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# THE MISSING WORD IN *LAWRENCE V. TEXAS*

RUTHANN ROBSON\*

The missing word is not liberty. “Liberty” manifests itself in the Court’s opinion in *Lawrence v. Texas*<sup>1</sup> in a way that satisfies and delights those of us who believe that the liberty clause of the Fourteenth Amendment<sup>2</sup> might yet provide a basis for liberation, including sexual liberation. Justice Kennedy begins his opinion for the Court by stating that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>3</sup> The Court then notes that the Texas statute criminalizing sodomy at issue in *Lawrence* “involves liberty of the person both in its spatial and more transcendent dimensions.”<sup>4</sup> A liberty both transcendent and intimate animates the Court’s conclusion that the criminal sodomy statute was unconstitutional.

The missing word is not privacy. The Court locates the precedential genesis of the interpretation of the liberty clause to include sexuality in the form of marital privacy as declared by the Court in *Griswold v. Connecticut*,<sup>5</sup> quickly noting its equal applicability to unmarried persons.<sup>6</sup> The Court

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<sup>1</sup> *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>2</sup> U.S. CONST. amend. XIV.

<sup>3</sup> *Lawrence*, 123 S. Ct. at 2475.

<sup>4</sup> *Id.*

<sup>5</sup> 381 U.S. 479 (1965).

<sup>6</sup> The Court in *Lawrence* states that in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), it invalidated a law prohibiting the distribution of contraceptives to unmarried persons, declaring that the Equal Protection Clause of the Fourteenth Amendment mandated such an extension of *Griswold v. Connecticut*. See *Lawrence*, 123 S. Ct. at 2477. The Court in *Lawrence* also noted that in *Eisenstadt* the majority declared that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

repeatedly emphasized that the statute in question was “touching upon the most private human conduct, sexual behavior, and in the most private of places, the home,”<sup>7</sup> concluding that the “petitioners are entitled to respect for their private lives.”<sup>8</sup>

Indeed, “privacy” is subject to critique as being too prominent in the Court’s opinion. From the perspective of liberation, privacy relegates sexuality to the home, the bedroom, and then into the closet. It protects sexual expression only when it is secreted away from the public sphere. Privacy does not safeguard “public displays of affection.” Privacy does not require civil rights. Privacy does not assist those without the economic privilege to maintain a private space.

Privacy is also a troublesome concept when we consider the liberation of those who experience violence within the home. For queer youth, this possibility is especially pronounced.<sup>9</sup> Lesbians and gay men are subject to intimate partner violence.<sup>10</sup> Feminist legal theorists have long argued that a man’s home cannot be his castle if women are to be protected from male violence.<sup>11</sup> The private sphere sacrosanct from governmental interference would preclude liberation for many.

*Lawrence*, 123 S. Ct. at 2477 (quoting *Eisenstadt*, 405 U.S. at 453).

<sup>7</sup> *Lawrence*, 123 S. Ct. at 2478.

<sup>8</sup> *Id.* at 2484.

<sup>9</sup> As the Gay and Lesbian Task Force reports, the home is a site of frequent violence for sexual minority youth:

One study of gay and lesbian youth found that 2 out of 5 had been physically assaulted with more than three-fifths of the incidents having occurred in their homes. According to Huckleberry House in San Francisco, a homeless shelter for young people, gay and lesbian youth report a higher incidence of verbal and physical abuse from parents and siblings than do their heterosexual peers.

NATIONAL GAY AND LESBIAN TASK FORCE, *Information About Gay, Lesbian, Bisexual, Transgendered and Questioning Youth*, at <http://www.ngltf.org/issues/youthinfo.htm> (last visited Sept. 24, 2003) (citations omitted). The case of *In re Shane T.*, 453 N.Y.S.2d 590 (1982) provides but one example. In *Shane T.*, a New York family court judge adjudicated a fourteen year old boy as abused by both his parents based upon his father’s “unrelenting torrent of verbal abuse” directed at the child’s “sexual identity,” specifically the father’s taunts of “fag,” “faggot,” and “queer,” despite the boy’s denial of his homosexuality. *Id.* at 593. The family court judge rejected the father’s justification of a right to discipline his child for the boy’s “girlie” behavior and also found the mother at fault for failure to protect the child. *Id.* at 594. For further discussion of family violence against sexual minority youth, see Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 439-40 (1998); Scott Hershberger et al., *Predictors of Suicide Attempts Among Gay, Lesbian, and Bisexual Youth*, 12 J. OF ADOLESCENT RES. 477 (1997); Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who are Queer - Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. LAW REV. 915 (2001).

