbian Sex*, in LESBIAN (OUT)LAW 47-51 (Firebrand Books1992) (cataloguing multiple referents of the term "sodomy"); *see also* Goldstein, *supra* note 3, at 1081-86; Janet E. Halley, *Reasoning Against Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1752-65 (1993); Hunter, *supra* note 18, at 533-38.

[29] *Lawrence*, 123 S. Ct. at 2490 n. 2 (Scalia, J., dissenting).

[30] At oral argument in *Lawrence*, Paul M. Smith, attorney for Lawrence and Garner, unsuccessfully tried to get Justice Scalia to understand the hermeneutical necessity of acknowledging the factual prism through which privacy jurisprudence had developed. "[T]he Court's decisions don't look just at history, they look at the—at *the function that a particular claimed freedom plays in the lives of real people.* That's why contraception became an issue. That's why abortion became an issue." Transcript of Oral Argument at 9, Lawrence v. Texas, No. 02-102, 2003 WL 1702534 (emphasis added) [hereinafter *Lawrence* Oral Argument]. However, Justice Scalia's dismissive response was: "I don't know what you mean by the function it plays in the lives of real people." *Id.*

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

A. Bowers

Others have perceptively and persuasively critiqued the factless, desexualized, closeted submissions of the attorneys in *Bowers*.[32] Whatever the strategic or theoretical reasons for that litigation strategy, the effect on the brief submitted by Hardwick's attorneys and on oral argument is evident. There is merely a one sentence passing reference in the brief to Michael Hardwick's arrest, without specifying the sodomitical act observed by the police officer.[33] There is no discussion regarding the impact of the arrest or of a possible conviction on Hardwick's life, or on the lives of other gays and lesbians who lived in the shadow of the Georgia or other state sodomy statutes, except to note that "Hardwick remains subject to prosecution for

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[32] *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1612-17 (1993). Cain questions:

> Would the case have come out differently if it had been argued by an openly gay lawyer who could have made the Court see the threat to dignity and self-respect posed by the Georgia statute? Was it wrong to focus so narrowly on the privacy aspects of the case? Would things have come out differently if *Baker*, with its full record, had reached the Court first?

Id. at 1616-17 (referring to Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd en banc*, 769 F.2d 289 (9th Cir. 1985), *petition for cert. denied*, 478 U.S. 1022 (1986)); *see also* Halley, *Reasoning*, *supra* note 28, at 1744-45. Halley contrasts the strategy of Hardwick's lawyers in earlier stages of the *Bowers* litigation with the strategy of a different team of lawyers as reflected in their final brief to the Court:

> Up to and including the briefs for certiorari, Hardwick's attorney's consistently framed his case as raising a question of homosexual rights, emphasizing his sexual-orientation identity and deemphasizing the acts for which he was arrested.... Hardwick's first strategy was therefore to call on the court to protect a group of persons from intimate invasion by making their acts a merely adventitious (in Aristotelian terms, an accidental) characteristic that renders them vulnerable to arrest. Though the early briefs emphasized Hardwick's commitment to "homosexual acts," they were written to hold at bay the conclusion that a" practicing homosexual" is a sodomite.
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> Hardwick's second team of attorneys, pursuing a different strategy, worked to exclude that conclusion all together.... Accordingly, they recast Hardwick's claim with painstaking care as a bid for protection along the register not of identities, but of acts – "the associational intimacies of private life in the sanctuary of the home." Hardwick's Supreme Court brief acknowledged "homosexual sodomy" only once.

Id. at 1744-45.

[33] "On August 3, 1982, Georgia exercised this 'police power' over personal morality by arresting 29-year-old Respondent Michael Hardwick in his own bedroom, and charging him with committing the crime of 'sodomy' with another consenting adult in that very room." *Bowers* Respondent's Brief, *supra* note 13, at 1. Of course, the fact that *Bowers* was resolved below on a motion to dismiss on the pleadings exacerbated the factual minimalist approach adopted by Hardwick's attorneys. In contrast, the factual record in *Baker* had been fully developed at trial and was enriched by reference to Baker's self-identification as gay, his successful career as a teacher, his gay rights activism, and the impact of the sodomy statute on his life. *See Baker*, 53 F. Supp. at 1126-28. For a more detailed rendering of the facts of Hardwick's life as a gay man and of the facts leading up to his arrest that did not find their way into the record, see IRONS, *supra* note13 and Thomas, *supra* note 8, at 1437-39. Regarding Hardwick's "public facts," Thomas notes that, "[t]aken together, they tell an all too typical story of gay and lesbian experience under the American legal system." *Id.* at 1437.

