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# LAWRENCE V. TEXAS: WHEN “PROFOUND AND DEEP CONVICTIONS” COLLIDE WITH LIBERTY INTERESTS

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On the morning of June 26, 2003, I sat in front of my computer watching the early reports of *Lawrence v. Texas*<sup>1</sup> while talking on a conference call to two friends who were doing exactly the same thing. We were each on the websites of different media outlets, and we excitedly yelled out the bits and pieces of the decision as they were reported. The relief we experienced upon reading that the majority overruled *Bowers v. Hardwick*<sup>2</sup> was quickly followed by jubilation when the phrase “liberty interest” began to appear in the early summaries. The majority had not only overruled *Bowers*,<sup>3</sup> it had eschewed the Petitioners’ equal protection argument in favor of reaching “the substantive validity” of the Texas sodomy law.<sup>4</sup>

When I finally retrieved the full opinion from Westlaw, I was surprised and gratified to see the majority’s willingness to cite historical work<sup>5</sup> and international trends,<sup>6</sup> as well as the majority’s repeated assertions that sodomy laws were demeaning.<sup>7</sup> Indeed, I was crying by the time I read, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and

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<sup>1</sup> 123 S. Ct. 2472 (2003).

<sup>2</sup> 478 U.S. 186 (1986).

<sup>3</sup> Petitioners’ brief led with an equal protection argument. See Petitioner’s Opening Brief at 9, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter Petitioner’s Brief]. Only the last eight pages of the brief dealt with the question of whether *Bowers* should be overruled. See *id.* at 22-30.

<sup>4</sup> *Lawrence*, 123 S. Ct. at 2482. The Court cited to an amicus brief filed by historians, which clearly informed the Court’s discussion of the prohibitions against same-sex sodomy. See generally Brief of Amici Curiae Professors of History et al., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102). The brief charts the development of sodomy laws and the construction of the modern homosexual. See *id.*

<sup>5</sup> See *Lawrence*, at 2478-80.

<sup>6</sup> See *id.* at 2481. The majority discussed international trends in response to Chief Justice Burger’s concurrence in *Bowers v. Hardwick* in which he asserted that “homosexual conduct [has] been subject to state intervention throughout the history of Western civilization.” *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

<sup>7</sup> See *Lawrence*, 123 S. Ct. at 2478, 2482, 2484.

now is overruled."<sup>8</sup> As I finished Justice Kennedy's opinion, I felt a little like Dorothy at the end of the Wizard of Oz when she learns that she had always possessed the power to go back to Kansas. Come to find out, I had always possessed the right to individual autonomy and choice in matters of sexuality. After seventeen years of attempts by pro-gay advocates to bifurcate conduct from status and sidestep *Bowers v. Hardwick*, Justice Kennedy's majority opinion had conclusively put the *sex* back into *homosexual*.<sup>9</sup>

My major concern on the morning of June twenty-sixth had not been that the Court was going to uphold the Texas Homosexual Conduct Law.<sup>10</sup> I fully expected the Court to invalidate the Texas law. My concern was that the Court would strike down the same-sex specific criminal statute on equal protection grounds and decline to overrule *Bowers v. Hardwick*, thereby advancing group equality interests, but preserving the state's power to criminalize consensual, private, noncommercial sex acts.<sup>11</sup> As I read Justice O'Connor's concurrence, I remained convinced that equality arguments based on orientation and group affiliation in the absence of a core right to sexual autonomy reinforced a view of stable gay identities that was ultimately disingenuous and disempowering.<sup>12</sup>

Taking a page from Dr. Kinsey's *Sexual Behavior in the Human Male*, Texas had actually argued that the fluidity of sexual orientation or same-sex desire proved that the Texas Homosexual Conduct Law did not target "any particular group for discriminatory treatment."<sup>13</sup> To the contrary, Texas explained that its law "applie[d] equally to bisexuals, and to heterosexuals who are tempted to engage in homosexual conduct because of confinement

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

<sup>9</sup> Referring to the petitioners, the majority wrote that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Id.* For a discussion of the bifurcation of status from conduct as a litigation strategy, see Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *LAW & SEXUALITY* 1, 54 (2003).