<sup>10</sup> See, e.g., Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law & Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 - 91 (1990) (examining lesbian domestic violence).

<sup>11</sup> See, e.g., CATHERINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 168, 190-94 (1989) (arguing that privacy theories are not sufficient to protect women from male violence); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 638 (1986).

The missing word is not lesbian. The word appears once in the Court's opinion, once in O'Connor's concurring opinion and twice in Scalia's dissenting opinion. However, in each of these instances the word "lesbian" occurs in the context of a citation, and in each of these cases the word "lesbian" is appended to "gay men."<sup>12</sup> Like the opinion and commentary to *Bowers v. Hardwick*,<sup>13</sup> *Lawrence v. Texas* perpetuates the invisibility of lesbians and the myth that there is no history of persecution against lesbians.<sup>14</sup>

While a specifically lesbian history may be absent, the missing word is not "history." History, unlike lesbian existence, preoccupies the Court. This preoccupation occurs despite Scalia's complaint that the Court has essentially weakened the history prong of the substantive due process test.<sup>15</sup> Despite Scalia's complaint, the Court does not explicitly criticize this backward looking interpretation of rights, which essentially freezes human rights to the America of 1776 in which African Americans, Native Americans, and women were all less than human. Although the Court does ultimately express an evolutionary perspective on rights<sup>16</sup> they nevertheless seem

<sup>12</sup> Justice Kennedy was discussing *Romer v. Evans*, which invalidated Amendment Two to the Colorado state constitution, which had singled out persons who were "homosexual, lesbian, or bisexual." See *Lawrence*, 123 S. Ct. at 2482 (citing *Romer v. Evans*, 517 U.S. 620, 624 (1996)). In her concurrence, Justice O'Connor quotes from a Texas case stating that "[t]he statute brands lesbians and gay men as criminals," to support her view that the Texas statute was "directed at homosexuals as a class." *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring) (quoting *State v. Morales*, 826 S.W.2d 201, 202-03 (Tex. App. 1992)). In Scalia's dissenting opinion, he mentions the Ninth Circuit's opinion in *High Tech Gays v. Defense Industrial Security Clearance Office* as upholding "expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearance." *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting) (citing *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 570-71 (9th Cir. 1990)). Scalia also cites to the *Gay/Lesbian Almanac*, the work of renowned gay scholar Jonathan Katz for the proposition that sodomy prosecutions occurred during the colonial period. See *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting) (citing JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC* 29, 58, 663 (Harper & Row 1983)).

<sup>13</sup> 478 U.S. 186 (1986). For an analysis of the commentary to *Bowers v. Hardwick* and its disregard of lesbian existence, see Ruthann Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 WOMEN'S RTS. L. REP. 177-203 (1990) (considering the constitutional doctrine of privacy and its critiques as applicable to lesbians).

<sup>14</sup> See Ruthann Robson, *Lesbianism in Anglo-American History*, 5 WIS. WOMEN'S L.J. 1 (1990) (discussing the history of lesbian sexual persecution).

<sup>15</sup> See *Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting). The test includes deciding whether the carefully articulated claimed right is "deeply rooted" in this nation's "history and tradition" and thus fundamental and thus deserving of heightened scrutiny. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>16</sup> See *Lawrence*, 123 S. Ct. at 2484. As the Court states:

Had those who drew and ratified the Due Process Clauses of the *Fifth Amendment* or the *Fourteenth Amendment* known the components of liberty in its manifold

compelled to reconsider the history of the sodomy laws and prosecutions. In so doing, they adopt the version of history promulgated in the Historian's Brief, as well as the briefs filed by the CATO Institute and the ACLU.<sup>17</sup> The Court reorients the historical inquiry to conclude that the "ancient roots" of the prohibition against sodomy as discussed in *Bowers v. Hardwick* only began to focus upon "same-sex couples" in the "last third of the 20<sup>th</sup> century."<sup>18</sup> Thus, the sodomy laws violate the Due Process Clause of the Fourteenth Amendment because they demean the existence, and seek to control the destiny of, the petitioners<sup>19</sup> and presumably other gay men and lesbians.<sup>20</sup>