the charged offense."[34] Nor is there any discussion, except in the most general terms, of the personal, intimate or relational aspects of Hardwick's sexual life and its relationship to his being a gay man.[35]

At oral argument, Lawrence Tribe, Hardwick's attorney, doggedly pursued this strategy. He narrowed the issue to a general right to be free from the state's "dictat[ing] in the most intimate and, indeed, I must say, embarrassing detail how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate personal association with another adult."[36] The remainder of the argument is primarily taken up with the justices' concern about a limiting principle regarding the right of intimate personal relationships, with Professor Tribe repeatedly turning their attention to the spatial limiting principle, the home: "We don't rely on peculiarities of the facts here, but we do say that it is only in the context of the home that the very powerful confluence of rights represented by the home and intimacy are involved."[37]

The briefs of amici, with three exceptions, did little to fill-in the factual gaps of the Hardwick Brief or of Professor Tribe's oral argument. However, the Brief of Amici Curiae American Psychological Association and American Public Health Association argued that homosexuality is a normal variant of human sexuality that relationships are as important to gays and lesbians as to heterosexuals, and that sexual intimacy is an important element of such

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[34] *Bowers* Respondent's Brief, *supra* note 13, at 1. This assertion, plus a later assertion that Hardwick faced future arrest and prosecution since he intended to continue to violate the statute were included merely as predicates to establish standing and not to contextualize Hardwick's claim within his life as a gay man living a sexualized life in Georgia. *See id.* at 5 n.5. Some commentators maintain that these facts – mere arrest without prosecution – did not establish standing and that the Court should have dismissed the appeal. *See, e.g.*, Donald A. Dripp, Bowers v. Hardwick *and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1415 (1995) (noting that the decision contains no facts about Hardwick and opining that in a case in which there was a real injury-in-fact, the result might have been different). *But see* Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 69-106 (2001) (arguing that employment, custody, speech and stigma implications in the lives of gays and lesbians of unenforced sodomy laws confer standing).

[35] *See* Halley, *Reasoning*, *supra* note 28, at 1744-45 ("The brief attempted to distance the plaintiff from his identity as 'homosexual' by designating it as part of the state's analysis rather than plaintiff's. . . . The decision to alienate identity in this way reflects anxiety – amply justified in retrospect – about the relationship between Hardwick's entry into reasoning as a homosexual and his act of sodomy. Hardwick's Supreme Court briefs were drafted in the shadow of the possibility that sodomy can remain a 'category of forbidden acts' and can form the object of a facial attack *only if all mention of gay identity is excluded.*") (emphasis added). Justice Blackmun's *Bowers* dissent reflects this dichotomy. Although he asserted that "[h]omosexuality may form part of the very fiber of an individual's personality," he nevertheless also found that Hardwick's claim that the Georgia statute "involves an unconstitutional intrusion into his privacy and right of intimate association *does not depend in any way on his sexual orientation.*" *Bowers*, 478 U.S. at 201, 203 (Blackmun, J., dissenting) (emphasis added).

[36] *Bowers* Oral Argument, *supra* note 13, at 16.

[37] *Id.* at 30. For a more sympathetic view of Professor Tribe's conundrum at oral argument, see Backer, *supra* note 5, at 592-93.

relationships.[38] Justice Blackmun specifically cited this brief in his dissent, discussing homosexuality as no longer being viewed as a mental illness and as being an important part of an individual's personality. Further, the briefs of two gay and lesbian groups detailed the impact of sodomy statutes on the social, economic and relational lives of gays and lesbians.[39]

B. Lawrence

The contrast between the submissions in *Bowers* and those in *Lawrence* is striking. Although Lawrence and Garner's main brief is almost as circumspect as the brief in *Bowers* in describing the circumstances of their arrest, it does specify that they were charged with engaging in "anal sex" and that they were jailed overnight.[40] However, it then immediately characterizes the state's action as an intrusion "inside its citizen's homes policing the details of their most intimate behavior and dictating with whom they may share *a profound part of adulthood.*"[41] This focus on "intimate behavior" as "a profound part of adulthood" is then particularized over the next forty-two pages of the brief in terms of the intersection of sexual acts, gay/lesbian personal identity and the formation of relationships, including family relationships, as the factual, experiential lens through which the Court is invited to view the petitioners' liberty/privacy and equal protection claims.