<sup>10</sup> The Texas Homosexual Conduct Law provides that, "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). "Deviate sexual intercourse" is further defined as "(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." § 21.01 (1).

<sup>11</sup> See *Lawrence*, 123 S. Ct. at 2484-88 (O'Connor, J., concurring).

<sup>12</sup> See Knauer, *supra* note 9, at 8 (noting "claims of immutability present[] an understanding of homosexuality with a non-volitional core that is ultimately disempowering and thoroughly abdicates the claims of individual autonomy and self-determination that animated the early gay rights movement in the period immediately following Stonewall").

<sup>13</sup> Respondent's Brief in Opposition at 12, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter Respondent's Brief]; see also *Lawrence v. State*, 41 S.W.3d 349, n.6 (Tex. 2001).

in prison, an interest in sexual experimentation or any other reason.”<sup>14</sup> Texas claimed that it was using the term homosexual as synonymous with same-sex sexual contact, rather than to refer to a “fixed . . . orientation.”<sup>15</sup> In her equal protection analysis, Justice O’Connor addressed the state’s argument and concluded that the Texas law was “directed toward gay persons as a class” because “[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.”<sup>16</sup> Under this reasoning, the state of being homosexual precedes and can remain independent from sexuality. The majority opinion in *Lawrence* armed this otherwise ethereal equal protection homosexual with a liberty interest in her individual sexual autonomy and thus reacquainted the class with its defining feature—same-sex desire.

By overruling *Bowers v. Hardwick*, the majority also deprived anti-gay and pro-family forces of one of their strongest remaining arguments. This argument maintains that if it is Constitutionally permissible to criminalize “homosexual sodomy,” then why can’t the state, employers, landlords, or schools disfavor those who build a “lifestyle” around such conduct?<sup>17</sup> The import of removing this argument from anti-gay discourse was immediately apparent to me when I read Justice Scalia’s uncharacteristically tepid dissent.<sup>18</sup> At the outset, I must admit that I had been looking forward to Justice Scalia’s dissent and perhaps had unreasonable expectations. Justice Scalia’s incendiary dissent in *Romer v. Evans* had ensconced in Supreme Court jurisprudence such favorite anti-gay chestnuts as ‘gay people have high disposable income’ and ‘gay people wield disproportionate political power.’<sup>19</sup> It read, in many parts, as if it were a tract produced by Colorado for Family Values.<sup>20</sup>

In his dissent in *Lawrence*, Justice Scalia seemed to display more interest in the future of *Roe v. Wade* and same-sex marriage than in our “immoral and destructive” sexual practices.<sup>21</sup> Gone were the comparisons between

<sup>14</sup> *Lawrence v. State*, 41 S.W.3d at 349 n.6.

<sup>15</sup> *Id.*

<sup>16</sup> *Lawrence*, 123 S. Ct. at 2486-87 (O’Connor, J., concurring).

<sup>17</sup> See *Romer v. Evans*, 517 U.S. 620, 642 (1995) (Scalia, J., dissenting). In his dissent, Justice Scalia argued that, “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” *Id.* (emphasis in original).

<sup>18</sup> See *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

<sup>19</sup> See *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting).

<sup>20</sup> Colorado for Family Values is the organization that proposed the Amendment 2 statewide referendum, which was struck down in *Romer v. Evans*.

