CHALLENGING DISSENT: THE ONTOLOGY AND LOGIC OF *LAWRENCE V. TEXAS*

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> "It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."[1]

In the above epigraph, Justice Blackmun highlights exactly what was at stake when the *Lawrence v. Texas*[2] case was argued before the Supreme Court: the right of individuals to make autonomous, free choices about those acts which define their identities and which constitute them as persons. It is from this autonomous self-determination that we infer the very dignity and integrity we deem worthy of persons. If these choices continue to be dictated and limited by the state, the freedom inherent in what it means to be a person in a democratic society would be gravely compromised. It is incumbent on any free society to allow its citizens to autonomously construct their own concept of existence and personhood, provided that their doing so does not obstruct the freedom and self-determination of others. It is our argument that being both subject to discrimination and relegated a to second-class status, without good reasons or a sound argument to justify a legitimate a state interest, impedes a person's ability to fashion who she is. The right to make autonomous, free choices about private, consensual, adult sexual activity is a central feature of this project of identity construction. And, it is with this in mind, that our investigation into this case will begin.

This article is comprised of two basic parts. The first is a philosophical and theoretical exploration into the underpinnings of the *Lawrence v. Texas* decision. It will address the manifold consequences that issue from an inquiry into what it means to be a homosexual. As the ontology of homosexual is integral to the case and its moral or ethical[3] and legal

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[1] Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

[2] 123 S. Ct. 2472 (2003).

[3] The terms "ethics" and "morality" are often used as synonyms in philosophy. Although

implications, this is clearly a reasonable starting point. Part II of the article will take on the bulk of Justice Scalia's dissenting opinion in light of both those philosophical considerations established in the first part and certain logical problems inherent in the dissent itself. We challenge Scalia's central argument, some of the rhetorical aspects of his opinion, and his philosophy of jurisprudence, including the underpinnings of his methodology and approach. Following those two related but distinct studies, we will conclude by briefly addressing the issue of same-sex marriage, held by many to be raised by the specter of this case.

I. ONTOLOGICAL PREMISES

This first part of our examination of the ontology and logic of the *Lawrence v. Texas* decision dissects the ontological factors foundational to both the majority decision and dissent. To do this in a relatively comprehensive manner, it will be subdivided into three sections.

The first, called "Acts, Identity and the Equal Protection Claim," will be a discussion of the relation of partnered same-sex behaviors to what it means to be homosexual.[4] Here we will consider the extent to which behavior defines a homosexual *qua* homosexual. An essential component of the claim to equal protection is whether the Texas anti-sodomy statute[5] is directed at homosexuals as a class of persons or specifically at homosexual acts. We question whether that distinction is even a fair one to draw. Although, on the most charitable read, the Texas law may have been originally aimed to regulate certain specific behaviors, given the collateral discriminatory effects incurred by self-identified homosexuals from the mere existence of the statute, it is undeniable that it has a far greater reach.

The next section, "What is (Homosexual) Sex?: Legislative History and the Question of the Fundamental Right to Sodomy," attends to the related concern of the particular behaviors detailed in the Texas anti-homosexual sodomy statute.[6] This section will elucidate exactly what, in Texas, constitutes criminal partnered same-sex sexual conduct. The intriguing irony is that many commonly practiced same-sex sexual activities are excluded from the statute. Not surprisingly, this omission engenders further analyses. One of these analyses will outline the trajectory of case law

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there are essential distinctions to be made between these terms, for our purposes here these differences are unimportant. Consequently, we shall use them interchangeably.

[4] Some would take issue here with the enforcement of the binaries and essentialized categories of sex, gender, and sexual orientation. Doing so would send us too far afield. However, it should be noted that a more queer theoretical position would dispel the very essentialized and binary categories utilized throughout the opinions on all sides of this case in favor of a conception of personal identity involving multiplicity and flux.

[5] *See* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).

[6] *Id.*

regulating sexual conduct and suggest the direction in which we think it ought to head. The issue of history is central, as the legal definition of the nature of a fundamental right, and therefore whether homosexual sodomy can be claimed as one, is dependent on the evidence that the practice has been legally supported in our Nation's history and traditions.[7] If *Bowers* were correctly argued, which we are inclined to deny, this fundamental right would have to be asserted in order to overturn it in the most direct manner.[8] Another analysis will demonstrate that the Court has unwittingly employed a mistaken assumption that impacts all analyses of sexual conduct, namely, that sex, by definition, is partnered. Finally, we will conclude this section with a quick pause to consider the strategic merit of claiming the right to engage in homosexual sodomy as fundamental.

The final section of Part I, "Homosexual, Gay, and Queer: The Trouble With Sodomy Statutes" will initiate the taxonomy of the various terms that are often interchangeably used to refer to people who partner with others of the same sex/gender. Most relevant among them are the terms "homosexual," "gay," and "queer." In unpacking the inherent discursive and social differences between these three terms, we will speak to the history and implications of employing each of them. Fleshing out the genesis of the term "homosexual" and understanding the ways in which it was born out of a system of domination and control of people's bodies and reproductive capacities will clarify the reasons for why this fundamental right to engage in homosexual sodomy probably ought not be asserted. The outcome of this analysis will examine the validity of making a distinction between homosexual people (either individuals or as a group) and homosexual behavior, as the transition from using the term "homosexual" to the term "gay" will serve as a marker for the scope of the collateral effects imposed upon so-called homosexuals; the very move to adopt a gay identity signals a wish to escape those injurious collateral effects. We will then suggest that understanding and embracing a queer ontology ought to be the ultimate aim of the Court, as it is more consistent with the direction they seem headed considering just a cursory glance at precedent. Here we will revisit the discussion of the individual liberty to make free, private, consensual, adult sexual choices and the way in which the concept, "queer," which problematizes the notions of sex/gender/sexual orientation and even identity, enhances our conception of this seemingly obvious basic human

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[7] *See* Palko v. Connecticut, 302 U.S. 319 (1937) (holding that the Due Process Clause of the Fourteenth Amendment incorporated some parts of the Bill of Rights to apply to the states, while others would not be so incorporated).

[8] Even if *Bowers* was correct in upholding Georgia's anti-sodomy law, GA. CODE ANN. § 16-6-2 (1984), on the basis that engaging in sodomy was not a fundamental right, there are other avenues available to overturn *Bowers*, as *Lawrence* has done and as we will argue throughout Part II of this essay.

liberty. This section will conclude by explaining why the move to queer ontology troubles both the significance and legitimacy of sodomy laws.

A. *Acts, Identity, and the Equal Protection Claim*

Several important philosophical assumptions buttress the *Lawrence v. Texas* decision. Most prominent among them, are the premises concerning what it means to be homosexual. The varied valences of this term resonate on both sides of the decision. First, it is a useful tool for determining whether the law is aimed at policing mere conduct, as both Texas' prosecutor Charles Rosenthal and Justice Scalia argued,[9] or homosexuals as a class, as the majority opinion holds.[10] As the Texas statute was specifically designed to criminalize homosexual sexual conduct,[11] relevant to establishing its scope is the unpacking of both the essence of homosexuality, to which we will presently attend, and the nature of homosexual conduct specifically pinpointed by the statute.[12] Second, it also impacts one of the central arguments of Justice Scalia's dissenting opinion: that in order for *Bowers* to be reversed, Texas must prove that homosexual sodomy is a fundamental right, which turns on whether it is "deeply rooted in this Nation's history and tradition."[13] Here the connection lies in the fact that what it means to be homosexual has a history, whose birth and evolution occurred relatively recently. This, effectively, undermines the possibility that homosexual sodomy could be too deeply rooted in the history and tradition of our nation.[14]

The debate about what it means to be a homosexual is far from settled. That is evidenced in the arguments and decisions constituting this case. Lesbian, gay, and queer theorists of many stripes have found that there are at least several key components that must comprise any meaningful definition. They are, in no particular hierarchy: first, conduct, behavior, and acts; second, self-identification or sexual "orientation"; and third, desires and fantasies. The recognition that there are a multiplicity of models of homosexuality is highlighted in the majority opinion by a reference to *Romer v. Evans'* classification of homosexuals and bisexuals on the basis of, "orientation, conduct, practices or relationships."[15] The first of these plays a

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[9] *Lawrence*, 123 S. Ct. at 2495-6 (Scalia, J., dissenting); Transcript of Oral Argument at 28-29, 31-32, 36, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter Oral Argument].

[10] *Lawrence*, 123 S. Ct. at 2482, 2485-2487 (O'Connor, J., concurring).

[11] *See* § 21.06(a).

[12] *See infra* Part I.B.

[13] *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

[14] *See infra* Part I.C.

[15] *Lawrence*, 123 S. Ct. at 2482 (quoting Romer v. Evans, 517 U.S. 620, 621 (1996)).

crucial role in forming the backbone of the arguments on each side of *Lawrence* and the last helps us flesh out the moral underpinnings of the statute.

This ontological distinction about what it means to be homosexual can be applied to the question of whether the law is aimed at policing and regulating homosexuals as a class or simply certain same-sex sexual acts. This is a key to determining the validity of the petitioners' equal protection claim. For, if it were directed at the former and not uniquely the latter, Texas' homosexual conduct statute could be perceived as discriminating against homosexuals as a class.[16] Scalia, following Rosenthal, wants to claim that it only targets the acts. Though both sides agree that it is not merely conduct that constitutes what it means to be a homosexual, as we will presently establish, the concern is that the dissenters fail to pay heed to the fact that the choice to perform certain sexual acts is a fundamental criterion for determining who might be regarded, at least in part, homosexual. By ignoring that, the *Lawrence* dissent intends to circumvent the accusation that the law singles out homosexual individuals or homosexuals as a class; this appears to be little more than a disingenuous strategy to undermine the petitioners' equal protection claim. For, even if the dissent maintains that the Texas statute only targets acts, if they do admit that acts are central to what it means to be homosexual, they would still have to ultimately concede that there is just cause to yield to the petitioners' claim.

Our analysis in this section will address the most important mappings of the ontological issues onto the legal debate in order to comprehensively

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[16] In a broad interpretation of the Equal Protection Clause of the Fourteenth Amendment, the Constitution guarantees *all* citizens equal protection under the law. This implies that the law must apply equally not only to all citizens, but to all classes of citizens. Thus, if *any* group or individual were singled out, and the law applied to that group and not others, it could be interpreted as unconstitutional. Under the Equal Protection Clause, a law must at least pass the lower-level scrutiny of rational basis review in order to discriminate against any individual or class. However, in practice, the Court generally works under a narrower interpretation, which only offers protection to certain legislatively established protected classes. To justify a law that singles out these classes, the Court mandates heightened scrutiny not extended to unprotected classes. Though efforts have been made in Congress to include sexual orientation among those protected classes, it currently remains unprotected. Likewise, even if it were definitively demonstrated that the Texas statute was aimed at homosexuals as a class, Scalia and others could argue, according to this narrower interpretation, that the equal protection claim should be dismissed, as the class of homosexuals falls outside the scope of protected classes and thus, heightened scrutiny. *See Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring), 2496 (Scalia, J., dissenting). That said, given that the Court "granted certiorari... to consider... whether the Petitioners' criminal convictions under the Texas 'Homosexual Conduct' law... violate the Fourteenth Amendment guarantee of equal protection of laws," *Lawrence*, 123 S. Ct. at 2476, we are inclined to align ourselves with the broader interpretation, allowing the equal protection claim to stand if it can be established that the law is directed at homosexuals as a class. It is evident that Justice O'Connor saw this interpretive discrepancy given that her concurring opinion focuses almost entirely on the equal protection claim and hinted toward heightened scrutiny with her call for "a more searching form of rational basis review." *See Lawrence*, 123 S. Ct. at 2484-85 (O'Connor, J., concurring).

establish the legitimacy of the petitioners' claims. We will do this by first investigating the argument that the Texas statute does pinpoint homosexuals as a class, analyzing both the question of what constitutes homosexual identity and the role of collateral effects in constituting it. Then, we will investigate the claim that the law merely targets acts. Finally, we will address the issue of morals legislation determining what moral principle the law is meant to prescribe.