The liberty interest is also particularized to include "the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex."[42] The importance of such a right is then personalized and generalized by conjuring an image of a life without sexual intimacy: "Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals."[43]

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[38] *See* Brief of Amici Curiae American Psychological Association et al. at 13-15, Bowers v. Hardwick, No. 85-140, 1986 WL 720445.

[39] *See* Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. et al. at 26-30, Bowers v. Hardwick, No. 85-140, 1986 WL 720449; Amicus Curiae Brief Lesbian Rights Project et al. at 22-25, Bowers v. Hardwick, No. 85-140, 1985 WL 667944.

[40] *Lawrence* Petitioners' Brief, *supra* note 13, at 2; *see also id.* at 26 ("Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity."). For a more detailed rendering of the facts surrounding Lawrence and Garner's arrest, and their lives prior to that arrest, see Bruce Nichols, *"We never chose to be public figures": Houston men were surrounded by secrecy throughout appeal*, DALLAS MORNING NEWS, June 27, 2003, Texas Section, at 19A.

[41] *Lawrence* Petitioners' Brief, *supra* note 13, at 8 (emphasis added).

[42] *Id.* at 10.

[43] *Id.* at 11. In his *Bowers* dissent, Justice Blackmun had similarly admonished that a person's ability to make decisions about sexual relations "is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy." *Bowers*, 478 U.S. at 203

Accordingly, the brief continues, "[t]he adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association."[44]

To this point, however, the value of sexual intimacy was described in either individual or binary terms. One could argue that such an approach might have been sufficient to bring the right of gays and lesbians to enjoy such intimacies within the scope of the Court's privacy jurisprudence. Nevertheless, the brief goes further. Realizing that a key disjunctive in the *Bowers* decision was the Court's cavalier dismissal of any "connection between family, marriage, or procreation on the one hand and homosexual activity on the other,"[45] the brief then connects same-sex sexual intimacy first to gay and lesbian identity and then to the formation of family.

First, quoting *Paris Adult Theatre I v. Slaton*,[46] the brief defines "[s]exual intimacy [as] 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."[47] It then makes explicit the connection between sexual intimacy and gay and lesbian identity intentionally hidden by Hardwick's attorneys:[48]

> One's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the state is anathema to liberty. Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. Section 21.06 utterly destroys that freedom by forbidding most sexual behavior for all same-sex couples, whether they are in a

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(Blackmun, J., dissenting). In critiquing *Bowers*, Jed Rubenfeld notes the intolerable effect and totalitarian nature of such an option:

> It is no answer to say that an individual interested in homosexual relations might simply remain celibate. The living force of the law is at issue, not its logical form, and the real force of anti-homosexual laws, if obeyed , is that they redirect physical and emotional desires that we do not expect people to suppress. . . . The point is this: childbearing, marriage, and the assumption of a specific sexual identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person's daily life and consciousness. Laws that force such undertakings on individuals may properly be called 'totalitarian,' and the right to privacy exists to protect against them.

Jeb Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 801-02 (1989).

44 *Lawrence* Petitioners' Brief, *supra* note 13, at 12.

45 *Bowers*, 478 U.S. at 191; *see also* Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1564-65 (2000) ("From this lack of connect comes the rest of the opinion.").

46 413 U.S. 49 (1973).

47 *Lawrence* Petitioners' Brief, *supra* note 13, at 12 (quoting *Paris Adult Theatre I*, 413 U.S. at 63).

48 *See generally* Halley, *Reasoning*, *supra* note 28.