<sup>21</sup> *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting). Justice Scalia explained that “[m]any Americans” desired to “protect [ ] themselves and their families from a lifestyle that they believe to be immoral and destructive.” *Id.*

homosexuality and murder or cruelty to animals.<sup>22</sup> In the absence of constitutionally permissible criminal stigma, Justice Scalia could only muster a mild comparison between homosexual orientation and a “nudist,”<sup>23</sup> although he did repeatedly offer lists of other types of sexual conduct that were criminalized on morality grounds, including, but not limited to, “fornication, bigamy, adultery, adult incest, bestiality and obscenity.”<sup>24</sup> The only state interest Justice Scalia discussed as supporting the Texas Homosexual Conduct Law was majoritarian morality.<sup>25</sup> Neither Justice Scalia nor Texas incorporated any of the repellent public health and public safety justifications catalogued by various anti-gay, pro-family amici.<sup>26</sup> Justice Scalia’s harshest words were reserved for “a Court that has grown impatient with democratic change”<sup>27</sup> and a “law-profession culture[] that has largely signed on to the so-called homosexual agenda.”<sup>28</sup> Rejecting the majority’s application of *stare decisis* and its due process analysis, Justice Scalia charted a slippery slope where preserving “traditional” morality was no longer a legitimate state interest<sup>29</sup> and judicially mandated same-sex marriage was just around the corner.<sup>30</sup>

By the time I finished Justice Scalia’s dissent and Justice Thomas’ brief libertarian postscript,<sup>31</sup> I began to consider just how much had changed

<sup>22</sup> See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

<sup>23</sup> *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

<sup>24</sup> *Id.* at 2495.

<sup>25</sup> See *id.*

<sup>26</sup> A variety of anti-gay, pro-family amici argued that public health and safety – not simply morals – justified the criminalization of same-sex sodomy. For example, an amicus brief filed by Texas legislators argued that the Texas Homosexual Conduct Law was rationally related to protecting public health. See Brief of Amici Curiae Texas Legislators at 15, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102). The legislators argued, *inter alia*, that “[s]ame-sex sodomy presents serious health problems that must be prevented in order to ensure that all of the people of the state of Texas, especially those that seek to engage in same-sex sodomy, are fully protected from the ravages of infection and disease.” *Id.* at 17. The Texas Physicians’ Resource Council argued specifically that “same-sex sodomy is more harmful to the public health than . . . opposite sex-sodomy” and noted that “[t]he extent of STDs associated with same-sex sodomy is likely related to the high frequency of sex, anonymous or multiple sex partners, and other high-risk behaviors.” Brief of Amici Curiae Texas Physicians’ Resource Council et al. at 20-21, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102). The brief filed by the Pro-Family Law Center was perhaps the most sensational of all the public health-oriented amici briefs. It began with a retelling of the controversial *Rolling Stone* article about “bug chasers” and includes a list of websites devoted to “barebacking.” See Brief of Amici Curiae Pro-Family Law Center et al. at 3-4, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102); see also Brief of Amicus Curiae Concerned Women for America at 1, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102); Brief of Amicus Curiae Liberty Counsel at 2, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

<sup>27</sup> *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

<sup>28</sup> *Id.* at 2496.

<sup>29</sup> *Id.* at 2495.

<sup>30</sup> See *id.* at 2497-98. Justice Scalia warns that “judicial imposition of homosexual marriage . . . has recently occurred in Canada.” *Id.* at 2497.

<sup>31</sup> See *id.* at 2498 (Thomas, J., dissenting).

during those “mere 17 years” that *Bowers v. Hardwick* had represented binding precedent.<sup>32</sup> Any instance where the Supreme Court overrules its prior precedent and declares that it had been incorrect when decided can produce a sense of dislocation. When the majority in *Lawrence* stated that Justice Stevens’ analysis in his dissent in *Bowers* “should have been controlling in *Bowers* and should control here,”<sup>33</sup> I was immediately transported back to my pre-*Bowers* law school days where Kenneth Karst’s *The Right to the Freedom of Intimate Association*<sup>34</sup> and *People v. Onofre*<sup>35</sup> signaled, at least to me, that it was only a matter of time before the Court would invalidate state sodomy laws. The sense of continuity provided by the incorporation of Justice Stevens’ reasoning, however, can not erase the fact that *Bowers* was used to sanction a wide array of legal disabilities imposed on gay men and lesbians<sup>36</sup> and stood as “an invitation to subject homosexual persons to discrimination,”<sup>37</sup> even in states which had repealed their sodomy statutes.<sup>38</sup>