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possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

*Id.*

<sup>17</sup> The Court states that "[a]t the outset, it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Lawrence*, 123 S. Ct. at 2478. This sentiment echoes the amicus brief in support of *Lawrence*, written by history professors, which argues that "the specification of 'homosexual sodomy' as a criminal offense does not carry the pedigree of ages but is almost exclusively an invention of the recent past." Brief of Amici Curiae Professors of History et al. at 4, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter History Professors' Brief]. The amicus brief written in support of *Lawrence* by the HRC contended that "it is a common misconception that gay people have always been singled out and their sexual relations specially criminalized. In fact, it is only relatively recently that sodomy has been proscribed solely between people of the same sex." Brief of Amici Curiae Human Rights Campaign et al. at 4, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No.02-102) [hereinafter HRC Brief].

Although Kennedy claimed not to "enter this [history of discrimination against homosexuals] debate in the attempt to reach a definitive historical judgment," he shortly thereafter highlighted several historical points drawn from the amici briefs and their sources stating that they counseled "against adopting the definitive conclusions upon which *Bowers* placed such reliance." *Lawrence*, 123 S. Ct. at 2478. First, Kennedy noted that 16th century English sodomy laws and later 19th century American sodomy laws were understood to include relations between men and women as well as between men and men, again adopting the versions of history promulgated in some of the amici briefs. See History Professors' Brief, at 6 (The English courts interpreted this [the secular crime of buggery] to apply to sexual intercourse between a man and woman as well as anal intercourse between two men); Brief of Amici Curiae Cato Institute at 9, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) ("American courts and commentators followed the English decisions defining the crime as involving penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or a boy."). Kennedy then embraces the notion that the absence of homosexual-specific legal prohibitions, as noted by some scholars, is in part due to the emergence of homosexual as a distinct category not occurring until the late 19<sup>th</sup> century. See *Lawrence*, 123 S. Ct. at 2478-79. This contention also appears in the briefs for the historians and the HRC. See History Professors' Brief, at 2 ("Not until the end of the nineteenth century did lawmakers and medical writing recognize sexual "inversion" or what we would today call homosexuality"); HRC Brief, at 6 ("Although same-sex relationships have been documented throughout history, the concept of homosexuality (or heterosexuality) as a defining characteristic of one's identity is relatively recent . . . It was only in the late 19th century that American scientific literature began describing homosexuality as a pathological 'condition,' something that was inherent in a person, a part of his or her nature.").

<sup>18</sup> *Lawrence*, 123 S. Ct. at 2479.

<sup>19</sup> See *id.* at 2484.

The missing word is not equality. The Court's reorientation of history from that espoused in *Bowers v. Hardwick* to that of accepting a history of discrimination against gay men (and lesbians) is an interrogation of the unequal status of sexual minorities. Although the majority states that there has been "no individual or societal reliance" on *Bowers v. Hardwick*<sup>21</sup>—a claim that Scalia vigorously disputes<sup>22</sup>—the Court nevertheless highlights links between (in)equality and the type of criminal sodomy statute upheld in *Hardwick*.<sup>23</sup> Moreover, the Court is obviously cognizant of the importance of equality doctrine insofar as that line of thinking had assisted in eroding *Bowers v. Hardwick*.<sup>24</sup>

For Justice O'Connor, concurring, the Equal Protection Clause of the Fourteenth Amendment, rather than the Due Process Clause, should have been the basis on which the Texas law was declared unconstitutional. O'Connor, who joined the Court's opinion in *Bowers v. Hardwick*, concluded in *Lawrence* that "moral disapproval" of a group, rather than of an act, cannot constitute a legitimate state interest under an equal protection analysis.<sup>25</sup> While O'Connor and the Court fall far short of declaring sexual minorities absolutely equal to heterosexuals—reserving as they each do specific instances in which inequality should be constitutionally permissible<sup>26</sup>—

<sup>20</sup> Assuming that they are not minors, are not being injured or coerced or "situated in relationships where consent might not easily be refused," or that the conduct is not public or commercial. *Id.*

<sup>21</sup> *Id.* at 2483.