What does it mean to be a class? A class is a group of people possessing a certain shared property. Both sides of this case seem to agree that this property, for the class of homosexuals, is not reducible to engaging in certain sexual acts. We propose that this property is some form of shared identity. However, identity is something that can arise either internally in a person or be externally ascribed to a person.[17] We will now survey both cases.

At first blush, the notion of an internally generated identity looks as if it provides the strongest position for Texas. Initially, most would agree with the argument that self-identified heterosexuals can engage in same-sex sodomy and, therefore, be convicted under the statute. Thus, the statute fails to pick out *only* homosexuals. Secondly, it can be argued that not all homosexuals engage in the specific acts prohibited by the law, some self-identified homosexuals might even be celibate. Thus, the law does not even *prima facie* apply to *all* homosexuals. Given that the law neither aims at all nor only homosexuals on this surface reading, it is evident why Scalia and Rosenthal think that they have invalidated the equal protection claim.

However, we must pause to speculate about whether Scalia and Rosenthal would regard a self-identified heterosexual who engages in same-sex sodomy as unambiguously heterosexual. A litmus test might be to ask Scalia whether he would sanction this person's participation in the Boy Scout organization, given that he deems it legitimate and constitutional to prohibit homosexuals from membership in that organization. We imagine that if such a person were known to be engaging in private, consensual, adult same-sex sodomy, Scalia might feel justified in excluding him from the Boy Scouts based on Supreme Court precedent.[18] What does that tell us? It indicates that this argument rests on a false dichotomy, one that limits classification to either the homosexual or heterosexual category. But, these two categories are not mutually exhaustive of the range of sexual orientation identities. Consider how the addition of bisexual or queer might complicate their argument. With the addition of bisexual, for example, Scalia and Rosenthal

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[17] In fact, it is most likely the dynamic interplay between both of these (internal and external) that gels an identity. However, for our purposes here, it is unnecessary to take up this angle, as investigating each of these separately will be sufficient to argue our point.

[18] *See generally* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

could maintain that this self-identified heterosexual is actually bisexual, at least in practice. And, to that, we would offer that, if this bisexual person were to be convicted of engaging in same-sex sodomy, he would be so convicted based on the homosexual, not heterosexual, component of his identity or practices. As such, the earlier argument, which holds that heterosexuals can also be prosecuted for these acts, is a bit deceptive; it is hardly the heterosexual conduct or identity of this person that is being measured under the law.

We want to suggest that there is only one group of people who, though they may self-identify as heterosexual, could engage in same-sex sodomy and legitimately be regarded as heterosexual. We will call this the deprivation group. It includes anyone who might opt to engage in same-sex sodomy due to a complete absence of potential partners of the opposite sex, say, prisoners, sailors, people at single-sex boarding schools, et cetera. A person of the deprivation group may be justified in maintaining his or her heterosexual self-identity even though he or she may be snared by the net of the Texas statue. This is what Rosenthal refers to when he states that, "part of the rationale for the law is to discourage similar conduct, that is, to discourage people who may be in jail together or want to experiment from doing the same thing."[19] However, a member of this group, who was convicted of committing an act of same-sex sodomy, would not be spared the collateral effects of the law. One of those effects would be his or her public inclusion in the class of homosexuals and bisexuals. In other words, post-prosecution, he or she would surely be publicly perceived as homosexual. This phenomenon is indicative of the external identity designation, to which we now turn.

By externally generated identity formation, we mean those identities that are thrust upon us from external sources whether or not we assert them as our own. As we will more fully develop in Section C of Part I, most queer theorists agree that "homosexual" itself is a term and identity originally launched from exclusively external sources such as medical and psychological discourses and the criminal justice system. When individuals who engaged in same-sex sexual activity began to self-identify according to their sexual orientation, they adopted the term "gay" in place of "homosexual." They employed this tactic largely to escape that external designation and the concomitant deleterious effects arising from the public perception that this identity is inherently one riddled with pathology.

This brings us to the issue of the collateral effects incurred by homosexuals as a class ensuing from the mere existence of laws prohibiting same-sex sodomy. Significant social ramifications attach to statutes that uniquely

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[19] Oral Argument, *supra* note 9, at 44.

outlaw homosexual sodomy.[20] In effect, such laws legitimate extensive discriminatory fallout against homosexuals and subject homosexuals as a class to it. The reality of the collateral effects that this class must face, serves to strengthen the petitioner's equal protection claim. Certainly, the discrimination against homosexuals as a class cannot be relegated to the prohibition of the performance of certain acts. The consequences are more nefarious and broader in scope. As it is tangential to our discussion, we will bracket the fact that, in most states having anti-sodomy laws, the penalties for breaking the law are actually quite severe. This, itself, seems to license a certain degree of discrimination especially if one considers that, in several states, convicted sodomy law-breakers could incur very severe penalties, such as being placed on public sex-offender lists along with rapists and child molesters. More germane is the candid admission by the Texas counsel and Scalia that the law is rarely, if ever, enforced.[21] Herein lies the crux of the issue: if the law is not going to be enforced, why maintain it on the books? The answer to this rings in with the concept of morals legislation. It would not be a stretch to imagine that the existence of a law carrying a felony charge and stiff penalties, even if rarely enforced, would spawn the belief that these actions are immoral. Clearly, this stigma seeps into the beliefs of society at large.

Thus, the mere identification of a person as homosexual implies that the person engages in this illegal conduct and is, thus, an immoral person. This attitude carries over into culture and society and translates into the belief that all homosexuals, or homosexuals as a class, are inherently immoral and thereby merit discrimination. In other words, the existence of the law implicitly, though not too subtly, sanctions a larger-scale collateral discrimination. As Scalia acknowledged, "many Americans do not want persons who openly engage in homosexual conduct as partners in their businesses [or] as scout masters for their children."[22] But, is private, consensual, adult, intimate, sexual activity equivalent to *openly engaging in homosexual conduct*? Even most advocates of the "homosexual agenda" would understand the reasons why two people, be they homosexual or heterosexual, *openly engaging* (for example, in public) in sexual conduct should not be considered for the position of scoutmaster to young children. But, indeed, it would not be sincere to interpret Scalia in this fashion. However, if this is not what he meant, on the most charitable read we can offer, he allows that the "homosexual" person be subjected to discrimination on the basis of actions inferred from the open declaration of his or her

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[20] *See* § 21.06(a).

[21] Oral Argument, *supra* note 9, at 11-12; *see also Lawrence*, 123 S. Ct. at 2479; *id.* at 2485 (O'Connor, J., concurring).

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

sexual orientation. In other words, homosexual identity is being equated to the set of sexual acts deemed immoral and illegal by the statute. This contradicts the very heart of our justice system, which stipulates that people are innocent until proven guilty, in that homosexuals are assumed to have committed some criminal act and ostensibly being punished for that assumption simply by virtue of their identity assertion. It was this equation of homosexuals as a class with sexual conduct that was the very position Rosenthal and Scalia wanted to deny in their effort to discredit the petitioner's equal protection claim. Scalia himself implies this when he states that, "[o]n its face [the Texas anti-homosexual sodomy statute] applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex."[23] Therein he reiterates his belief that sexual acts alone do not equate to homosexual identity. On the other hand, if we take Scalia on a less charitable read, what he appears to be sanctioning is intolerance and discrimination against self-identified homosexual persons on the basis of simple moral disapproval and without legitimate reasons.[24]

The matter of the collateral effects of the Texas statute was expounded upon throughout the majority opinion and was the focus of Justice O'Connor's concurring decision. For example, O'Connor elucidates this position when she declares that, "[w]hile it is true that the law applies only to homosexual conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed at gay persons as a class."[25] She also reveals that, "Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law 'legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law' including in the areas of 'employment, family issues, and housing.'"[26] One of the more shocking of the collateral effects of anti-sodomy laws, mentioned above, is the fact that, "in one of four States, . . . conviction would require [offenders] to register as sex offenders to local law enforcement."[27] Kennedy, too, speaks to the existence of these effects when, he grants that, "if 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

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[23] *Id.* at 2495.

[24] In Part II of this essay, we will show that the lack of legitimate reasons would be sufficient for the statute to fail rational basis review.

[25] *Lawrence*, 123 S. Ct. at 2486-87 (O'Connor, J., concurring).

[26] *Id.* at 2486 (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992)).

[27] *Id.*

public and in the private spheres."[28] All these elements seem to get to the heart of the discrimination Scalia was endorsing when he stated that there is justification for excluding homosexual persons from employment and prohibiting them from participating in the Boy Scouts organization.[29]

Affirming O'Connor's position that this, "conduct . . . is closely correlated with being homosexual," [30] we can view this matter from a new angle. There are three relevant components that make manifest that laws of this strain do discriminate against homosexuals as a class and are, thus, unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment: (1) a person who engages in same-sex sodomy outside of a situation of deprivation is, at least in part, homosexual, since, in virtue of engaging in same-sex sodomy, one would be considered either homosexual or bisexual (and with respect to the latter, only the homosexual component of the behavior would be relevant), (2) anyone convicted of such a crime would be *ipso facto* regarded as homosexual in the public eye, and, (3) as a result of the conviction, he or she would suffer various and, perhaps, severe collateral effects. In other words, orthodox heterosexuals would not be subject to conviction and, further, discrimination under the Texas statute.

Shifting to the matter of acts, as detailed above, the *Lawrence* dissent asserts that the Texas statute does not violate the Equal Protection Clause on the ground that the statute merely picks out a specific set of acts and, thus, does not discriminate against homosexuals as a class. Rosenthal insists that, "the class actually is people who violate the act, not classes of individuals based upon sexual orientation."[31] In a sense, he endeavors here to deny the equal protection claim by deriving the class of people from the law, rather than acknowledging that the law is aimed against an already existing class. On one interpretation, this could mean that homosexuals only become a class *after* the "crime" is committed and not prior. Following this line of reasoning, one could infer that homosexuals are the class of people who have engaged in same-sex sexual activity *and been prosecuted for it.* Neither Rosenthal nor Scalia would want to state this explicitly, however, as it would lead to the collapse of their argument. For, if there were no class of homosexuals prior to the statute, which defines that class solely as those who engage in same-sex sexual activity, and the homosexual *qua* homosexual only comes to be as a result of the crime committed, would that not be the same as saying homosexuals as a class are such in virtue of the fact that they have engaged in (and been prosecuted for) same-sex sexual acts? On this analysis, what other than sexual acts would they be relying upon for their definition of

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[28] *Id. at* 2482.

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

[30] *Id.* at 2486 (O'Connor, J., concurring).

[31] Oral Argument, *supra* note 9, at 29.

what it means to be homosexual? This would contradict their argument that homosexuals are not defined as such exclusively because they perform same-sex sexual acts.