Although seventeen years may be but a moment in terms of Supreme Court jurisprudence, the time that elapsed between the Court’s 1986 decision in *Bowers* and its 2003 decision in *Lawrence* represented an unprecedented period of creativity in the development of gay political thought, advocacy and scholarship. In Justice White’s majority opinion in *Bowers*, homosexuals made only a shadowy appearance in the person of Michael Hardwick who self-identified as “a practicing homosexual” for procedural reasons.<sup>39</sup> Referring to homosexuals only three times,<sup>40</sup> Justice White, and to an even greater extent Justice Burger in his concurrence,<sup>41</sup> focused on an oddly disembodied act of “homosexual sodomy,” which was also described as the more generic “homosexual activity” or even simply “that

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<sup>32</sup> Justice Scalia referred to “the Court’s surprising readiness to reconsider a decision rendered a mere 17 years ago[.]” *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

<sup>33</sup> *Id.* at 2484.

<sup>34</sup> Kenneth Karst, *The Freedom of the Right to Intimate Association*, 89 YALE L.J. 624 (1980).

<sup>35</sup> 51 N.Y.2d 476 (1980).

<sup>36</sup> See Knauer, *supra* note 9, at 57 (discussing “homosexual-as-sodomite argument”).

<sup>37</sup> *Lawrence*, 123 S. Ct. at 2482.

<sup>38</sup> In his dissent in *Romer*, Justice Scalia noted that Amendment 2 was not inconsistent with Colorado’s repeal of its sodomy law since “the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful[.]” *Romer*, 517 U.S. at 645.

<sup>39</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

<sup>40</sup> See *id.* at 188, 190.

<sup>41</sup> See *id.* at 196 (Burger, C.J., concurring). Chief Justice Burger erased the homosexual completely when he said that, “there is no such thing as a fundamental right to commit homosexual sodomy.” *Id.* His only recognition that homosexual sodomy involved more than proscribed body parts touching exists in a vague reference to “decisions of individuals relating to homosexual conduct have been subject to state intervention.” *Id.* Chief Justice Burger concluded that “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.” *Id.* at 197.

conduct."<sup>42</sup> What Justice Blackmun referred to as "the Court's almost obsessive focus on homosexual activity"<sup>43</sup> allowed the majority in *Bowers* to conceptualize the occasional and, perhaps inevitable, freestanding 'crime against nature' as unencumbered by any interpersonal context or meaning. The homosexual in 1986 was a cipher; a necessary, but ultimately derivative, actor.

Justice White's statement that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated"<sup>44</sup> represented fighting words to many pro-gay advocates who then devoted their time to establishing just such a connection and constructing a homosexual identity independent of conduct.<sup>45</sup> The resulting emphasis on orientation and identity politics has risked the production of a highly normative gay identity explained or excused by the still elusive gay gene and defined by the desire to mate for life in monogamous unions and serve proudly and openly in the country's armed forces.<sup>46</sup> Petitioners' brief directly addressed the "no connection" rationale of *Bowers* and offered the Court a view of homosexual sodomy within the context of committed same-sex relationships and the families they form, noting that "[s]ince 1986 . . . the country has developed a more accurate understanding of gay and lesbian couples and families[.]"<sup>47</sup> The brief then discussed the 2000 census figures showing that same-sex couples can be found in 99.3% of all counties in the United States and outed Father Mychal Judge in a parenthetical discussing the rights of surviving same-sex partners.<sup>48</sup> In a footnote located on the second to the last page of the brief, Petitioners begrudgingly acknowledged that "[p]ersons not in committed relationships have the same fundamental rights as those who are."<sup>49</sup> Despite the majority's emphasis on individual liberty interests, the homosexual in *Lawrence* is undeniably contextualized within a relationship of some form. The choice protected by liberty interests is the choice of individuals "to enter upon this relationship in the confines of their homes and their own private

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<sup>42</sup> *Bowers*, 478 U.S. at 191-92.

<sup>43</sup> *Id.* at 200 (Blackmun, J., dissenting).