<sup>22</sup> See *id.* at 2491 (Scalia, J., dissenting) ("What a massive disruption of the current social order" the "overruling of *Bowers* entails.").

<sup>23</sup> In *Lawrence*, the Court states:

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

*Lawrence*, 123 S. Ct. at 2482.

<sup>24</sup> Justice Kennedy relies upon his previous opinion in *Romer* as one of the two cases subsequent to *Bowers* which "cast its holding into even more doubt." *Lawrence*, 123 S. Ct. at 2481-82. The other case was *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833 (1992) in which the Court reaffirmed protection for abortion within the liberty clause of the Due Process Clause of the Fourteenth Amendment.

<sup>25</sup> See *Lawrence*, 123 S. Ct. at 2486, 2488 (O'Connor, J., concurring).

<sup>26</sup> O'Connor states that there are legitimate interests that would allow distinctions between

equality as a concept and doctrine is certainly not missing from the Court's opinion in *Lawrence v. Texas*.

Equality and Liberty. Privacy and History. Even a few references to "Lesbian." What could be missing? The missing word, the word I longed to read, longed to hear addressed, longed for like a lost lover, friend or child, was, an apology. Something like "sorry" or a mention of "remorse." Repentance has a rather religious overtone, but I think that would have been more palatable than silence.

The Court stated that, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>27</sup> For some, this may have read as an apology. It may be an admittance of error, but it was not the apology that sexual minorities deserve. We deserve an apology for the seventeen years of grief, pain, and death caused by *Bowers v. Hardwick*, which the Court now admits has always been wrong.

Michael Hardwick, the original plaintiff in *Bowers v. Hardwick*, certainly deserves an apology. In 1982, Michael Hardwick was a 28-year-old white gay man working in a gay bar in Atlanta. The animosity of one particular police officer led Michael Hardwick to become a plaintiff in a civil rights action challenging Georgia's sodomy statute.<sup>28</sup> After prevailing in the Eleventh

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"heterosexuals and homosexuals . . . such as national security or preserving the traditional institution of marriage." *Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring). The opinion of the Court is less definite, only making it clear that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 2484.

<sup>27</sup> *Id.*

<sup>28</sup> One morning after work, Hardwick left the bar with a beer in his hand. He was stopped by a police officer and had to sit in the back of the officer's car for twenty minutes, after which the officer finally issued a ticket for drinking in public. When Hardwick did not appear for the hearing, probably because of an error of the hearing date on the ticket, that same police officer came to Hardwick's home with an arrest warrant. Hardwick was not home. When Hardwick's roommate told him later that a police officer had been there, Hardwick went to the county clerk. He told the clerk that a police officer had already been to his house with an arrest warrant. The clerk said that was impossible, because it usually takes at least forty-eight hours to process a warrant. Apparently, Officer Torrick had personally processed the warrant, the first time he had done this in ten years. Michael Hardwick paid a \$50 fine for drinking in public. He thought everything was settled. About three weeks later, Officer Torrick came to Michael Hardwick's house with the arrest warrant. The front door to the house was open. Officer Torrick stood by the door to Michael Hardwick's bedroom and watched him having oral sex with another man. Officer Torrick then entered the bedroom and arrested Michael Hardwick

Circuit, Michael Hardwick found himself in the United States Supreme Court. One can only imagine what it was like for Hardwick to read the Court's insulting opinion in *Bowers v. Hardwick*.<sup>29</sup> Would Hardwick not have died five years later had the result in the case been different?