If conduct were all that defined a homosexual as such, then it would certainly be true that no distinction exists between homosexuals as a class and homosexual conduct. In other words, the set of people who engage in homosexual acts would be identical to the set of people who are homosexual because homosexual is being defined as engaging in same-sex sexual acts. Thus, the petitioner's equal protection claim would be justified because the law would be singling out and discriminating against homosexuals as a class.[32] As we know, Rosenthal attempts to circumvent this challenge. He offers that, "[homosexuals] are not homosexuals by definition if they commit one act. It is our position that a heterosexual person can also violate this code if they commit an act of deviate sexual intercourse with another of the same sex."[33] While it is true that if a self-identified heterosexual person engaged in these acts and was caught, prosecuted, and convicted of this "crime," the law would not appear to have been unfairly applied. However, Rosenthal's argument is at best on shaky ground and at worst mere rhetorical fancy; though self-identified as heterosexual, as argued earlier, this person would not be considered strictly heterosexual prior to the conviction nor at all heterosexual after it, as he or she would now belong to the social class of homosexuals in virtue of having been convicted of engaging in same-sex sexual activity. Her or his self-identification prior to the act and conviction becomes irrelevant in light of this.

Given that if Scalia and Rosenthal dubbed the post-prosecution class "homosexuals" their argument would not stand up to careful examination, Scalia would likely prefer that we recast this group as "sodomizers." Although he does not make this move, it is implied by his analogy to nudists.[34] Rather than rehearsing Scalia's example, let us momentarily juxtapose the class of sodomizers to the class of murderers who are picked out by laws against murder. This may illustrate whether or not Scalia's has resolved the dilemma of what, if any, class is being designated. Indeed, one can recognize the unmistakable legitimacy of treating murderers as a class in virtue of their crimes and, perhaps, even discriminating against them as a result of their behavior. Obviously, this would not be contrary to the Equal Protection Clause. We are not convinced, however, that the analogy

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[32] As explained earlier in note 16, homosexuals are not classified as a suspect class or, one deserving a higher level of scrutiny in an equal protection review. Still, rational basis review based upon the Due Process Clause of the Fourteenth Amendment dictates that, unless there is a compelling state interest, states may not discriminate against any group, even those not considered deserving of a higher level of scrutiny.

[33] Oral Argument, *supra* note 9, at 28.

[34] *See Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

advanced by Scalia is accurate. In order for an argument by analogy to hold, the terms must not have any important differences, otherwise the analogy fails. While, at first glance, this change of terminology might evade the problem of differentially applying the law to homosexuals, the terms in this analogy are not parallel enough to overcome the challenge. First, the Texas law does not claim that all consensual, private, adult sodomy is illegal; it only criminalizes same-sex sodomy. If we map that back onto the murder case, this would be akin to criminalizing only same-sex homicide (defined here as killing someone of the same sex). Likewise, trying to evade the problem by switching terms to sodomizer from homosexual does not account for the full scope of the statute; it would be more accurate to call that person a same-sex sodomizer.

Another contradiction could be raised that would foil the analogy to murder yet again. In this instance, a murderer is only a person who commits murder, someone who commits a certain act. However, a same-sex sodomizer while appearing to be a person who just commits an act, is more than just that. However, there are collateral effects that classify and impact even those homosexuals who do not engage in sodomy along with same-sex sodomizers. What class of people would suffer collateral effects of murder legislation aside from the class of murderers themselves?

Since Scalia champions morals legislation as a rational basis for upholding the Texas statute,[35] he believes it essential to reveal that the underlying moral disapproval is directed at the act not the agent who is performing it. In other words, is it homosexual individuals that are morally repugnant or is it the same-sex sexual acts? Scalia submits that, "[t]he Texas statute undeniably seeks to further the belief of its citizens that forms of sexual behavior are 'immoral and unacceptable.'"[36] Importantly, are the act and the identity of the individual altogether different? As we have already rehearsed at length, given the false homosexual/heterosexual dichotomy and the egregious collateral harms sustained by homosexuals as a consequence of the law, it is not legitimate to distinguish between homosexuals as individuals or a class and same-sex activity with respect to the scope Texas' law. In light of this, it is transparent that the full moral weight of the law contains a blatant form of homophobia; even if the intention were initially otherwise, the moral underpinning of the law seems to plainly advocate the perspective that homosexuals, themselves, are morally repugnant. Accordingly, as it is needless to consider on which side the act/identity debate lands, the moral justification is eroded, rational basis is undermined, and the petitioners' rights under the Due Process Clause

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[35] *Id.* at 2495.

[36] *Id.* (citing *Bowers*, 478 U.S. at 196).

should prevail. Parallel to *Loving v. Virginia*,[37] which found that anti-miscegenation laws did not pass the strict scrutiny required of cases involving the issue of race insofar as their only intent was to further white supremacy, anti-homosexual sodomy statutes further no other state interest than heterosexism. Albeit true that homosexuals are not federally protected as a class, unlike classes based on racial categories, if the full moral justification of the law is to discriminate against homosexual individuals, due process is not served and the law would does pass rational basis review. Now let us turn our attention to the majority opinion to see how it weighs in on these matters.

The majority recognizes that what it means to be homosexual includes sexual acts in vital ways, though it is far more complex than merely acts, as we will soon understand.[38] In other words, though acts might arguably be a necessary condition, they can by no means be considered a sufficient condition. Numerous instances throughout the decision effectively draw out the premises under which the majority was operating. The majority elegantly revealed this theme by drawing a striking analogy raised in *Bowers*: "[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."[39] This echoes Justice Stevens' claim in his *Bowers* dissent that its, "continuance as precedent demeans the lives of homosexual persons."[40] The fundamental principle being advanced in both the majority opinion of *Lawrence* and Stevens' dissent in *Bowers* is that one's sexuality is undeniably an essential component of what it means to be a person. To this, we must add that to be able to fully realize oneself as a person, one must also be an autonomous, self-determining agent. According to the moral and political philosophy on which our nation's law is founded, it is from this very autonomy that dignity *qua* person is generated. Thus, the ability to define one's sexuality free from state intervention is central to developing oneself as a person and an allowance for that must be made under the law's respect for the dignity of autonomous persons. The Court recognized this sentiment when it echoed its previous argument in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

> [T]hese 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 . . . Beliefs about

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[37] 388 U.S. 1 (1967).

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

[39] *Id.*

[40] *Id.* at 2482.

> these matters could not define attributes of personhood were they formed under compulsion of the State.[41]

The *Lawrence* majority also affirmed that, "adults may choose to enter upon this relationship in the confines of their home and their private lives and still retain their dignity as free persons."[42] This once again recalls Stevens' dissent in *Bowers*, particularly where he held that:

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.[43]

The *Lawrence* decision is markedly seeking to rectify a certain injustice; it lifts the legal impediment to the exercise of autonomy by restoring the previously compromised dignity of a class of persons who, at least in part, are classed as such based on certain forms of sexual behavior they practice and the partners with whom they opt to practice them. Thus, effectively, in judging anti-sodomy laws unconstitutional, the Court has ruled that states may not, "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."[44] The bottom line is that, "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[45]

One other minor point against Rosenthal ought to be raised before concluding this section: the examples he furnished to reinforce his distinction between homosexuals as a class of people and persons engaging in same-sex sexual behavior instead served to bolster the counterclaim. He argued that there has been increased public approval of homosexuals as persons but that there has not been comparable progress on the front of sanctioning same-sex sexual acts.[46] He cited the failure of Congress to gain widespread backing for legislation to add sexual preference to the list of protected classes as support for his claim that there is increased societal acceptance of homosexuals as people.[47] Similarly, he noted the fact that, post-*Bowers*, many states repealed their sodomy laws as support for his claim that there remains a marked societal intolerance for same-sex sexual

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

42 *Id.* at 2473.

43 *Bowers*, 478 U.S. at 205.

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

45 *Id.* at 2475.

46 *See* Oral Argument, *supra* note 9, at 30.

47 *Id.*

activity.[48] Clearly, the examples he provided to justify his claims about societal opinions about homosexuals as persons and persons engaging in same-sex sexual behavior instead serve to bolster the opposite.[49]

B. *What is (Homosexual) Sex?: Legislative History and the Question of the Fundamental Right to Sodomy*

Underlying this entire case, sits the ontological question of what exactly homosexual sexual activity is. Digging deeper still, we expose the fact that there is a very clear paradigm being employed in defining "normal" sex. We deem the selection of this paradigm over other equally legitimate possibilities to be at the origin of the moral and legal quandaries faced by the Supreme Court in deciding *Lawrence.*

A notable feature of this case, with regard to those questions, is the list of specific prohibitions catalogued under the Texas sodomy statute.[50] Recall that the law merely forbids, "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."[51] Prior to investigating this territory in detail, we should note that other state statutes are more broadly defined and comprehensive than the Texas statute considered in *Lawrence.*[52] Apart from the fact that the Texas statute only regulates homosexual sexual activity, in itself a blatantly discriminatory facet of the legislation, it is actually prima facie only a narrow injunction against a specific inventory of acts. In other words, outside the scope of the law there remains a domain of sexual activity between partners of the same sex still considered legally permissible. One could reasonably infer from this fact that this statute smacks of unadulterated ignorance about what acts two people of the same sex might perform in the bedroom. More plausibly perhaps, the omission owes itself to an exceedingly narrow view of sexuality based on a heterosexual binary model, which understands penetration as the objective of all sexual interactions between two people and, in its best light, oral sex as an accompaniment or precursor to it. Because of this, many commonly practiced sexual acts are not criminalized under the law, such as: kissing, touching, manual stimulation, mutual masturbation, frottage, sadomasochistic practices, analingis, and digital penetration of the genitals

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48 *See id.*

49 *See id.*

50 *See Lawrence,* 123 S. Ct. at 2476.

51 § 21.06 (a).

52 *See* MO. REV. STAT. § 566.090 (Supp. 1984) ("A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact or engages in conduct which would constitute sexual contact except that the touching occurs through the clothing without that person's consent.").

or anus.

These omissions have many varied consequences. For one, it could be rightly stated that homosexual sex is not outlawed wholesale, as these aforementioned acts would still be permissible. This consequence might have the result of bolstering Texas' case against the equal protection element of the petition, since homosexuals as a class would not actually be prevented from intimate sexual interactions, only certain specific acts. However, if heterosexuals were at liberty to perform the prohibited acts, the petitioners may still have made a reasonable equal protection claim. Further, it is arguable that at least some of these acts are integral or even essential to the sexual interaction of same-sex partners. Likewise, the opposition to the equal protection claim would be enhanced still further insofar as, for some self-identified homosexual people, the foundation of their sexual interaction would not crumble as a result of the statute. But, is it really conceivable that a person who finds the listed acts in the Texas statute to be immoral would not also hold that the omitted acts are also reprehensible? Would a law aimed at upholding the morals of the people of Texas, who disapprove of same-sex sexual activity, not also need to include these omitted acts in order to comprehensively carry out its stated intention? If the opponents to *Lawrence* could not justify these omissions in some reasonable fashion, which it is doubtful they could do, it would imply that the moral explanation for upholding the law was faulty, as the law is incapable of comprehensively prohibiting the alleged moral vice and is hence, under inclusive.

A second analysis arising from the examination of the list of prohibited acts is located at the level of the premises underlying most theories about sex. Apart from no-longer existing prohibitions against masturbation, most legislation concerning sexual activity focuses on the couple, the binary interaction, as the fundamental unit. We think this is fundamentally misguided. One of the main problems with the entire process of trying to legislate or make judicial decisions in this case is the basic assumption that sex is something that, at its root, begins with two people when, in fact, this sort of investigation ought to first turn its sights to the individual. Employing the couple as the most atomic unit entails a host of moral judgments not found if the paradigm is shifted from the binary to the unitary model.