<sup>44</sup> *Id.* at 191.

<sup>45</sup> See Nancy Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 464 (2000).

<sup>46</sup> See generally Knauer, *supra* note 9 (discussing construction of contemporary gay political narrative).

<sup>47</sup> Petitioners' Brief at 28.

<sup>48</sup> See *id.* The Brief cites to the Mychal Judge Police and Fire Chaplain Public Safety Officers' Benefit Act of 2002 and describes Father Judge as "gay New York firefighter chaplain who lost his life in September 11 terrorist attacks." *Id.*

<sup>49</sup> *Id.* at 29.

lives and still retain their dignity as free persons.”<sup>50</sup> As Justice Kennedy explained “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>51</sup>

The social and political sea change that was occurring in the lives of gay and lesbian individuals during *Bowers*' seventeen-year run was also reflected in the litigants who appeared before the Court. Michael Hardwick was followed nine years later by the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB). In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>52</sup> the homosexual was part of an organization that was undeniably political, as well as Irish. Writing for an unanimous Court, Justice Souter discussed the message that the “openly gay, lesbian, and bisexual descendants of the Irish immigrants”<sup>53</sup> wished to communicate as part of the St Patrick Day's parade and held that forced inclusion of the GLIB contingent would impermissibly infringe upon “the choice of [the parade organizer] not to propound a particular point of view.”<sup>54</sup> The next year, as the so-called “Culture War” raged, gay and lesbian residents of Colorado were before the Court in *Romer v. Evans* seeking to invalidate Amendment 2, passed amidst much acrimony in response to modest state and local gains regarding anti-discrimination laws and the recognition of same-sex relationships.<sup>55</sup> Four years later, James Dale, the openly gay Eagle Scout and Assistant Scout Master, unsuccessfully fought the Boy Scouts' expressive association claim.<sup>56</sup> Justice Rehnquist's majority opinion found that Dale's forced inclusion under the New Jersey public accommodation law “would significantly burden the organization's right to oppose or disfavor homosexual conduct.”<sup>57</sup> The Court recognized the uniquely expressive nature of the openly gay individual and the integral part sexuality plays in gay identity when it held that Dale's mere presence as a non-closeted and non-apologetic homosexual would telegraph a message “that the Boy Scouts

<sup>50</sup> *Lawrence*, 123 S. Ct. at 2478.

<sup>51</sup> *Id.*

<sup>52</sup> 515 U.S. 557 (1995).

<sup>53</sup> *Id.* at 571.

<sup>54</sup> *Id.* at 575. Justice Souter argued that:

The parade organizers may not believe these facts about Irish sexuality to be so, or they may object to the unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of the speaker not to propound a particular point of view, and that choice is presumed to lie beyond the overnment's power to control.

*Id.*

<sup>55</sup> *Romer v. Evans*, 517 U.S. 620 (1995).

<sup>56</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>57</sup> *Id.* at 654.



accepts homosexual conduct as a legitimate form of behavior."<sup>58</sup>

Thus, by the time John Geddes Lawrence and Tyron Garner were before the Court, the homosexual had already emerged from shadows of Supreme Court jurisprudence as a politicized, organized, expressive and sexual individual. The majority in *Lawrence* imbued the homosexual with constitutionally protected liberty to choose to enter into sexual relationships without state interference.<sup>59</sup> The progression of the homosexual from the near-anonymous sodomite in *Bowers* to the autonomous, yet contextualized, sexual actor in *Lawrence* represents a much more nuanced understanding of same-sex intimacy and the history of same-sex desire – an understanding that was painstakingly forged by pro-gay advocates and scholars during the seventeen-year interval since *Bowers*. For example, in *Lawrence*, the majority's discussion of homosexuality is much more comprehensive than Justice Stevens' 1986 liberty-based dissent.<sup>60</sup> The majority's synopsis of the state regulation of same-sex desire in *Lawrence* directly challenged the notion of a trans-historical and universally condemned homosexual and took Chief Justice Burger to task for his unreflective reference to "Western civilization[.]"<sup>61</sup>