Robin Shahar also deserves an apology from the United States Supreme Court. Not content with his victory in *Bowers v. Hardwick*, Michael Bowers, the Attorney General of Georgia, believed it was important that no potential sodomites were in his employ. Thus, he revoked the offer of employment to Robin Shahar as "necessary in light of information . . . relating to a purported marriage between [Ms. Shahar] and another woman."<sup>30</sup> The Eleventh Circuit acknowledged that Michael Bowers' role in *Bowers v. Hardwick* gave him a special concern about Shahar's suitability as an employee because he could reasonably view her as creating controversy within the Attorney General's Office.<sup>31</sup>

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and his companion for violating Georgia's sex statute. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 381-403 (Penguin 1988); *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

<sup>29</sup> The Court ruled that Hardwick's claim that "homosexual sodomy" is protected by federal constitutional privacy is "at best, facetious." *Bowers*, 478 U.S. at 194. Moni Basu pondered Hardwick's fate:

Today, Hardwick's family wonders whether his life might have been different had the Court ruled in his favor seventeen years ago. Perhaps he would not have become a virtual recluse who was found dying of AIDS in his South Beach studio . . . [Hardwick's nephew] Weston said the Supreme Court ruling haunted his uncle until his death [in 1991]. 'The ruling was devastating for all gay people, but it was especially so for him,' he said. 'It called into question everything he had been about.'

Moni Basu, *Georgia Activist's Family Celebrates Gay Sex Ruling*, THE ATLANTA JOURNAL-CONSTITUTION, June 29, 2003 at, A1. There is also a persuasive argument for the connection between the AIDS epidemic and sodomy laws:

First, sodomy laws create and reinforce internalized homophobia among certain gay men. Secondly, sodomy laws prevent the dissemination of safe-sex materials. Thirdly, sodomy laws interfere with data collection and distort medical research. Fourthly, sodomy laws discourage gay men from reporting venereal disease to their doctors and public health authorities.

Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 121 n.118 (2000) (internal citation omitted).

<sup>30</sup> *Shahar v. Bowers*, 114 F.3d 1097, 1101 (11th Cir. 1997) (quoting letter from Michael Bowers to Robin Shahar).

<sup>31</sup> See *id.* at 1105. The Eleventh Circuit stated:

As both parties acknowledge, this case arises against the backdrop of an ongoing controversy in Georgia about homosexual sodomy, homosexual marriages, and other related issues, including a sodomy prosecution—in which the Attorney General's staff was engaged—resulting in the well-known Supreme Court decision in *Bowers v. Hardwick*. When the Attorney General viewed Shahar's decision to "wed" openly—complete with changing her name—another woman (in a large

*Bowers v. Hardwick* empowered many people other than Michael Bowers to discriminate. Although the Constitutional basis of *Bowers* is the Due Process Clause of the Fourteenth Amendment, some courts imported the Supreme Court's decision into the equal protection analysis.<sup>32</sup> Further, even when *Bowers* was correctly limited, it could operate to uphold employment discrimination as when Teyonda Walls, an administrator with a community diversion program in Virginia, refused to answer Question 40 of a new background check asking, "[h]ave you ever had sexual relations with a person of the same sex?"<sup>33</sup> The Fourth Circuit declared that the "relevance of this type of question to Walls' employment is uncertain, but because the *Bowers* decision is controlling, we hold that Question 40 does not ask for information that Walls had a right to keep private," and upheld Walls' termination from her employment.<sup>34</sup>

In addition to losing employment because of the Court's mistake in *Bowers v. Hardwick*, lesbians and gay men lost their children. In the notorious case of Sharon Bottoms, the Virginia courts disregarded the presumption in favor of a "natural parent" to award custody of Ms. Bottom's toddler to her mother, the child's maternal grandmother, because Ms. Bottoms was "sharing her bedroom and her bed" with her female lover.<sup>35</sup> The trial judge concluded that Sharon Bottoms' conduct was illegal and was a "felony in the state of Virginia," therefore rendering Ms. Bottoms an "unfit parent."<sup>36</sup> The

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"wedding") against this background of ongoing controversy, he saw her acts as having a realistic likelihood to affect her (and, therefore, the Department's) credibility, to interfere with the Department's ability to handle certain kinds of controversial matters (such as claims to same-sex marriage licenses, homosexual parental rights, employee benefits, insurance coverage of "domestic partners"), to interfere with the Department's efforts to enforce Georgia's laws against homosexual sodomy, and to create other difficulties within the Department which would be likely to harm the public perception of the Department.