The history of the Court seems to reflect an interest in transcending this problem. At first, "early American sodomy laws . . . sought to prohibit non-procreative sexual activity more generally."[53] Initially, "one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined

[53] *Lawrence*, 123 S. Ct. at 2472.

by the criminal law"[54] (defined uniquely as non-consensual penetration of a woman's vagina by a man's penis). In fact, "American laws targeting same-sex couples did not exist until the last third of the 20th century."[55] The move from the initial regulation of all non-procreative sex, even in the marital bedroom, to the acknowledgement that policing the sexual and procreative decisions of married heterosexual couples was unjust in *Griswold v. Connecticut*[56] was a first step away from anti-sodomy laws. The subsequent extension of that acknowledgement to non-married heterosexual couples in *Eisenstadt v. Baird*,[57] *Roe v. Wade*,[58] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[59] and, finally, to non-married homosexual couples in the *Lawrence* decision has whittled away the notion that regulating private, consensual, adult sexual activity is a legitimate state interest. This move, it seems, reflects the growing understanding that the right to make free choices about coupled, private, consensual, adult sexual activity is to be held by individual citizens and not the state. This is witnessed by the historical development of case law from its concentration on the married couple, to the unmarried heterosexual couple, to the present case of the homosexual couple.[60] Ultimately, we think the next move of the Court should be to solidify rights around the individual; this would resonate well with the liberal ideals of individuality exalted in our nation's history and traditions. Moreover, it is clear that the Court recognizes this aim, as it acknowledges an, "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[61]

This trajectory echoes a fundamental ontological question about exactly what sex is. Briefly stated, if we take the couple as the core unit of

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54 *Id.* at 2479.

55 *Id.*

56 381 U.S. 479, 481-82 (1965) (holding that a Connecticut statute prohibiting the use of contraceptives was unconstitutional because it violated a married couple's right to privacy, which is an enumerated right of the Federal Constitution).

57 405 U.S. 438 (1972) (holding that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried individuals was unconstitutional because it violated an individual's right to privacy following *Griswold*).

58 410 U.S. 113 (1973) (holding that *Roe* was still the law of the land, and that a Pennsylvania statute requiring women to wait at least twenty-four hours for an abortion after being provided with information from health care workers among other things did not place an "undue burden" on women seeking abortions, used the undue burden test on abortion laws established in Webster v. Reproductive Health Service, 492 U.S. 490 (1989)).

59 505 U.S. 833 (1992) (holding that a Pennsylvania statute requiring women to wait at least twenty-four hours for an abortion after being provided with information from health care workers among other things as well as upheld *Roe* and used the undue burden test on abortion laws).

60 Homosexual couples cannot be legally married and thus, until the move to unmarried couples was made, had no prospect of being considered legally at liberty to engage in such intimate conduct.

61 *Lawrence*, 123 S. Ct. at 2480.

investigation, the resulting view of sex and its concomitant moral implications are going to be somewhat skewed.[62] It would be more advantageous and perhaps even more accurate to realize the extent to which sex is originally an individual experience and practice. In other words, it is probable that for most people who undergo "normal" sexual development, masturbation will occur prior to any interpersonal sexual interaction. Sex is only secondarily extrapolated out to the binary interaction. If all sexual activity is analyzed by taking the binary (heterosexual) perspective as originary, it becomes apparent why certain acts, including masturbation, get depicted as incomplete or morally wrong. If we were to consider the solitary practice of masturbation as the root of all subsequent sexual activity, our analysis of that subsequent activity would certainly be viewed through a different lens.[63] For, what is masturbation other than a consensual, homosexual, non-monogamous, non-procreative and, to a certain degree, incestuous act?[64] We can surmise, from working with this model rather than the binary heterosexual one, that many of the acts contained on Scalia's laundry list (consensual adult incest and polygamy, for example[65]) might already have a basis upon which to argue their permissibility. This move parallels the aforementioned direction of the Court in the sense that, through this paradigm, we take the individual as the starting point. If the Court does ultimately find it suitable to extend the right to make free choices about private, consensual, adult sexual matters to individual citizens rather than to couples, we could perhaps begin the task of modifying our moral ideals to better match the implications of the unitary (or, masturbatory) paradigm.

This leads us to the subject of whether the performance of the specific acts that amount to homosexual sodomy should each be granted the status of a fundamental right. It is not at all obvious that those aligning themselves with the so-called "homosexual agenda" would truly want to argue that they ought to be. It may be more accurate to assert the entitlement to freely choose both acts and partners as a fundamental liberty or an essential good, as the majority opinion has done.[66] This would sidestep the regrettably narrow legal definition of fundamental right, which insists that the privilege

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62 In other words, if we start from the binary model as the norm, masturbation and sex with multiple partners, for example, could be looked upon with moral disapprobation or, at least, as abnormal sexual activity.

63 *See* Jami Weinstein & Jeffrey Bussolini, *Comblement/Fulfillment: Toward an Ontological Ethics of Sex*, *in* MARGINAL GROUPS AND MAINSTREAM AMERICAN CULTURE 71-95 (Yolanda Estes et al. eds., 2000).

64 *See id.* (Masturbation can be, at least tongue-in-cheek, taken as incestuous in the sense that you are clearly related to yourself and having sexual relations with yourself).

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

66 *See id.* at 2478.

be deeply rooted in our nation's history and traditions.[67] Philosophically, and even common sensibly, we believe a fundamental right is something more profound than that strict legal definition. However, sifting through the morass that is the debate over the essence of a fundamental right would be a needless digression. Justice Stevens, in his *Bowers* dissent, hit the nail squarely on the head when he cited that:

> [I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[68]

However, if one must locate these privileges in the domain of rights, (say, because, as Scalia mistakenly argues, they think it is the sole method of overturning *Bowers*), one could reasonably argue for something like a right to *freedom of self-determination* about with whom and in what manner one desires to have sex (stipulating of course that it be adult, consensual, and private). Stevens acknowledges this distinction in his *Bowers* dissent by stating that, "[t]he Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all *individuals* have in controlling the nature of their intimate associations with others."[69] This strategy would circumvent the need to venture into the murky rights terrain and undertake the daunting task of overturning precedent, which would be required to advocate a fundamental right to engage in specific acts of homosexual sodomy. This understanding of the right falls well within the purview of already existing fundamental rights known to be deeply rooted in our nation's history and traditions; as such, characterizing the entitlement in this fashion would not involve any significant alteration of the rule of law. Given, as we have demonstrated, that sexuality is a central element of one's identity as a person, and that being permitted to freely develop oneself as a person is essential to the recognition of the autonomy and thus dignity of a person (a linchpin of our justice system since its founding), a person's authority to formulate one's own conception of self by means of these sorts of choices must be left unfettered according to our nation's traditions and history.

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[67] *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

[68] *Bowers*, 478 U.S. at 199 (Stevens, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

[69] *Id.* at 206.

C. Homosexual, Gay, and Queer: The Trouble with Sodomy Statutes

It is important to tease out a distinction among several commonly used terms in order to appreciate the scope of the *Lawrence* decision as well as the impact of the many other related cases that preceded it. These terms include the following: homosexual, gay, and queer. People often mistakenly assume that these terms carry the same significance, refer to the same object, and that they can be used interchangeably. However, this assumption is incorrect.

It should come as not surprise that Michel Foucault[70] should be introduced here, as his work was indirectly invoked in the texts of the *Lawrence* case. The majority employed the work of theorists,[71] whose own work owes much to the scholarship of Foucault, in order to give weight to a pivotal historical claim. That historical claim implies that, because before the 19th century a class of people designated as homosexual did not discursively, socially, or ontologically exist, there could not have been laws banning conduct thought to be integral to that class. Foucault's widely cited study illustrates that, during the 19th century, there was a move from the delineation of individual perversions to the taxonomy of individuals as members of a class of deviants. Appropriate to this case, he states that around 1870, "[t]he sodomite had been a temporary aberration; the homosexual was now a species."[72] Undoubtedly, this would have had an effect on the possibility of demonstrating whether homosexual sodomy could indeed be granted the status of a fundamental right in the sense that Justice Scalia thinks the majority ought to do in order to overturn *Bowers*.[73] For, how could one be expected to show that such conduct, practiced by people who at that time still did not have even an identity, had a long-standing tradition and history? Likewise, the majority opinion cites that, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[74] This can be for no other reason than the fact that there is no longstanding tradition of the existence of the homosexual.[75]

The term "homosexual," thought to be the most neutral and employed most frequently in the *Lawrence* case, is thus actually embedded with a decidedly scientific resonance. Under that light, the term bears an essential

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[70] *See generally* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION (Robert Hurley trans., Vintage Books 2d ed. 1990) (1978).

[71] *See Lawrence*, 123 S. Ct. at 2479.

[72] *See* FOUCAULT, *supra* note 70, at 43.

[73] *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

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

[75] Note that with the birth of the species "homosexual" came the simultaneous birth of the "heterosexual." It is not the case that there was always already a concept of the heterosexual to which the nascent homosexual was being contrasted.

link to the notion of deviance, for the term was invented by sexologists merely to isolate those who were in a particular way 'abnormal.' Additionally, as was indicated in the texts of *Lawrence*, it also possesses a close, and almost inextricable, relation to criminality.[76] Seen in this way, it would not be incorrect to assert that using the term "homosexual" evokes an overall discursive practice related to the categorizing of norms and deviances, one that in the case of "homosexual," plainly falls on the side of deviance. In fact, following Foucault, it would not be a stretch to say that one cannot use the word at all without implicating deviance, be it medical, psychological, statistical, behavioral, or criminal.

Furthermore, when the designation "homosexual" came into play around 1870, it was created as part of a larger social system of pathologization and prohibition directed at the control of bodies and their reproductive functions. Foucault calls this biopower.[77] Thus, the very concept of what it means to be a homosexual is inextricably tied into an economy of social control of bodies, with a special focus on their relation to reproduction and sex, overseen by institutions as varied as medicine, criminal law, religion, and psychiatry. Foucault holds that this process marked homosexuals as inherently pathological, as the very word homosexual became linked to the pathologization of it insofar as the term was invented and the species was born under the guise of essentializing a class of people thought to be deviant.[78] Similarly, in O'Connor's words, "Texas' sodomy law brands all homosexuals as criminals."[79] Thus, quite like the fact that the invention of the homosexual species by the psychiatric and medical community created an inherent assumption that being or identifying as homosexual marked one as sick, "because of the sodomy law, *being* homosexual carries the presumption of being a criminal."[80] While it is certainly no elementary task to pinpoint exactly what it means to be a homosexual, those in power in these various institutional regimes sought to carve out a category, a species, upon which they would be able to exercise their disciplinary and even punitive forces. This pathologization of homosexuals has been maintained by the regime of psychiatric medicine until the late 1980's when it was stricken from the Diagnostic and Statistical

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[76] *See Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

[77] *See* FOUCAULT, *supra* note 70, at 140.

[78] Note that Foucault's subtle analysis also claimed that a tandem process was in effect for fixing the class deemed normal. In other words, the norm only arises in the delineation of the deviant. Thus, heterosexuality was born simultaneously with homosexuality. It only has meaning as a norm when affixed to the deviant category. This signifies that heterosexuals do not exist without their counterpart homosexuals. *See supra* note 70.

[79] *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

[80] *Id.* at 2487.

Manual of Mental Disorders.[81] Notwithstanding its deletion from the official texts of the field, there is little doubt that the sense of pathology associated with the term still reverberates even today.

It is due to these associations to the pathological that the leaders of the late 1960's emergent gay liberation movement sought to replace the term "homosexual." They considered it a label imposed upon them by discursive and institutional regimes, whereas the term, "gay," could be embraced as a self-identity free of the baggage inherent in the original designation and reflective of the actual lived experience of people who formed their identity in relation to an anti-normative sexuality. For, if identifying as a homosexual necessarily brings with it the presumption of immorality, criminality, psychological illness, deviance, abnormality, and pathology, who would want to self-identify in that manner? Given, too, that the goals of the early movement crystallized around an identity politic aspiring to achieve equal rights comparable to those extended to heterosexual people, there was a necessity to normalize the identities of those demanding the rights. This served to make their struggle more palatable to the mainstream and possibly even liberate self-identified gays from the collateral effects to which they were subject as a result of the inextricable moral, legal, and medical pathology inherent in the category "homosexual."