> committed, long-standing relationship, a growing one, or a new one.[49]

After a fairly straightforward articulation of the importance of the home in privacy jurisprudence,[50] the brief returns to the theme of the intersection of intimate relationships with gay and lesbian identity: Gay and lesbian Americans have the same liberty interests as heterosexuals in private consensual sexual intimacy free from unwarranted intrusion by the State. Gay adults, like their heterosexual counterparts, have vital interests in their intimate relationships, their bodily integrity, and the sanctity of their homes.[51]

Finally, however, the brief focuses on the "sanctity of the home" not just as a place where free citizens can engage in conduct that is protected within the home, even though such conduct may be repugnant to some or, indeed, to many.[52] Rather, it turns the Court's attention to the home as the locus of same-sex families:

> Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country. . . . Today, the reality of these families is undeniable. The 2000 United States Census identified more than 600,000 households of same-sex partners nationally, ... The reality of these families cannot be disregarded just because they do not match the "nuclear" model of a married couple with biological children. . . . For gay men and lesbians, their family life, their intimate associations and the homes in which they nurture those

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49 *Lawrence* Petitioners' Brief, *supra* note 13, at 12-13 (internal citation omitted).

50 *See id.* at 14-16.

51 *Id.* at 16.

52 In contrast, Lawrence Tribe in *Bowers* had emphasized the protection of otherwise unprotected behavior, such as possession of obscenity, in the home. *See, e.g.*, *Bowers* Respondent's Brief, *supra* note 13, at 20-21 (relying on Stanley v. Georgia, 394 U.S. 557 (1969)). Similarly, although Justice Blackmun in his *Bowers* dissent affirmed homosexual relationships, including same-sex sodomy, as normal and as "part of the very fiber of an individual's personality," he also retreated to a reliance on the "right to be let alone" to, among other things, watch obscene movies at home. *Bowers*, 478 U.S. at 201, 203 (Blackmun, J., dissenting); *see also id.* at 207-208. It has been argued that Blackmun's privacy-based, morally neutral approach did not answer the arguments of the majority in *Bowers* and that such an approach was ultimately harmful to gays and lesbians. *See, e.g.*, Sandel, *supra* note 18, at 534-35 (contrasting Blackmun's voluntarist approach, which emphasizes a neutral, individual privacy right to be left alone to choose personal relationships, with a substantive approach, which "claims that much that is valuable in conventional marriage is also present in homosexual unions. In this view, the connection between heterosexual and homosexual relations is not that both result from individual choice but that both realize important human goods. Rather than rely on autonomy alone, this second line of reply articulates the virtues homosexual intimacy may share with heterosexual intimacy, along with any distinctive virtues of its own."); *see also* Thomas, *supra* note 8, at 1455-56 ("The problem with reliance on privacy, however, is that 'the closet' is less a refuge than a prison house.").

> relationships – is every bit as meaningful and important as family life is to heterosexuals.[53]

Lawrence and Garner's attorneys contextualize their equal protection argument in similar terms focusing on the statute's limiting intimate affection only for same-sex couples:

> Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. The law's discriminatory focus sends the message that gay people are second-class citizens and lawbreakers, leading to ripples of discrimination throughout society.[54]

The brief then particularizes the "ripples of discrimination" that result from the law's "brand[ing] gay persons as second-class citizens,"[55] focusing on the ways in which criminalization of same-sex sodomy affects gay and lesbian identity, and associational and family life.[56]

Paul M. Smith, attorney for Lawrence and Garner, attempted a similar recontextualizing at oral argument. However, the first twenty pages of the transcript are taken-up primarily with responses to the Court's inquiry regarding the long history of condemnation of sodomy and the impact of that history on the claim of a fundamental right to intimate association involving sodomy. Mr. Smith consistently attempted to debunk that history and to generalize the Court's privacy jurisprudence.[57]

Finally, beginning at page twenty-three, he got to articulate the themes in his brief outlined above, in response to a question regarding why *Bowers* should be overruled:

> [F]irst it [*Bowers*] posed the question too narrowly by focusing just on homosexual sodomy, which is just one of the moral choices that couples ought to have—that people ought to have available to them. And second in its analysis of history, which I think I explained already and third, and perhaps most importantly, in the assumptions that the Court made in 1986 about the realities of gay lives and gay relationships, the Court simply asserted in the *Bowers* case that there's no showing that has been demonstrated between the opportunity to engage in this conduct and family. And certainly while it may not have been shown in that case or even apparent to the Court this 1986, I submit it has to be apparent to

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53 *Lawrence* Petitioners' Brief, *supra* note 13, at 16-19.

54 *Id.* at 9-10, 40.

55 *Id.* at 40.