*Id.* at 1104-05. The court then concluded that the Attorney General's "worries and view of the circumstances that led him to take adverse action against Shahar" could not be said to be "beyond the broad range of reasonable assessments of the facts." *Id.* at 1106.

<sup>32</sup> See, e.g., *Schroeder v. Hamilton School Dist.*, 282 F.3d 946 (7th Cir. 2002) (citing *Bowers* as authority for the proposition that homosexuals as a class are afforded minimal scrutiny in sexual harassment cases); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (reasoning that an argument that "practicing homosexuals" deserve suspect class status even though the argument would not stand even though it was not foreclosed by the holding in *Bowers*). *But see* *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375 (9th Cir. 1990) (rejecting contention that *Bowers* determines the level of equal protection scrutiny).

<sup>33</sup> *Walls v. City of Petersburg*, 895 F.2d 188, 190 (4th Cir. 1990).

<sup>34</sup> *Id.* at 193. Walls had refused to answer several other questions and the court similarly held that Ms. Walls had no right not to answer the questions.

<sup>35</sup> See *Bottoms v. Bottoms*, 457 S.E.2d 102, 106 (Va. 1995).

<sup>36</sup> Trial Transcript, *In re* Doustou, No. CH93JA0517-00 (Cir. Ct. of Cty. of Hendrico, Va.

trial court's award of custody to the child's grandmother was upheld by the Virginia's highest court.<sup>37</sup>

Not content to affirm a denial of custody and further restrict visitation to a lesbian mother, a justice on South Dakota's Supreme Court concurred specifically to emphasize the state's sodomy statute and declare that "homosexuals" such as the lesbian mother in question were "committing felonies, by their acts against nature and God."<sup>38</sup> The Alabama Supreme Court likewise did not hesitate to use its state sodomy law to support its conclusions that lesbians should be deprived custody of their children. In *Ex Parte D.W.W.*, the Alabama Supreme Court upheld restricted visitation and a denial of custody to a lesbian mother, citing the Alabama "deviate sexual intercourse" statute to conclude that "the conduct inherent in lesbianism is illegal in Alabama," and thus the mother "is continually engaging in conduct that violates the criminal law of this state."<sup>39</sup> The court continued by holding that "[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them."<sup>40</sup> Citing *D.W.W.*, in the case of *Ex Parte J.M.F.*, the court changed custody from the mother to the remarried father because the mother had "chosen to expose the child continuously to a lifestyle" that was illegal under Alabama law.<sup>41</sup> In *Ex Parte H.H.*, although the opinion for the court merely mentioned the mother's "homosexual relationship" in reversing her grant of custody, Chief Justice Moore's concurring opinion expounded at length on the sodomy laws of Alabama (and other states) which supported his conclusion that "[h]omosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated."<sup>42</sup>

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Sept. 7, 1993) (on file with author).

<sup>37</sup> *Bottoms*, 457 S.E.2d at 108-09.

<sup>38</sup> *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part).

<sup>39</sup> *Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (citing ALA. CODE § 13A-6-65(a)(3) (1975)).

<sup>40</sup> *Id.*

<sup>41</sup> *Ex Parte J.M.F.*, 730 So. 2d 1190, 1196 n.5 (Ala. 1998) (citing ALA. CODE § 13A-6-65 (1975), the state statute prohibiting "deviate sexual intercourse").

<sup>42</sup> *Ex Parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring). Moore was elected to the Alabama Supreme Court with the campaign promise to "restore the moral foundation of the law" and soon thereafter achieved notoriety for installing a 5,280-pound monument depicting the Ten Commandments in the rotunda of the Alabama State Judicial Building. See *Glassroth v. Moore*, 335 F.3d 1282, 1285 (11th Cir. 2003). After federal courts found that the monument violated the Establishment Clause of the First Amendment, *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1304 (M.D. Ala. 2002), *aff'd*, *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003), Chief Justice Moore was ordered to remove the monument. See *Glassroth v. Moore*, No. 01-T-1268-N, 2003 LEXIS 13907 (M.D. Ala. Aug. 5, 2003). After the deadline to remove the monument passed, Chief Justice Moore was suspended, with pay, pending resolution