In this remainder of Part I, a few quick sketches will carve out the direction it looks as if the Court is and ought to be headed and how that coheres with the perspective a more contemporary queer theoretical position would advocate. The queer perspective takes into account many practices not delineated by the law, opens up the range of acceptable activity, recognizes diversity and multiplicity of sex/gender/sexual orientation, and ultimately lays open the more radical acceptance of the rights of individuals to make free, unfettered, private, consensual, adult choices. This perspective can easily be mapped onto what we described above as the possible conclusion of the historical trend in case law starting from the common law period and leading up to *Lawrence*: a move toward the individual as the possessor of the fundamental right to freedom in regard to sexual choices. We will not do that mapping here. What we aim to illustrate by introducing the term "queer" into this arena, is merely the extent to which that perspective might complicate and trouble the existence and application of anti-sodomy laws.

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[81] *See* Brief of Amici Curiae American Psychological Association et al. at 9, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102). In an amicus brief submitted by the American Psychological Association for the petitioners, this matter is judged to be settled insofar as, despite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or 'disorder.' *See id.*

The shift to queer from gay or lesbian identity indicates a departure from the identity politics advocated in the early stages of the liberation movement. Queer, in its most theoretical form, strives to situate itself as a praxis, or practice, rather than a fixed or essentialized identity. In this vein, we could better comprehend queer as a verb than a noun, as a practice than an identity, as dynamic rather than static, and as multiple rather than singular. Generally speaking, it is the activity of anti-normativity. Though some norm does form the backdrop against which queer is positioned, that norm is in geographic, socio-cultural, and temporal-historical flux, thereby precluding queer from gelling around any fixed set of criteria and thusly forming a static identity. Since queer is in a constant and inextricable relationship to an ever-changing norm (as its antithesis), it must also always be multiple and in flux. Part of this multiplicity is derived from the denaturalization of binary categories of sex/gender/sexual orientation.[82] Queer also dares to upset those categories by deeming them false dichotomies, if not merely wholesale constructions. As theorists have contributed more and more to collapsing these binary and essential categories, queer theory has grown increasingly relevant as the methodology through which we could resolve the new and intriguing puzzles such destabilizations and denaturalizations have engendered. It would be too massive a digression to dig much more under the surface and advance a lengthy and detailed account of the queer perspective here. Relevant to this context, we need only realize the way in which these destabilizations affect our understanding and application of anti-sodomy laws.

The move to identify as queer troubles the very notion of anti-sodomy laws on a number of different levels. Let us rehearse two of these. First, by complicating the sex/gender binary, we lose track of exactly to whom the law would rightly apply. For example, what would the law prescribe in the case of a woman-identified-female who engaged in the prohibited sexual acts with a female-to-male transgendered partner (a person who identifies as a male but is anatomically female)? How, too, might the law treat that same woman-identified-female if she were to practice this prohibited conduct with a male-to-female transsexual (a person who has, for argument's sake, completed the whole battery of surgeries, takes estrogen, and has been completely sex reassigned) or an intersexed person (one of the 1/2000 people who does not, for one reason or another, properly fit in either the male or female

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[82] By this we mean that the categories of sex, gender, and sexual orientation have become understood by many theorists not to be natural, but performative or socially constructed, and to be resistant to binary classification (i.e. they are not neatly taxonomized as an either/or of male-female, feminine-masculine, homosexual-heterosexual). In disrupting the notion that they are binary, we can come to see the multiplicity of sex, gender, and sexual orientation identities. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Routledge 1990).

categories)? Thorny problems indeed, if one is committed, as the law certainly is, to the notion that sex and gender are not only intrinsically linked but also are each categorically binary. Secondly, the move to queer has the effect of unhinging the dichotomy of heterosexual and homosexual (including bisexual, which relies upon that binary for its very existence). Thus, statutes aimed solely at homosexuals would be called into question. For example, still considering the cases of the individuals mentioned earlier, what would constitute a homosexual sexual interaction? What criteria would we use to determine whether the individuals involved were of the same or different sex? How would gender figure in determining orientation? What becomes of sexual orientation when gender and sex are not correlated in a hegemonic fashion?[83] These problems raised by the queer theoretical perspective certainly pose conundrums for the understanding and application of anti-sodomy statutes directed specifically at homosexuals. And to a large degree, they challenge the very validity of maintaining such statutes.

II. CHALLENGING SCALIA'S DISSENT

The second part of our examination of the *Lawrence v. Texas* case focuses on the arguments of and concerns in Scalia's dissent. His dissent is divided into five sections, with an introduction, and an ending we shall call the "coda." Section I focuses on the overturning of *Bowers* and stare decisis. Section II lays out what the *Lawrence* Court's goals should have been and whether the Court's opinion satisfies these requirements. Section III addresses what Scalia calls the majority's aspersions on *Bowers'* "conclusion that homosexual sodomy is not a fundamental right."[84] Section IV attempts to refute the Court's central holding that the Texas statute failed rational-basis review. Section V investigates the petitioner's equal protection challenge, and Justice O'Connor's related concurring opinion.
Finally, we argue that in what we dub the "coda," Scalia deviates from any logical, rational, or sensible analysis, and chooses instead to engage in a diatribe about the so-called "culture wars."

A. *The Issues*

In the last paragraph of Scalia's dissent, he succinctly summarized his answers to what he believed were the three main Constitutional questions in *Lawrence*:

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[83] Of course, it should be acknowledged that the more comprehensive statutes, the ones that include both homosexuals and heterosexuals, would not be affected by this; in those cases, any two people performing these acts would be subject to punishment regardless of sex/gender/sexual orientation.

[84] *Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting).

> Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws.[85]

This characterization of the main issues before the Court is only partially correct, and a bit skewed. As the Court points out, certiorari was granted under three questions: 1) did the Texas statute constitute an equal protection violation;[86] 2) whether the criminal convictions of the petitioners violated "their vital interest in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment,"[87] and 3) whether *Bowers* should be overruled.[88] Scalia's summary conveniently omitted the last of these points, although he recognized that the issue regarded whether homosexual sodomy was a fundamental right. Furthermore, he narrowly interprets the meaning of the Due Process issue by finding that if sodomy was not a fundamental right, then the only relevant issue was whether the Texas statute passed a rational-basis review.[89]

First, let us begin with what we analyze Scalia's dissent to claim the majority both held, and did or did not do in *Lawrence*:

1. Most of the Court's opinion is irrelevant to what it actually holds.[90]
2. The Court does not describe homosexual sodomy as a fundamental right or liberty interest.[91]
3. The Court does not subject the Texas statute to strict scrutiny.[92]
4. The application of the Texas statute to petitioners fails the rational-basis test, and overrules *Bowers'* holding to the contrary, which said sodomy statutes do satisfy the rational-basis test.[93]
5. The Court does not reverse *Bowers'* conclusion that homosexual sodomy is not a fundamental right.[94]
6. The Court asserts that the promotion of majoritarian sexual morality is not a legitimate state interest. Consequently, laws prohibiting and/or limiting bigamy, adultery, masturbation, fornication, prostitution, *et cetera* cannot survive rational-basis review (from now

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85 *Id.* at 2498.

86 *See Lawrence*, 123 S. Ct. at 2476.

87 *Id.*

88 *See id.*

89 Of course, this is not the only legitimate way to approach the due process claim. This concept will be discussed at length later on in the article.

90 *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

91 *See id.*

92 *See id.*

93 *See id.* at 2495.

94 *See id.* at 2488, 2492.

on).[95]

7. Effectively, *Lawrence* puts an end to all morals legislation.[96]

With respect to point 1, it is not exactly clear what Scalia means by this claim, but we shall later investigate its possible meanings. Scalia is correct about point 2, and consequently point 3 as well, although Justice O'Connor does allude to a potential desire for intermediate scrutiny review when she calls for something more than rational-basis. Again, Scalia is correct in claiming that points 4 and 5 logically follow from point 2. Point 6 is a bit trickier as the majority opinion does not explicitly argue that an end to morality driven legislation would follow from their holding. Instead, this is Scalia drawing a supposed logical consequence from the Court's approach.

The strategy of Scalia's dissent is to first show that homosexual sodomy is not a fundamental right. The Court does not take issue with that proposition since it never asserts that sodomy is a fundamental right (which they would have done explicitly if they so desired since they overturned *Bowers*, and *Bowers* asserted that sodomy was not a fundamental right). Since it is not a fundamental right, then the due process challenge simply reduces to the rational-basis test for the Texas statute. Since Texas argued that the state's interest in the law was moral disapprobation of sodomy, Scalia then argues that moral disapprobation meets rational-basis review, because rational-basis review requires only that the law be rationally related to the state's compelling, legitimate interest. Cleary, a law that prohibits sodomy is rationally related (in some minimal sense) to moral disapprobation of sodomy. But the majority showed that the state did not have a compelling, legitimate interest. Therefore, the fundamental disagreement between Scalia and the Court is over what counts as a legitimate state interest, and the relation between the Due Process Clause and rational-basis review.

B. *Scalia's Rhetoric*

At the outset, it should be noted that the rhetorical flair of Scalia' dissent is quite high and could be viewed as a substitute for rational argument in a few places. For example, in describing the majority's opinion in *Casey* he uses the word "paean" in a derogatory way to describe the Court's deference to stare decisis.[97] In the same place, he gets another cheap shot in by using the phrase "judicially invented abortion rights."[98] Finally, he describes a very famous and important passage in the *Casey* decision as the

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95 *See id.* at 2495.

96 *See Lawrence*, 123 S. Ct. at 2495. (Scalia, J., dissenting).

97 *See id.* at 2488.

98 *See id.*

"famed sweet-mystery-of-life passage."[99] The passage from *Casey* that Scalia ridicules held that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[100] Scalia claims not to understand what "defining oneself" means. It is quite clear that there are many different ways in which we form both the unique and shared aspects of our selves and personhood—that is defining oneself. Denying that the concept of "defining oneself" has meaning is similar to Chief Justice Rehnquist's claiming that he did not understand how abortion was a private act in his *Roe v. Wade* dissent.[101] Bracketing the issue of whether there is a right to privacy in the penumbras of the Constitution, Rehnquist claimed that abortion as a private act stretched the ordinary meaning of the word "privacy."[102] Obviously, an action or piece of information is still private even though it involves a physician (and possibly other health care staff) or that the information is shared with a physician. Practices of medical record confidentiality, whether legally sanctioned or not, confirm these intuitions. Would Rehnquist claim that he did not understand how sexual activity between two people in their own bedroom was a private act because it involved another person? Both Scalia and Rehnquist's claims seem to be more bluster than a serious questioning of semantics. In fact, Scalia questions the meaning of the same term in *Lawrence*:

> Next the Court makes the claim, again unsupported by any citations, that "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." The key qualifier here is "acting in private"—since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were "infrequent." I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by.[103]

Scalia explicitly questions what "acting in private" means and thereby misses the point of the Court. He notes, surely correctly, that enforcement of anti-sodomy laws to acts of sodomy committed in private would be difficult to do given that they are done where no one, including law enforcement,

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99 *Id.* at 2489.

100 *Lawrence*, 123 S. Ct. at 2489 (quoting *Casey*, 505 U.S. 833 at 851).

101 *See Roe*, 410 U.S. at 197-98 (Rehnquist, J., dissenting).