56 *Id.* at 45-50 (cataloguing resulting limitations on custody, visitation, foster care, political association, inclusion in civil rights protection, and employment).

57 *Lawrence* Oral Argument, *supra* note 30, at 3-23.

the Court now that there are gay families that family relationships are established, that there are hundreds of thousands of people registered in the Census in the 2000 Census who have formed gay families, gay partnerships, many of them raising children and that for those people, the opportunity to engage in sexual expression as they will in the privacy of their own homes performs much the same function that it does in the marital context, that you can't protect one without the other, that it doesn't make sense to draw a line there and that you should protect it for everyone. That this is a fundamental matter of American values.

So those are the three reasons we ask you to overrule *Bowers v. Hardwick* as to the fundamental rights aspect of the case and that we think that that is an area where the Court should go—should go back and reconsider itself. The Court has now left open for nearly 30 years the question of whether anybody outside has a right—has a privacy right to engage in consensual sexual intimacy in the privacy of their home. And I submit to you, you know, while the Court has left that unanswered, the American people have moved on to the point where that right is taken for granted for everyone. Most Americans would be shocked to find out that their decision to engage in sexual intimacy with another person in their own home might lead to a knock on the door as occurred here and a criminal prosecution. And that—that reality is something that the Court needs [to take] into account and certainly in so doing, it shouldn't—in constructing its fundamental rights edifice draw distinctions between gay couples and other couples.[58]

III. THE *LAWRENCE* DECISION IN LIGHT OF LAWRENCE AND GARNER'S SUBMISSIONS

I do not claim that the factual contextualization of the privacy and equal protection arguments of Lawrence and Garner's attorneys summarized above[59] alone carried the day. However, the symmetry between their submissions to the Court[60] and the language and the narrative regarding gay and lesbian identity and relationships adopted by the *Lawrence*

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[58] *Id.* at 23-24.

[59] *See supra* Part II.B.

[60] *See id.*

Court[61] suggests that they were a key factor. The Court clearly adopts the factual prism articulated by Lawrence and Garner's lawyers through which to view and resolve the liberty and equal protection claims, especially in terms of the right of gays and lesbians to demand respect and protection for their decisions about intimate association and their relationships.

But what about Lawrence and Garner's demand for protection of these decisions in terms of "family"? I would submit that even in that regard, the Court adopted their viewpoint. The Court, in its exegesis of *Planned Parenthood v. Casey*, emphasizes the underlying reasons for protecting decisions about, among other things, "family":

> The Casey decision again confirmed that our laws and tradition afford constitutional protection to *personal decisions relating* to marriage, procreation, contraception, *family* relationships, child rearing, and education. In explaining the respect the Constitution demands for the *autonomy of the person in making these choices*, we stated as follows: 'These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.* At 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 compulsion of the State.' *Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.* The decision in *Bowers* would deny them this right.[62]

Indeed, Justice Scalia, in citing this portion of the majority opinion in his dissent, concludes that "[t]oday'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 of marriage is concerned."[63]

In hindsight, one can decry the failure of the attorneys in *Bowers* to also craft such a richly textured and nuanced narrative.[64] Of course, there is no doubt that the public narratives of gay and lesbian lives eighteen years ago were not as evident as they are today.[65] However, that contrast can be

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[61] *See supra* Part I.

[62] *Lawrence*, 123 S. Ct. at 2481-82 (internal citation omitted) (emphasis added).

[63] *Id.* at 2498 (Scalia, J., dissenting).

[64] *See, e.g.*, Cain, *supra* note 18; Halley, *Reasoning*, *supra* note 28; Sandel, *supra* note 18.

[65] *See, e.g.*, Michaelson, *supra* note 45, at 1560 ("In 1986, the *kulturkampf* that Justice Scalia would later describe in his *Romer* dissent had not yet begun in earnest; it was hard for Justice White even to imagine a connection between homosexual sodomy and the areas of life traditionally protected by the Fourteenth Amendment. Not so in 2000, a time at which America has thousands of recognized gay families; gay domestic partnerships recognized by corporations

overstated. The *Lawrence* Court itself notes that changing public and legal attitudes towards gays and lesbians should have been apparent to the *Bowers* Court in 1986.[66] As noted above, the submissions of three amici in *Bowers* documented the personal, social, relational, erotic, and political lives of gays and lesbians.[67] The Brief of Lawrence and Garner documents the data about gay and lesbian lives available even in 1986.[68]

In any event, it may be the case, as Professor Thomas has forcefully argued, that inclusion of those facts would have made no difference to the *Bowers* Court.[69] Effective or not, they would have, as their inclusion in *Romer* and *Lawrence* has, contributed to the counter-narrative[70] within which future gay and lesbian rights cases are litigated.