Perhaps surprisingly, this evolution of understanding is also evident in Justice Scalia's dissent. The homosexual-as-sodomite reasoning has not simply failed to garner a majority of the Supreme Court, it has receded from socially acceptable discourse.<sup>62</sup> In its place, Justice Scalia sees a highly motivated and politicized special interest group with as much right as the next group to "promot[e] their agenda through normal democratic means."<sup>63</sup> Indeed, Justice Scalia's near obsessive focus on same-sex marriage, which he believes is the next item on our much ballyhooed 'agenda,' leads him to make a reference to "homosexual couples"<sup>64</sup> – something that is anathema to those who view homosexuals as merely the sum of our sex acts.

As political beings, Justice Scalia contends that our fortunes should be determined in the democratic marketplace of ideas by appeal to the

<sup>58</sup> *Id.* at 653.

<sup>59</sup> *Lawrence*, 123 S. Ct. at 2472.

<sup>60</sup> *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).

<sup>61</sup> *Id.* at 196 (Burger, J., concurring). For an early critique of the historical record set forth in *Bowers*, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1086-89 (1988); see also Brief of Amici Curiae Professors of History et al., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter History Professor's Brief].

<sup>62</sup> See Knauer, *supra* note 9, at 56 (discussing "presumptive sodomite" reasoning).

<sup>63</sup> *Lawrence*, 123 S. Ct. at 2497. Justice Scalia states "[l]et me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means." *Id.*

<sup>64</sup> *Id.* at 2498.

legislature.<sup>65</sup> By taking sides in the “Culture War,” Justice Scalia argues, the majority in *Lawrence* is giving an unfair advantage to politicized homosexuals who seek to circumvent majoritarian morality.<sup>66</sup> In his dissent in *Romer*, Justice Scalia also suggested that homosexuals refused to play by the rules of democratic engagement when he asserted that Amendment 2 was nothing more than a “lawful democratic counter-measure[.]”<sup>67</sup> According to Justice Scalia, the unelected federal judiciary is expressing its “anti-anti-homosexual” bias and imposing the views of an elite caste on mainstream Americans who value traditional morality and would object to homosexuals teaching their children or being boarders in their homes.<sup>68</sup>

Having lost the battle over criminal sodomy laws, Justice Scalia’s dissent is forward looking. As I noted earlier, Justice Scalia envisions a slippery post-*Lawrence* slope where Alabama will no longer be able to ban sex toys<sup>69</sup> and judicially mandated same-sex marriage is all but an “inexorable command.”<sup>70</sup> In the days and weeks that followed the decision, academics and pro-gay advocates were not quite as optimistic and instead worried out loud about the significance of Justice Kennedy’s failure to preface our newly recognized, but longstanding, liberty interest to sexual autonomy with the talismanic designation of “fundamental.”<sup>71</sup> Anti-gay, pro-family advocates heard Justice Scalia’s clarion call and took to the airwaves to rail about the coming assault on traditional marriage,<sup>72</sup> while at the same time trying to console themselves that the majority’s latest iteration of *stare decisis* now made it easier to overturn *Roe v. Wade*<sup>73</sup> or, at a bare minimum, revealed the plurality in *Planned Parenthood v. Casey*<sup>74</sup> to be the politically motivated result-orientated jurisprudence that they had always known it to be.

Somewhat more ominous than the rantings of pro-family advocates is the fact that the proposed amendment to the U.S. Constitution banning

<sup>65</sup> *Id.* at 2497.

<sup>66</sup> *See id.*

<sup>67</sup> *Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

<sup>68</sup> *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

<sup>69</sup> *See Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001).

<sup>70</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*stare decisis* is not an inexorable command”).

<sup>71</sup> On this point, Justice Scalia states that, “the Court simply describes petitioners’ conduct as ‘an exercise of liberty’ – which it undoubtedly is – [and] proceeds to apply an unheard-of form of rational basis review[.]” *Lawrence*, 123 S. Ct. at 2488.