102 *See id.*

103 *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting) (internal citation omitted).

can see. But the case in *Bowers* and in *Lawrence*, both involved private acts.[104] So, a salient feature of both cases is that the sodomy was performed in private, which is important to distinguish in order to demonstrate that no other kinds of law are applicable, such as public indecency laws.

Furthermore, Scalia uses the rhetorical power of tongue-in-cheek. In comparing *Bowers* to *Roe*, Scalia quips that if *Roe* were overruled —for example, in *Casey*—it "would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State."[105] Whereas, he seems to feel that overturning *Bowers* leads to the opposite result: it would be a more dramatic change both legally and culturally. Scalia thinks that *Roe* was disruptive to the prevailing view of abortion in 1973 and perhaps later. Consequently, overturning *Roe* would not be so disruptive morally and politically, but overturning *Bowers* is disruptive morally and politically.[106] Scalia here is making a comparison between the Court's reasoning in *Casey*—that overturning *Roe* would disrupt the current social order—and it's reasoning in disregarding stare decisis in overturning *Bowers* now. He seems to be blind to the fact that the availability of abortion has become an entrenched social norm (since 1973) whether or not one thinks abortion is immoral. Making sodomy illegal has not become an entrenched social norm in our society since *Bowers*. To a certain extent, the legal milieu with respect to abortion before *Roe* and with respect to sodomy before *Bowers* is irrelevant.

Finally, Scalia tries to implore the reader to imagine the absurdity of obtaining warrants under a sodomy statute.[107] The example is not as absurd as Scalia assumes. If a state wants to have anti-sodomy laws, then it most certainly should be prepared to issue warrants which would aid in enforcement of those laws. If one really believes these laws are just, then why would obtaining warrants be absurd?

C. *Scalia's* Reductio

One of the main arguments Scalia puts forward is essentially a *reductio ad absurdam*.[108] He reiterates how *Bowers* rejected the rational-basis challenge

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[104] *Lawrence*, 123 S. Ct. at 2475-77.

[105] *Id.* at 2491 (Scalia, J., dissenting).

[106] *Id.* ("What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.").

[107] *See id.* at 2494. Scalia asks us to "[i]magine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring." *Id.*

[108] Some may view the argument as a slippery slope. There are acceptable and fallacious forms of slippery slope arguments. Scalia's central argument is best interpreted as a *reductio ad absurdam* [hereinafter RAA] because slippery slope arguments require a causal chain or stages—one thing leads to another, all the way down the slippery slope to some unacceptable set of circumstances or obviously false proposition. Scalia does not indicate stages or any causal chain.

to sodomy laws because it was impossible to distinguish between the moral justification of homosexual sodomy laws and traditional (other) "morals" offenses.[109] The *Bowers*' Court found that there was a rational relationship between an anti-sodomy statute and a state's interest in furthering the moral beliefs of its citizens (as reflected through their legislature).[110] Scalia believes that the wholesale rejection of morals legislation, or even the moral justifications for laws in general, will place morals legislation, and perhaps all law, in jeopardy.[111] Scalia finds such a consequence unacceptable, and hence believes that "morals" legislation must be allowed through the democratic process.[112] In other words, a majority's moral belief is a sufficient reason to legislate, and consequently passes the rational-basis test.

The rational effectiveness of a *reductio ad absurdam* argument depends almost completely on the rejection or unacceptability of the recorded consequences of the principle (or whatever) one is examining. Hence, if the consequences are *not* unacceptable, the argument fails. In *Lawrence*, as Scalia sees the issues, the principle is using majoritarian moral disapprobation as a sufficient reason for legislation, and thereby satisfying rational-basis review. In addressing this concern, one might question whether the principle would in fact lead to the consequences the arguer enumerates; perhaps the consequences are improbable, impossible, or simply do not follow necessarily from the principle under review. Some of the "offenses" Scalia lists as being hitherto untenable as legal prohibitions would strike many as being unproblematic.[113] One could either bite the bullet on these (accept the consequences), or argue that there is a substantial difference between homosexual sodomy and the remaining legal prohibitions, which would also demonstrate that all of these moral offenses ought *not* be grouped together. This latter strategy is effectively recognizing that finding homosexual sodomy laws unconstitutional does not necessarily mean that the remaining conduct on the list cannot be prohibited. The differences between these various behaviors, which warrants treating them differently for the purposes of constitutional adjudication, will be discussed below. Whatever strategy one adopts, it is going to come down to ethical or moral argumentation. This is where Scalia is vulnerable, and where he does not offer much. Below we

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He merely indicates that acceptance of a certain principle (to be discussed below) would lead to absurd consequences. Scalia's argument meets the conditions and criteria of a RAA argument, and does not meet the criteria of a slippery slope. Therefore, the argument is a RAA and not a slippery slope. *See* DOUGLAS WALTON, SLIPPERY SLOPE ARGUMENTS 74, 208 (Vale Press 1999) (1992).

109 *See Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

110 *See Bowers*, 478 U.S. at 196.

111 *See Lawrence*, at 2488, 2495 (Scalia, J., dissenting).

112 *Id.* at 2497.

113 *See id.* at 2494. Some of the legal prohibitions Scalia mentions are adult incest, prostitution, adultery, child pornography and obscenity. *See id.*

conclude that Scalia seems willing to accept just any reason a state might have for morals legislation to be sufficient in order to justify establishing such legislation.[114]

Scalia's list of traditional morals legislation is indicated in two places, the first segment states:

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . .(noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[115]

In this passage Scalia is accusing the Court of not limiting the scope of their holding. But this is neither a devastating criticism nor a real problem. The Court could have simply claimed that the holding is limited to the issue in the case (homosexual sodomy), but that they think most or many of the listed conducts are also protected liberty interests.[116] Alternatively, the Court could have replied that there are differences between sodomy and the other aforementioned conduct, but it was not incumbent for them to say what those differences are in the *Lawrence* opinion. The other relevant Scalia passage reads as follows:

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[114] Of course there might be other reasons for abandoning certain morals laws, as Justice Thomas points out in his brief *Lawrence* dissent. *See id.* at 2497 (Thomas, J., dissenting). Thomas basically puts forward a utilitarian argument for repealing these kinds of laws by simply stating that it is not worth wasting law enforcement resources on enforcing and prosecuting such "crimes." *See id.* Moreover, he thinks the Texas statute is silly. But Thomas' point here would have to be made at the legislative level, not at the judicial level. *See Lawrence*, 123 S. Ct. at 2497. The fact that a law would be a waste of valuable law enforcement funds does not challenge its rational relation to the goals of the legislative body. *See id.* Hence, even accepting this view, the law would still survive rational basis review (which is presumably one of the reasons Thomas dissented, and why he adds the quip that if he were a member of the Texas legislature he would vote to repeal this law). From this, it is unclear whether he agrees with the kind of moral judgments that the Texas statute supposes, *vis-à-vis* moral disapprobation of homosexual sodomy.

[115] *Id.*. at 2490 (Scalia, J., dissenting).

[116] This, perhaps, also suggests, albeit implicitly, a methodological point that such cases need to be considered on a case-by-case basis because of their moral complexity and far-reaching consequences.

> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," —the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual[.]" The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.[117]

The conclusions to be drawn from Scalia's argument here are: 1) that there is no effective way of distinguishing between the rational-basis review of sodomy laws and laws prohibiting other such sexual conduct; and 2) since we cannot make this distinction, those who are sympathetic with the Court's holding but would also want to prohibit some types of conduct would be forced to accept them as legally permissible. Of course, Scalia does not even note that perhaps the salient reason to distinguish between affording liberty with respect to sodomy and curtailing liberty in regard to the other conducts is different. Laws against fornication, adultery, and masturbation may actually not even survive rational-basis review.[118] If one accepts this as true, then the force of Scalia's *reductio ad absurdam* argument is further eroded. In addition, one could reasonably accept *consensual* adult incest, prostitution, and polygamy and thus further erode the strength of Scalia's argument. However, though we might be able to find plausible counterarguments, it could be reasonably argued that prostitution, bestiality, and polygamy, whether consensual or not, might have *intrinsically* bad moral properties (e.g., violation of certain moral rights) and deleterious social effects. Thus, the state could have a rational, legitimate interest in regulating these practices, provided that such complex moral argumentation was supplied.

Now the greatest difficulty in Scalia's list is the inclusion of non-consensual adult incest, forced prostitution, bestiality, and bigamy. The issue with these practices is that Scalia is being too reductive if he includes them.

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117 *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (internal citation omitted).

118 Though seemingly counterintuitive, it may even be possible to make a reasonable case that could undermine the view that a state has a legitimate interest in regulating bestiality. For example, if that state allows the non-consensual (in the sense that non-human animals cannot give consent, like human infants) use of animals in scientific laboratories, and the non-consensual factory farming of animals for meat production, how could that state make a consistent moral argument against bestiality on the basis of consent?

These can easily be dealt with by referring to the non-consensual character of the acts, which effectively distinguishes them from consensual homosexual sodomy. In addition, forced prostitution, bestiality, and bigamy are other-regarding actions, which violate someone's autonomy or basic moral rights. One could then rationally argue that the state has a legitimate interest in prohibiting them because of their non-consensual nature.

D. *Scalia on the Past*

In Section I of his dissent, Scalia addresses issues with respect to stare decisis, and the overturning of *Bowers*. His first criticism of the Court is to point out the contradiction that widespread opposition was used in *Casey* to reaffirm *Roe*, but in *Lawrence* it was used to overrule *Bowers*.[119] What can we make of this claim? First, as Scalia points out, there is a problem with interpreting the notion of "widespread opposition." What counts as widespread? What should count as opposition to a decision? Lack of enforcement, changes in laws made by legislatures, citizen protests, scholarly writings, the number of amicus briefs filed? Whatever one counts as opposition, Scalia does seem to have pointed out a contradiction between the reasoning in *Lawrence* and *Casey*. Hence, either the Court was wrong in *Casey*, or it is wrong to cite widespread opposition as a reason for overruling *Bowers*. If the Court was wrong in citing wide opposition to *Bowers* as a reason for overturning it, then the overturning of *Bowers* can still be justified on the other grounds the Court gives. The Court provides at least these other reasons for overturning *Bowers*: (1) the *Bowers* Court was wrong in thinking that the only issue was whether there was a fundamental right to engage in a certain kind of sex;[120] (2) in fact, the approach stated in (1) demeans the claim the petitioner put forward;[121] (3) the penalties and purposes of such anti-sodomy statutes go far beyond the prohibition of certain kinds of sexual acts;[122] (4) such statutes do not allow those who engage in such sexual conduct to retain their dignity as free persons;[123] (5) the history and historiography upon which *Bowers* relied is questionable or false.[124] The most important of these is (1), which essentially says that one does not have to invoke the concept of fundamental rights in order to invoke liberty claims. The others, except for (5), can be interpreted as following from (1).

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119 *See Lawrence*, 123 S. Ct. at 2481, 2483.

120 *Id.* at 2478. In other words, the *Bowers* Court "misapprehended the claim of liberty there presented to it. . . ." *Id.*

121 *See id.*

122 *See id.*

123 *See id.* at 2478.

124 *See Lawrence*, 123 S.Ct. at 2478-79.

Scalia cites post-*Bowers* cases to show that they were decided by lower courts based upon *Bowers*.[125] However, there is a simple, obvious reason why this does not sound like widespread opposition: lower courts are generally bound to use precedent and case law to decide new cases. Hence, it is not surprising to see lower courts using *Bowers* to decide cases, as that is exactly what they are supposed to do. Widespread opposition is usually not going to come from the judiciary itself.