Of course, the lawyers in *Lawrence* did not include all of the facts of Lawrence's and Garner's arrest or lives.[71] No mention was made of the fact that Lawrence is white, Garner black; that Lawrence is 24 years older than Garner; or that the anonymous call that lead to their arrest was from a former roommate of Garner's, "who obtained a [temporary] protective order against Mr. Garner, accusing him of several beatings and sexual assault."[72] Certainly, one could persuasively argue that those facts were

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and many municipalities; gay adoptive parents; not to mention gay television characters and members of Congress.").

66 *See Lawrence*, 123 S. Ct. at 2480-81.

67 *See supra* notes 38 and 39; *see also* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940 101-11, 291 (Basic Books 1994) (describing development of social and kinship relationships during this period); KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (Columbia University Press 1991).

68 *Lawrence* Petitioners' Brief, *supra* note 13, at 16-17, 21-25, 46-47. This data was also documented in the briefs of myriad amici. *See, e.g.*, Brief of Amici Curiae Professors of History et al. at 10-21, Lawrence v. Texas, No. 02-102, 2003 WL 152350; Brief of Amici Curiae American Psychological Association et al. at 1-23, Lawrence v. Texas, No. 02-102, 2003 WL 152338.

69 *See, e.g.*, Thomas, *supra* note 8, at 1455 ("[W]hat those who suggest that *Hardwick* would have been decided differently had the facts of gay and lesbian relationships been put before the Court overlook, though, is the degree to which the *Hardwick* Court's 'willful blindness' toward gay and lesbian life in America and the privacy paradigm are governed by the same logic."). *But see* Backer, *supra* note 5, at 595 ("The moral for people looking to engage in impact litigation is bleak. At least with respect to litigation involving sexual nonconformity, finding the perfect set of facts through which to litigate an issue provides little comfort; in every case involving sexual nonconformity, litigants will have to fight the sexual ghouls created by the courts. However, bleakness does not imply hopelessness.").

70 *Id.* at 595 ("But the real lesson is that impact litigation requires *quantity* as well as quality. One set of facts, such as presented in *Bowers*, does not a cultural revolution make? If new meta-narratives are to be created, they will require more than a handful of 'good facts' paraded before the public and the courts. That requires creation of a new meta-narrative."). *See generally* Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY J. 2 (2003) (critiquing of identity and equivalence narratives and urging morality narrative that affirms gay and lesbian lives, including their erotic component, as good).

71 *See* Nichols, *supra* note 40.

72 *Id.* However, the case was apparently dropped when the roommate could not be located for trial. *See id.*

strictly irrelevant to the case.[73] A resolution of that conundrum is beyond my purposes in this brief essay.

Of more significance is the fact that neither the *Lawrence* attorneys nor the *Lawrence* majority expressly acknowledges the fact the Lawrence and Garner were not involved in a relationship.[74] At first glance, this omission appears odd, given that the right at issue in *Lawrence* was articulated both by the attorneys and the Court, as demonstrated above, almost exclusively in relational terms. However, the narrative constructed by the attorneys was not a narrative in which each sexual act is romanticized as being directly related to an existing relationship. A hint of their more expansive narrative regarding sexual encounters can be found in the *Lawrence* brief:

> One's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. Section 21.06 utterly destroys that freedom by forbidding most sexual behavior for all same-sex couples, *whether they are in a committed, long-standing relationship, a growing one, or a new one.*[75]

This passage's reliance on *Casey* is also telling, since the citation is to the portion of *Casey* that reaffirms the protection of relational decisions for unmarried persons enunciated in *Eisenstadt v. Baird.*[76] The narrative in *Eisenstadt* also did not present to the Court an unmarried individual who was involved in or intending to be involved in a relationship. There is no indication whatsoever in *Eisenstadt* what the female students who took the free samples of vaginal foam intended to do with them and certainly no evidence that they intended to use them solely for health or contraceptive purposes in the context of a personal ongoing relationship, rather than simply in the context of a one-night stand. Nevertheless, the *Eisenstadt* Court, refusing to be dragged into the intimacies of an unmarried person's sexual encounters to make such evaluative determinations, simply held that individuals had the right to make such decisions for themselves.[77]