<sup>72</sup> *See Sarah Kershaw, Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 5, 2003, at 8 (noting that both sides “agree[] that the question of whether the United States will allow gays to marry would become the next major focus of both the gay rights movement and of social conservatives”).

<sup>73</sup> 410 U.S. 113 (1973); *see also* Neil A. Lewis, *Conservatives Furious Over Court’s Decision*, N.Y. TIMES, June 27, 2003, at A19 (remarking that Phyllis Schlafly focused on an “unlikely silver lining” that *Roe* was now vulnerable to overruling).

<sup>74</sup> 505 U.S. 833 (1992).

same-sex marriage has been referred to the Senate Judiciary Committee and subcommittee hearings were held on September 4, 2003.<sup>75</sup> Senate majority leader, Bill Frist, expressed his unqualified support for the Federal Marriage Amendment (FMA) three days after the Court decided *Lawrence*.<sup>76</sup> The next day, President Bush addressed the issue of same-sex marriage during a Rose Garden news conference.<sup>77</sup> President Bush stated that "we ought to codify" that "marriage is between a man and a woman," but stopped short of supporting the FMA.<sup>78</sup> His preference for codification confused commentators, given the existence of the Defense of Marriage Act (DOMA).<sup>79</sup> Although I do not mean to be an alarmist, it should escape no one's attention that DOMA was enacted in the months following *Romer*, which, at the time, was a gay rights victory of unprecedented magnitude.<sup>80</sup> Nor should anyone forget the state Constitutional wrangling that took place in Hawaii after *Baehr v. Lewin*<sup>81</sup> and in Alaska after *Brause v. Alaska*.<sup>82</sup>

Justice Scalia would consign an unpopular and historically despised minority to the vagaries of majoritarian politics and leave to the people, rather than the courts, the question of "whether the majority may use the power of the state to enforce [its moral condemnation of homosexuality] on the whole of society[.]"<sup>83</sup> In the case of private consensual sexual conduct, the Court has answered this question in the negative, but it remains to be seen how the balance will be struck when the liberty interests recognized in *Lawrence* are balanced against state interests such as "preserving the

<sup>75</sup> The Federal Marriage Amendment (FMA) provides:

Marriage in the United States shall consist only of a union of a man and a woman. Neither this constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003); see also Senator John Cornyn, *Opening Statement*, Hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights, Sept. 4, 2003, at <http://www.judiciary.senate.gov> (stating that, "[r]ecent . . . cases . . . have raised serious questions regarding the future of the traditional definition of marriage, as embodied in DOMA").

<sup>76</sup> See *Frist Opposes Gay Marriage*, N.Y. TIMES, June 30, 2003, at B8.

<sup>77</sup> Neil A. Lewis, *Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, at A1.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*; see also Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at 48 (noting that the marriage amendment has potential to "provoke a mini-culture war in each of the 50 state legislatures").

<sup>80</sup> *Romer v. Evans* was decided on May 20, 1996. In July of that year, the House overwhelmingly approved the Defense of Marriage Act (DOMA), as did the Senate on September 10, 1996. See Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, n.298. President Clinton signed the bill into law several days later. See *id.*

<sup>81</sup> 852 P.2d 44 (Haw. 1993); see also Rosen, *supra* note 79 (describing citizen's initiative to amend Hawaii's constitution).

<sup>82</sup> No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Ala. Feb. 27, 1998).

<sup>83</sup> *Lawrence*, 123 S. Ct. at 2480.

traditional institution of marriage”<sup>84</sup> or protecting “national security.”<sup>85</sup> Justice Scalia foretells of a “massive disruption of the current social order,”<sup>86</sup> and, in this regard, I certainly hope Justice Scalia is right.

Despite my conviction to hope for the best, I do not for a moment believe that *Lawrence* will spell the end to the legal and social disabilities imposed on those who experience and/or act upon same-sex desire, just as the 1973 decision of the American Psychiatric Association to declassify homosexuality as a mental illness did not lead to the wholesale dismantling of sodomy laws and the broad enactment of anti-discrimination measures.<sup>87</sup> The declassification of homosexuality was a necessary step to secure equal rights for gay men and lesbians,<sup>88</sup> but it alone was not sufficient because the *DSM* categorization of homosexuality was never the only justification for the disparate treatment of homosexuals.