In addition, it is here that Scalia contributes a new fallacy to the field of informal logic. Let us call it the "*Roe*-too" fallacy.[126] Several times Scalia highlights that the reasons the Court gives for overruling at least part of *Bowers*, also hold true for *Roe* as well. Now, in one sense, this is simply irrelevant. In *Lawrence* the Court could be adopting new criteria and standards for stare decisis, or, even though *implausible* yet still logically possible, the Court could now be suggesting (albeit indirectly) that *Roe* should be overruled. But to point out here that these reasons apply to *Roe*, merely shows a discrepancy in standards and criteria of stare decisis application. This is why Scalia speculates that the Court in *Lawrence* abandons consistency and stability, surely desirable goals in decision-making, for manipulation.[127] On the other hand, Scalia himself admits that he does not favor strict adherence to stare decisis in constitutional cases.[128] The fact that some of the reasoning used by the Court in *Lawrence* to overrule *Bowers* can also be used for overruling *Roe* does not add anything to the legal argument. In some future case, where the plight of *Roe* is directly concerned, these considerations may perhaps be relevant.

Scalia also continually insists that the Court did not completely overturn *Bowers*.[129] However, this can be true only in a narrow sense of the term "overrule." The Court did overrule the *conclusion* of *Bowers*. The Court can overrule a previous decision by showing that the approach in the decision was wrongheaded, and this is what the Court did in *Lawrence*. *Bowers* argued that sodomy was not a fundamental right. In the *Lawrence* decision, as Scalia repeatedly says, the Court does not assert that homosexual sodomy is a fundamental right. Instead, they sidestep the issue of fundamental rights

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125 *See id.* at 2490 (Scalia, J., dissenting).

126 We are, of course, referring to the standard informal fallacy "you-too," which is more formally known as *ad hominem tu quoque* fallacy. One way of defining *tu quoque* is when an arguer points out, in attempting to reject another's conclusion, that she does not practice what she preaches. It is a brand of pragmatic contradiction. For example, someone rejects the conclusion "do not smoke" because someone who smokes uttered the conclusion. This is fallacious because no matter what one actually does in practice, it is irrelevant to the truth or falsity of the claim one is making, especially when there are independent reasons supporting the conclusion.

127 *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

128 *See id.*

129 *See id.* at 2488, 2492.

in favor of discussing liberties and due process through rational-basis review. Hence, the Court can overrule the ultimate conclusion of *Bowers* without arguing that sodomy is a fundamental right. Conclusions from previous cases may be overruled while the approach and reasoning of that case is evaded in favor of a new approach and reasoning. In other words, one can show that a conclusion of an opinion or argument is wrong without showing that the original reasoning and premises of that argument are unsound or not cogent. One does this by developing new reasoning with new premises, which happens to show that the conclusion of the prior opinion is wrong.

There may be many reasons why the Court adopted the strategy of not arguing that homosexual sodomy is a fundamental right, some of which are indicated in the opinion. First, they could have recognized the inherent difficulty in finding justification, constitutional or otherwise, for the notion that homosexual sodomy is a fundamental right. Scalia mentions the standard criteria for determining what counts as a fundamental right citing, *Washington v. Glucksberg*.[130] The idea of what a fundamental right with respect to the Due Process Clause of the Fourteenth Amendment goes back to Justice Cardozo writing in *Palko v. Connecticut* that, "they represent the very essence of a scheme of ordered liberty, . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[131] The *Palko* and *Glucksberg* criteria for a fundamental right are difficult to satisfy—the alleged right must be deeply rooted in the traditions and history of this nation. This would be difficult to show for sodomy, to say the least. Second, it could have been thought that the best way to address the issue was by looking at the spirit of the Fourteenth and other amendments with respect to liberty. The Court explicitly reveals this approach to *Bowers*, but Scalia does not seem to understand it because of his overly narrow construal of the issues at hand in the case.

The fact that the Court does not argue that homosexual sodomy is a fundamental right, and effectively ignores *Glucksberg* criteria for fundamental rights actually makes much of Scalia's dissent irrelevant to the holding (and reasoning) of the Court. Of course, Scalia may retort that he did not address the broader liberty approach to due process because it makes no sense. Alternatively, it is possible that Scalia strategically ignored the Court's new approach (the fundamental right issue) because he did not have any reasonable argument at hand that could refute it.

The *Lawrence* Court quotes the *Bowers* Court, who states that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws

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130 *See id.* at 2489 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

131 *See Palko*, 302 U.S. at 325.

of the many States that still make such conduct illegal and have done so for a very long time."[132] The Court then goes on to argue that:

> That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. . . The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. . . This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. . .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.[133]

In fact, immediately after making this statement, they reiterate the point, that the *Bowers* Court, "misapprehended the claim of liberty there presented to it."[134] All of this demonstrates that the *Lawrence* majority was not interested in addressing the issue of whether homosexual sodomy was or was not a fundamental right. The Court, rightly, we believe, locates the issue in general liberty interests.

E. *Moral Argument and the Law*

Section II of Scalia's decision begins by delineating the central issues of the *Lawrence* case. First, the Court must show that *Bowers* was wrongly decided. Second, it must be shown that the Texas statute as applied to the petitioners is unconstitutional.

All laws are based upon some moral premises, be they rights, the harm principle, autonomy, or consequentialism. As a result, moral justification is a necessary condition for having a law, no matter how convoluted or hidden that ultimate moral justification is. It may also be a sufficient condition for having a law, if that moral justification is cogent, sound, and good. However, merely having moral disapproval, especially when applied to so-called "morals" legislation, is not sufficient for rational-basis review. Why? Mere moral disapproval is essentially no argument or reason at all. Ethicists, and especially bioethicists, have called similar moral positions the "yuk factor."[135]

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[132] *Lawrence*, 123 S. Ct. at 2479.

[133] *Id.* at 2478.

[134] *Id.* at 2479.

[135] The "yuk factor" is now common parlance in ethics. As far as we know, no one knows of the precise origin of this phrase and its first use.

This is when the only premise (reason) someone puts forward in attempting to justify "X is immoral" is that X is "Yuk!!"[136] Yuk should be interpreted as disgust or revulsion as a wholly immediate emotional reaction with little to no cognitive mediation. We do not have to deny that people actually have this response, and it may sometimes be even a visceral response. But this is not rational argumentation, and this phenomenon is not beyond analysis. People can respond in all sorts of way to things that are often based upon false beliefs, unrealistic expectations, prejudice, bias, and indoctrination. One can see an example of this clearly in the *Lawrence* oral arguments. When pushed, Texas attorney Charles Rosenthal could only say that people disapprove of sodomy, or find it immoral.[137] This is just repeating the moral conclusion over and over again. To say that the reason we have this law is because people morally disapprove of homosexual sodomy, and the reason they disapprove of it is because they disapprove of it, is simple question begging (fallacious). This is barely an argument at all. In creating a law prohibiting conduct that is integral to the autonomy and identity of a person, reasonable people expect their legislators and judges to offer something more substantial than the "yuk factor." This is not to say that there can be *no* argument against sodomy or (say) fornication, but in order to do so, the state must put forward a plausible, compelling argument, otherwise the law will neither pass rational-basis review nor meet the due process challenge. For rational-basis review, we submit, not only does one need a rational relation between the law and the state's interest (in having the law), one needs to have an argument showing that the interest of the state is legitimate, which should be interpreted at least in part as saying that one must have a plausible argument for the *moral interest* and thereby the law. This is especially true of "morals" legislation because it involves a direct appeal to the moral beliefs of citizens. Thinking "yuk" does not satisfy this condition. Possibly, this is what Justice Stevens meant in his *Bowers* dissent.

F. *Scalia on O'Connor*

In section V of his dissent, Justice Scalia criticizes Justice O'Connor's concurring opinion. In response to her point that the Texas statute must be "directed toward gay persons as a class,"[138] Scalia says:

> Of course the same could be said of any law. A law against public

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[136] We do not have to deny that people actually have this response, and it may sometimes be a visceral response. But this is not rational argumentation, and this phenomenon is not beyond analysis. People can respond in all sorts of ways to things that are often based upon false beliefs, unrealistic expectations, prejudice, bias, and indoctrination.

[137] *See* Oral Argument, *supra* note 9, at 41-46.

[138] *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring). "Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class." *Id.*

> nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law *does* deny equal protection to "homosexuals as a class," that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.[139]

Prima facie Scalia's comments seem extremely principled, and he has a very literal and sober jurisprudential interpretative philosophy. Unfortunately, such rigidity quells the imaginative power necessary for understanding and adjudicating cases that involve such complex social behavior, psychologies, and social divisions. To deny that such laws involve socially complex phenomena is to relegate them exclusively to textbooks and theory. Is Scalia blind to the divisiveness such sodomy laws create between people? Further, these divisions often fuel the fire of bias, prejudice, even violence, and in effect create a kind of second-class citizenship for those that engage in such sexual behavior. To what end? In order to allow the citizens of Texas to pass laws to further their moral beliefs with respect to sexual conduct? That question reveals what is behind the Court's claim that there is no legitimate state interest in having such a sodomy law. It is not so much that morality can never be part of the rational relation between a law and a state's interests but rather we must recognize the sometimes subtle and other times blatant differences in the nature of moral beliefs. The upshot of Justice Stevens' *Bowers* dissent is not the idea that majoritarian morality can never be used to justify law. Instead, it's the idea that when we deal with recognizably controversial cases it is not sufficient to simply cite the moral beliefs of the populace as the only basis for the case against sodomy. The idea of creating a class of "sodomizers," furthers little interest, protects no one, and has deleterious social effects on a class of persons who are engaged in private, freely chosen, consensual, adult behavior, which infringes upon neither the rights nor autonomy of another. Even if one finds sodomy, especially homosexual sodomy, disgusting, one can try to persuade others to not engage in such behavior. Does the fact that they find it morally disgusting alone warrant intrusion?[140] Such a concept is ridiculous and yet, this is what Scalia's brand of "morals legislation" entails. It is as if Scalia's jurisprudence

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139 *Id.* at 2496 (Scalia, J., dissenting) (emphasis in original).

140 This was exactly the question asked by Justice Blackmun in *Bowers*:

> This case involves no real interference with the rights of others, for the mere knowledgethat other individuals do not adhere to one's value system cannot be a legally cognizable interest. . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

Bowers, 478 U.S. at 213 (Blackmun, J., dissenting).

ignores the fact that there is a world outside of the text of the law, which is populated by persons of different preferences. This is precisely where the libertarian's intuitions are correct.[141] There is a realm around the person that is off limits, both because of liberty internal to the autonomy of persons, and the liberty necessary to obtain the best social consequences.

The point is not that every law in consequence creates a class to which it applies, but that certain classes that are created by the effects of a law are socially useless, protect no one, and do not even further some sort of moral integrity of the sexual morality of the majority. No one is made better by passing, voting for, and having such laws. But this is a pragmatic consideration.

G. *Scalia's Coda, Pragmatism, and Democracy*

A major foil to Scalia's brand of jurisprudence is pragmatism, especially the kind put forward by Judge Richard Posner.[142] Pragmatism relies not so much on legal authority, precedent, case law, or perhaps even consistency in a strict sense, but replaces these with judgments about the practical consequences of various legal decisions. Pragmatists focus on the probable consequences of judicial decisions. Often pragmatists are skeptical about abstract legal theory and interpretation. They ask, "What is going to happen if I decide X rather than Y?" With respect to anti-sodomy laws, the pragmatist would ask whether we really want to live in a society where people may be prosecuted and punished (albeit infrequently) for noncommercial, consensual, private, adult sexual relations of their choice? Even if one finds the behavior disgusting either morally, emotionally, or aesthetically, do we want laws like this on the books? A person who finds homosexuality (and perhaps other sexual acts) morally disgusting may also have limits as to how far they are willing to go legally. Such people may be against criminalizing private sexual acts, but would be more inclined to be sympathetic to certain forms of discrimination against homosexuals, because they do not want their children exposed to such people, nor do they want to work or live with

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[141] Libertarians take most seriously the intuition that people ought to be let alone as much as possible, so that it takes a very serious problem of other people's rights being violated to justify interference with that freedom. It should be noted that the Cato Institute, a libertarian think tank in Washington D.C., filed an amicus brief with the Court in support of the petitioners written by William Eskridge, John A. Garver Professor of Jurisprudence at Yale Law School, and Robert A. Levy of the Cato Institute.