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[73] *But see* Miller, *supra* note 6, at 500 ("Stories are subsumed in legal theory, which serves as both the starting point and ending point for case theory. Facts exist simply to be plugged into legal theory, and facts that cannot find a home in some legal element are deemed virtually irrelevant."); *see also* Mazur, *supra* note 8, at 265-72, and those cited therein, regarding the challenge of including the plaintiff's "facts," and of constructing a narrative that is "representative."

[74] Nor am I aware of any indication that they have entered into a relationship since their arrest.

[75] *Lawrence* Petitioners' Brief, *supra* note 13, at 12-13 (citing *Casey*, 505 U.S. at 851) (internal citation omitted) (emphasis added).

[76] 405 U.S. 438 (1972).

[77] *See id.* at 453-54.

Similarly in *Lawrence*, the Court could not have been blind to the fact that the plaintiffs were not claiming to be an idealized, romantic couple involved in a long-term relationship. Nevertheless, as in *Eisenstadt*, the majority accepted the plaintiffs' narrative as part of a broader story of the place decisions about having sex with someone, even if only for one night, have in the overall personal, sexual and relational life of gays and lesbians.[78]

CONCLUSION

As demonstrated above, a key distinction between the *Bowers* and *Lawrence* litigation is that the *Bowers* Court did not have before it Michael Hardwick's personal, sexual, relational narrative as a gay man living under the shadow of a criminal sodomy statute due to a conscious strategy decision by Hardwick's attorneys.[79] In contrast, Lawrence and Garner's attorneys placed this narrative squarely before the Court.[80] These differences in case strategies and narratives did not make the outcomes in each case inevitable. However, it is difficult to imagine that the tone of respect for same-sex sexual intimacy and relationships articulated in the *Lawrence* decision would have been so pronounced without the inclusion of the factual and narrative detail employed by Lawrence and Garner's attorneys.

Interestingly, the *Lawrence* decision gives an indication of what a favorable decision without such a rich narrative component might have looked like. The majority extols Justice Stevens' *Bowers* dissent: "[His] analysis, in our view, should have been controlling in *Bowers* and should control here."[81] However, Justice Stevens' analysis would have protected the right of gays and lesbians to engage in same-sex sodomy on the following basis: "The essential 'liberty' that animated the development of the law in [our privacy] cases . . . surely embraces the right to engage in nonreproductive, sexual conduct *that others may consider offensive or immoral.*"[82] Nowhere in Justice Stevens' dissent was there any attempt to challenge the basis on which such behavior is considered to be "offensive or immoral" let alone any positive, affirming analysis regarding same-sex sexual intimacy or

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[78] *See supra* notes 11-13 and accompanying text. Accordingly, a criticism raised before the *Lawrence* decision of the litigation strategy's linking sex and relationships as "[c]asting gays merely interested in sex as second-class citizens relative to their commitment-oriented peers," has proved to be, at best, overblown. Douglas NeJaime, *Marriage, Cruising, and Life In Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C. L. L. REV. 511, 538 (2003).

[79] *See supra* notes 32-38 and accompanying text.

[80] *See supra* notes 40-58 and accompanying text.

[81] *Lawrence*, 123 S. Ct. at 2483.

[82] *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting) (emphasis added).

relationships.[83]

On the other hand, the *Lawrence* decision includes just such an affirming analysis as a key and, I would maintain, necessary part of its reasoning and holding. In addition, the Court articulates this analysis not just in abstracted theoretical terms, but enriches it with a contextualizing narrative. As shown above, the decision of Lawrence and Garner's attorneys to include their clients' sexual narrative as central to their case theory and as in some respect representative of the erotic and relational narratives of gays and lesbians, clearly contributed to the factual and theoretical articulation adopted by the *Lawrence* majority. Future cases must now be informed and guided by that narrative.

[83] In contrast, as noted above, Justice Blackmun in his dissent incorporated, but did not ultimately rely on, such an affirmative analysis. *See supra* notes 15, 35, 38, 43 and 52.