The history of the regulation of same-sex desire in the United States is one of overlapping and mutually reinforcing prohibitions.<sup>89</sup> As the majority in *Lawrence* explained, the original criminal sanctions for sodomy applied equally to other forms of non-procreative sexual activity and had shared origins in religious and moral teachings.<sup>90</sup> The advent of the homosexual or invert as “a species”<sup>91</sup> in the late nineteenth century justified new legal disabilities while never fully displacing the discourse of sin and criminal transgression.<sup>92</sup> The degenerate, but naturally appearing, invert soon gave way to the psychoanalytic model popularized by the American Freudians.<sup>93</sup> Their diagnosis of homosexuality as a mental disorder created yet another series of reasons to disfavor homosexuals and gave rise to an innovative set of new laws designed to deal with the sexual psychopath.<sup>94</sup> The end of diagnosis removed an important argument from anti-gay discourse, but it did not remove the image of the (male) homosexual as a sexual predator from

<sup>84</sup> *Id.* at 2488 (Scalia, J., dissenting).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2491.

<sup>87</sup> Knauer, *supra* note 9, at 26-27.

<sup>88</sup> First published in 1952, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I) included homosexuality as one of the most severe sociopathic personality disorders. *Id.* at 20.

<sup>89</sup> *See id.* at 11-12.

<sup>90</sup> *Lawrence*, 123 S. Ct. at 2479 (stating that, “prohibition of homosexual sodomy . . . is as consistent with a general condemnation of non-procreative sex as it is with an established tradition of prosecuting acts because of their homosexual character”).

<sup>91</sup> Discussing the emergence of the homosexual as a distinct type of person, Michel Foucault remarked that, “[t]he sodomite had been a temporary aberration; the homosexual was now a species.” MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Pantheon Books 1978). The amicus brief of the history professors filed in *Lawrence* repeated Foucault’s famous declaration. *See* History Professor’s Brief, *supra* note 61, at 11.

<sup>92</sup> *See* Knauer, *supra* note 9, at 11.

<sup>93</sup> *See id.* at 18-22.

<sup>94</sup> *See id.* at 20.

our popular imagination.<sup>95</sup>

The removal of the Constitutionally permissible stigma of criminality is a necessary step, but, as with the classification of homosexuality as a mental disorder, the criminal status of homosexual conduct was never the only justification for the social and legal disabilities imposed of gay men and lesbians. As the state of Texas argued, criminalization reflected the strong moral and religious disapproval of same-sex sexuality.<sup>96</sup> Such disapproval will continue long after the Texas Homosexual Conduct Law has retreated into memory because, as the majority in *Lawrence* explained, “[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”<sup>97</sup> According to *Lawrence*, however, these “profound and deep convictions” no longer trump my individual liberty interest and, therefore, no longer determine the course of *my* life.

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<sup>95</sup> See *id.* at 12. In Justice Scalia’s otherwise lukewarm dissent there was the discernible whiff of the pedophile when he invoked the image of the Scoutmaster and the teacher. See *Lawrence*, 123 S. Ct. at 2497. Justice Scalia wrote that, “[m]any 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.” *Id.* Justice Scalia’s curious use of the adverb “openly” raises the question of whether a shameful, closeted homosexual would be acceptable to “[m]any Americans.” See Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1034-38 (discussing Dale’s openness versus the closet).

<sup>96</sup> The state of Texas argued that the rational basis for the Texas Homosexual Conduct Law was that the legislature had determined “that homosexual sodomy is immoral.” Respondent’s Brief, *supra* note 13, at 3.

<sup>97</sup> *Lawrence*, 123 S. Ct. at 2480 (stating that “for centuries there have been powerful voices to condemn homosexual conduct as immoral”).