[142] *See generally* RICHARD A. POSNER, SEX AND REASON (Harvard University Press 1992); OVERCOMING LAW (Harvard University Press 1995); PROBLEMATICS OF MORAL AND LEGAL THEORY (Harvard University Press 1999); FRONTIERS OF LEGAL THEORY (Harvard University Press 2001); LAW, PRAGMATISM AND DEMOCRACY (Harvard University Press 2003); THE PROBLEMS OF JURISPRUDENCE (Harvard University Press 1990) (Posner gives an account of pragmatic adjudication and moral reasoning in the books previously cited, and in many other articles, notes, et cetera).

them.[143] The problem with such an approach is its vagueness, and reliance on just what Scalia and his ilk fear: judges interpreting law in accordance with their own preferences and philosophies. Scalia favors the democratic process for these kinds of matters.

Letting the democratic process loose on such issues as homosexuality, and perhaps even abortion, is irrational in the sense that it simply commits the bandwagon fallacy. In a general sense, not all democratic decisions guarantee the rational result warranted by logic and good reasoning even when they are achieved through thorough debate and deliberation. Democratic decision making, although ideally and theoretically more prone to rational results by the sheer number of people involved can, and often, does fall short of what rationality demands. This is the risk of democracy, and perhaps Scalia is willing to live with that risk because he sees the alternatives as much worse.[144]

Now the question is: what does one want to do about the deficiencies of democracy? First, locating where the deficiencies truly lie is a problem. Are the problems structural or are they about the participants or both? One could decide to live with the vagaries of democracy and have hope, or one can attempt to ameliorate the problems by the least intrusive and damaging means, especially when things go very wrong. Perhaps the latter is a legitimate role for courts to play in a republican, representative democracy. In a constitutional democracy, majoritarianism is limited. Usually, the limitation comes in the form of political and legal rights. Of course this general and spare suggestion, taken by the founding fathers, does not make clear what rights should be given and how to extend and interpret them, but it is a recognition of something fundamentally important about the role of the judiciary. Some may argue that "controlling" and "limiting" democracy through the judiciary is a form of elitism. It may be, but then it was never clear that there was anything wrong with some forms of elitism. Is this judicial limitation on democracy paternalistic? Perhaps it is, but not in the sense of wanting to make individuals better or in order to protect them. Rather, it would be to make society as a whole better and well suited for democracy and the democratic process itself.

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[143] *See Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.").

[144] The alternatives would be anti-democratic political structures, such as totalitarian and fascist regimes among others.

In the coda section, Scalia asserts that the Court has taken sides in the culture wars.[145] Scalia admonishes the Court for being subsumed by the "law profession culture," which prohibits discrimination against homosexuals among other things.[146] But these organizations and institutions must have been persuaded by the case put forth by homosexual activists and others that this form of discrimination is unjust. That *is* the democratic process. One cannot simultaneously laud and worship the democratic process and then when the results of that process are not to your liking, rebuke them. If Scalia is asking homosexuals in the state of Texas to live with a democratically-arrived-at law that criminalizes the most intimate of their behavior, then he must live with the changes made to the legal profession and other organizations. Otherwise, he would be contradicting himself, and that would be "against principle." Scalia seems to be assuming that somehow the "legal world" has been bamboozled or held hostage. Activists for the so-called "homosexual agenda" just do not have that kind of power. If the legal world has changed, it is probably because its constituents were convinced it needed to be changed.

CONCLUSION

One final sticking point for many with respect to opening the proverbial floodgates by allowing homosexual sodomy to gain legitimacy under our nation's laws, is the perceived consequence that this decision will unhinge all other legal and moral prohibitions on homosexual conduct—particularly at stake are those statutes that currently prevent the legal recognition of same-sex couples. It must be explicitly highlighted here that it is *patently incorrect* to assume that the so-called "homosexual agenda" has reached consensus on whether same-sex marriage is in fact a desirable aim of the movement. Many gay rights advocates, in particular those aligning themselves with anti-normative queer political goals, argue that the very state recognition and valorization of couples itself is the problem. Moreover, the benefits and rights accorded to those couples as "rewards" for their pairing might be viewed by these parties as ridiculous and unnecessary. To these more radical wings of the movement, a better solution might be to disassociate many or most of the rights and benefits that are currently linked to heterosexual marriage from marriage and leave only the essential emotional core.

Further, some might contend that the very issue of marriage ought to not even be considered a legitimate state interest. In other words, these advocates would fight for universal healthcare rather than the right to marry

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145 *See Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

146 *See id.* at 2496-97.

one's same-sex partner and be granted health care benefits as a spouse. Such changes would be effected at a broader systemic level, rather than at the level of reform achieved, by winning equal rights to those of heterosexuals. This strategy might actually more successfully root out the background factors contributing to a larger and more widespread degree of oppression than the strategy of attaining marriage rights for same-sex couples. Understandably, many might consider this strategy a longer range goal, as achieving this sort of revolution might very well be a more complicated and arduous battle.

That said, many same-sex couples would like to join ranks with their fellow heterosexual citizens and have the state legitimate their relationships. And, both Scalia and O'Connor do explicitly express the fear that *Lawrence* might set a "dangerous" precedent that would open the doors to same-sex marriage. As Scalia notes, "[t]his reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[147] Here he takes issue specifically with O'Connor's reasoning to underscore what he mistakenly believes is the principal loophole that would allow gay marriage rights to flow from the logic of the *Lawrence* decision. Scalia argues that:

> Justice O'Connor seeks to preserve [laws limiting marriage to opposite-sex couples] by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. . .But "preserving the traditional institution of marriage" is just a kinder way of describing the states' *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).[148]

Were it valid to substitute "expressing moral disapproval" for "preserving traditional institutions," then Scalia's argument would have a great deal of force. However, Scalia actually generates an irrelevant contradiction, since the contradiction he identifies does not apply to the argument O'Connor is advancing. It is not at all apparent that in all cases, preserving (moral)[149] traditions is equivalent to expressing moral disapproval. Scalia is assuming that wanting to preserve tradition X and expressing moral disapproval of not-X are functionally equivalent (or at least

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147 *Id.* at 2496.

148 *Id.*

149 We place parentheses around "moral" here because in the quotation above Scalia does not use the phrase "moral tradition" but instead just "tradition." O'Connor, whom Scalia is in part quoting, does not use it. But the adjective "moral" may be implied.

that is what he must assume for his argument to be cogent or valid). There are many examples in which these two concepts bifurcate. For example, I can desire to preserve the (moral) tradition of eating meat[150] without thereby expressing moral disapproval of not eating meat (vegetarianism). I might think vegetarianism is morally permissible. Scalia could reply by asking what does it mean to want to "preserve a (moral) tradition" then? First, since strictly the term "moral" is optional here, it is very clear that one can support preserving a tradition where that position is morally neutral. There are many such traditions. In the case at hand, one could want to preserve different sex marriage for other than moral grounds. Second, even if we keep the traditions and disapprovals moral, one could say that one wants to preserve a certain tradition as a social norm without entailing outright disapproval of those who deviate from this social norm.[151] Furthermore, one may insist that those who deviate from the social norm are not to be condemned or subject to discrimination. Similarly in this case, it is quite reasonable for one to want to preserve the tradition of different sex marriage in this culture and not disapprove of same sex marriage. One can rationally believe that X is better than Y without also believing that Y is bad. Thus, Scalia's contradiction and O'Connor's argument are too dissimilar, and the substitution of one for the other is either not cogent or invalid.

Moreover, it seems that Scalia neglected to properly complete his homework, as he neglected to read the rest of O'Connor's concurring opinion. For, she also states that, "[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist* to promote the institution of marriage beyond mere moral disapproval of an excluded group."[152] Hence, even in the specific case with which he grapples, he is incorrect to claim an identity relation between "expressing moral disapproval" and "preserving traditional institutions." O'Connor here explicitly states that these two terms are not identical and that *other reasons* would be required to codify that type of state interest as legitimate.

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[150] Many may wonder whether it is appropriate to describe the traditional practice of eating animal flesh as a moral one; however, it is indeed a moral practice whether it seems like it or not. There are many practices that are so entrenched that it is difficult to separate ourselves from them and take up an objective point of view. For example, at one time in the United States it was nigh impossible for most members of society to think of slavery as a moral tradition. One hears such phrases as "that's the way it has always been," et cetera.

[151] During *Lawrence* oral argument, Charles Rosenthal, the attorney for Texas, makes a similar point. He says, "and just because someone has decriminalized sodomy doesn't mean that they embraced that practice as something that ought to be taught in the schools as was mentioned before." Oral Argument, *supra* note 9, at 31. Essentially he is saying that decriminalization of sodomy does not entail moral approval of sodomy, which is analogous to our point here.

[152] *Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring) (emphasis added).

Finally, as mentioned previously, as long as there are legitimate reasons accompanying moral disapproval (more then just a "yuk"), a legitimate argument could be constructed to justify a rational state interest. What we argued, which is consistent with O'Connor's concurring opinion, is that without such reasons, moral disapproval (the "yuk factor") alone is not sufficient to satisfy the conditions of rational state interest required even under the lowest form of scrutiny, rational basis review. Consequently, the force of Scalia's claim is merely rhetorical, laden with his own fears of the advancement of the "homosexual agenda," and not indicative of his ordinarily sharp jurisprudential reasoning skills.

In this article, we thoroughly reviewed the ontological underpinnings of *Lawrence v. Texas.* Our findings are largely consistent with, and greatly support, the majority opinion and its outcomes. We found that much of the problem with the dissent was simply that they misunderstood or misrepresented these foundations. We rehearsed the central arguments against the majority opinion and found much, if not all, of it to be lacking in logical force and laden with rhetorical fancy. As the above argues, even the perceived threat that the *Lawrence* decision would implicitly sanction same-sex marriage emerges as an unfounded apprehension.

In closing, it is important to pay heed to Justice Scalia's own recommendation to allow the democratic process to legislate the needs and moral concerns of its citizens. An essential element of the democratic process is that it allows citizens to speak out, have their voices heard and their concerns acknowledged. This is what is entailed by our long-standing tradition of respecting the dignity of autonomous agents and fostering their freedom and self-determination. We find this especially important to underscore because legislative and judicial decisions have been made that hinder the ability of those agents to fully and freely develop their own concept of existence and personhood in ways that they see fit, and have little or no0 impact on the freedom and self-determination of others. Being both subject to discrimination and relegated to second-class status relative to other citizens, without good reasons or a sound argument to buttress a legitimate a state interest, are such hindrances. When these hindrances are created, either intentionally or inadvertently, it is incumbent upon our legislative and judicial leaders to recognize them as flaws in our system, and to rectify them as soon as possible after this element of the democratic process forces that awareness. We think that the *Lawrence* Court rightly did just that.[153]

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[153] We would like to thank the editors, especially Olga Giller, for their patience and skill in improving this article. Of course, we are to blame for all shortcomings that remain.