Sharon Bottoms, the lesbians in the above custody cases known to us only by their initials, as well as countless women and men who feared to litigate because of the reverberations from *Bowers* all deserve an apology from the United States Supreme Court. Those who were convicted under the various forms of the sodomy statutes deemed constitutional in *Bowers* also deserve an apology. James Williams, convicted of solicitation of sodomy—a crime which is dependent upon the criminalization of sodomy<sup>43</sup>—was required as a condition of his probation to “wear a placard stating ‘BEWARE HIGH CRIME AREA’ while walking through the area where he committed his offense.”<sup>44</sup> In 1999, Daryl Bullock, who testified that he called himself “Lady Denise,” was sentenced to thirty months of hard labor for solicitation involving an undercover officer of a “crime against nature.”<sup>45</sup> In another instance involving an undercover police officer and a conviction for soliciting a crime against nature, Dandre Moore was ultimately sentenced to ten years of hard labor, a sentence upheld on appeal in 2001.<sup>46</sup> These people,<sup>47</sup> including men convicted of heterosexual sodomy,<sup>48</sup> suffered

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of an ethics complaint, which charged that he failed to “observe high standards of conduct” and “respect and comply with the law.” Jeffrey Gettleman, *Judge Suspended for Defying Court on Ten Commandments*, N.Y. TIMES, August 23, 2003, at A7.

<sup>43</sup> For example, in *People v. Uplinger*, 447 N.E.2d 62, 62-63 (N.Y. 1983), the New York Court of Appeals held that a statute which prohibited loitering “in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature” must be viewed as a “companion statute to the consensual sodomy statute.” The court reasoned that because they had previously declared that the underlying sodomy statute that criminalized acts of deviate sexual intercourse between consenting adults unconstitutional, and because the “object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy,” there was “no basis upon which the State may continue to punish the loitering or solicitation.” *Uplinger*, 447 N.E.2d at 62 (citing *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)).

<sup>44</sup> See *Williams v. State*, 505 S.E.2d 816 (Ct. App. Ga. 1998) (vacating “creative” sentencing and remanding case for resentencing).

<sup>45</sup> See *State v. Bullock*, 767 So. 2d 124, 126 (La. App. 2000). Bullock was arrested by an undercover police officer who testified that both oral sex and the amount of \$20 were discussed. See *id.* at 126.

<sup>46</sup> See *State v. Moore*, 797 So. 2d 756 (La. App. 2001). One can only hope his attorneys are pursuing a writ of habeas corpus after the decision in *Lawrence*.

<sup>47</sup> See, e.g., *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996) (convicting defendant of solicitation of sodomy in a sting operation where officers patrolled a highway rest area and approached men to see if they would express an interest in sexual activity); *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (convicting defendant of sexual misconduct for touching an undercover police officer’s penis and equal protection arguments rejected because prohibiting homosexuality was rationally related to public health goals); *Sawatzky v. City of Oklahoma*, 906 P.2d 785 (Okla. Crim. App. 1995) (convicting defendant for soliciting an act of non-commercial sodomy from a police officer of the same gender).

<sup>48</sup> See, e.g., *State v. Chiaradio*, 660 A.2d 276 (R.I. 1995) (convicting two male defendants of committing abominable and detestable crimes against nature when they had oral sex with two female exotic dancers, with the court noted that an unmarried heterosexual adult does not have a privacy right to engage in unnatural acts); *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001) (sentencing a Coast Guard member to eleven months of confinement and subsequent discharge for videotaping consensual oral sex with his female partner in his home).

because the United States Supreme Court was “wrong.”

Measured against those who lost their lives, their children, and their freedom, an appeal for apology on behalf of all those who merely had to read the hateful words of the United States Supreme Court might seem trivial. Yet, for seventeen years, law students—lesbian, gay, bisexual, heterosexual, transgendered, and questioning—have been forced to read the words of a majority of the United States Supreme Court as they reinterpret a claim of privacy as a claim of “homosexual sodomy” and then reject that claim as “at best, facetious.”<sup>49</sup> While at the same time reading Burger’s concurring opinion, citing the Bible and declaring that to “hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>50</sup> Adding insult to injury is Powell’s concurrence in *Bowers*, which minimized the importance of the lives of sexual minorities,<sup>51</sup> and, as some casebook authors argue, was a decision later regretted by Justice Powell who had thought that *Bowers v. Hardwick* was not really an important decision.<sup>52</sup>

Students typically used to read excerpts from *Bowers v. Hardwick* several times during their legal education. The case is properly found in constitutional law, family law, criminal law, and sexuality and the law casebooks.<sup>53</sup> For sexual minority students, each time they read the case it provoked a range of emotions including rage, fear, sadness, incredulity, outrage, and hopelessness. Perhaps the most common reaction I heard expressed was disrespect for the Court, the law, and their future profession, often to the point of questioning whether they still desired a career in law. All of these students have earned an apology from the United States

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<sup>49</sup> *Bowers*, 478 U.S. at 194.

<sup>50</sup> *Id.* at 197 (Burger, J., concurring).

<sup>51</sup> *See id.* at 197 (Powell, J., concurring).

<sup>52</sup> *See, e.g.*, JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 267 (4th ed. 1999) (“retired Justice Powell stated that ‘he probably made a mistake’ in his vote”); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1258 (4th ed. 2000) (discussing Justice Powell’s regret at the switch in his vote and his explanation that he’d never met a homosexual); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 50-58 (2d ed. 2002) (stating in the notes to *Bowers v. Hardwick* that “Justice Powell publicly questioned his *Bowers* vote as early as 1990”).

<sup>53</sup> *See, e.g.*, AREEN, *supra* note 52, at 263-266; DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 572-578 (3d ed. 2003); BREST, *supra* note 52, at 1243-1253; SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 158-161 (7th ed. 2001); KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 568-573 (14th ed. 2001); WEISBERG & APPLETON, *supra* note 52, at 50-57.

Supreme Court.

It is not only sexual minority students who deserve an apology. It is all students who enter their legal education possessing some idea of fairness and justice, however vague or in some cases subordinated to other interests, and who then discovered the United States Supreme Court's cramped and dishonest version of justice in *Bowers v. Hardwick*.

And it is not only law students that deserve an apology. As law professors, many of us stood before our students and taught a case that declared that any state could constitutionally criminalize our sexual expression. Certainly, each sexual minority professor who taught *Bowers v. Hardwick*, like all professors, developed a strategy for teaching the case. But, I daresay it was never pleasant.

There are, of course, many unpleasant cases and to my knowledge, no court has ever apologized. The Court in *Brown v. Board of Education*<sup>54</sup> did not say it is sorry for the travesty of *Plessey v. Ferguson*'s<sup>55</sup> constitutionalization of racial segregation. The Court in *Williamson v. Lee Optical*,<sup>56</sup> finally putting *Lochner v. New York*<sup>57</sup> to rest, did not apologize to the workers of the United States.

Moreover, although the Supreme Court is an institution, it is comprised of individuals. Of the justices who composed the majority in *Bowers v. Hardwick* and participated in *Lawrence v. Texas*, neither joined the opinion overruling *Bowers v. Hardwick*.<sup>58</sup> Perhaps it is asking too much for the members of the Court in the majority to apologize for mistakes that they themselves did not make. Isn't it enough that the Court acknowledges that they were wrong and correct the mistake?

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<sup>54</sup> 347 U.S. 483 (1954).

<sup>55</sup> 163 U.S. 537 (1896).

<sup>56</sup> 348 U.S. 483 (1955).

<sup>57</sup> 198 U.S. 45 (1905).

<sup>58</sup> Justice O'Connor wrote a separate concurring opinion, which would have found the Texas statute unconstitutional on equal protection grounds, and Chief Justice Rehnquist joined the dissenting opinion of Justice Scalia.

Yet it is important to remember that the reason *Lawrence v. Texas* is such a victory is that *Bowers v. Hardwick* was such a disaster.<sup>59</sup> A disaster of this scope produced by the United States Supreme Court merits more than mere correction. The Court should account for the blood and tears of an uncountable number of persons. An apology would be a beginning.

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<sup>59</sup> For further discussion, see Mary Dunlap, *Gay Men and Lesbians Down by the Law in the 1990s USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1 (1994); see also Leslie, *supra* note 29.

