Lawrence v. Texas as the Perfect Storm

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INTRODUCTION

A perfect storm arises when a number of necessary events occur simultaneously and the confluence causes a disaster, marvel, or simply a natural phenomenon that is both statistically improbable and often historical. The American civil rights movement can be likened to a series of perfect storms, each episode of major progress resulting from a set of peculiar events. Perfection is rare, and perfect storms of the variety that advance civil rights may come about only once a generation. But, when they do occur, their results are awe-inspiring and long-lasting. Rosa Parks did not intend to start a civil rights crusade in Montgomery, Alabama. She was in the right seat at the right time, and she refused to give it up. This refusal precipitated the boycott of Montgomery buses and served as a rallying point for the American civil rights movement. John Lawrence and Tyron Garner were not looking to lead the first significant civil rights charge of the twenty-first century when they went back to John's bedroom to engage in some private, consensual adult activity. But, their encounter started a chain of events that had never before happened in the State of Texas, or in any other state for that matter. They became the first same-sex adult couple to be prosecuted and convicted for consensual sodomy performed in a private bedroom. And, like other accidental activists before them, they stood up for themselves and fought for their civil rights.

In *Lawrence v. Texas*,[1] Justice Kennedy authored a majority opinion that reversed *Bowers v. Hardwick*[2] and held that state criminal prohibitions on private, noncommercial sodomy between consenting adults violated privacy rights under the United States Constitution. Following the announcement of the *Lawrence* opinion, commentators have taken issue with the sweep of the Supreme Court's language and privacy rationale. Several have asserted that an equal protection approach, espoused by Justice O'Connor in her concurrence, represented a more legitimate basis for invalidating the Texas sodomy law.

This Essay has three goals. First, it explains what was at stake in the litigation. *Lawrence* was not merely symbolic litigation; sodomy laws inflicted real harm on real people. Second, the Essay examines the allure of Justice O'Connor's equal protection approach to invalidating sodomy

[1] Lawrence v. Texas, 539 U.S. 558 (2003).

[2] Bowers v. Hardwick, 478 U.S. 186 (1986).

laws and shows how a ruling based on equal protection would not have solved any of the underlying harms caused by sodomy laws. Third, the Essay explains why it is so important that the Court took the privacy path enshrined in Justice Kennedy's majority opinion instead of the equal protection course advocated by Justice O'Connor's concurrence. In so arguing, the Essay seeks to instill appreciation for just how fortunate the civil rights community is that the facts of *Lawrence* unfolded as they did. But for a series of unlikely events and mistakes by Texas officials, the case would never have reached the Supreme Court and *Bowers* would have remained citable law.

I. *LAWRENCE*: BEFORE AND AFTER

While the *Lawrence* opinion had much symbolic significance, the decision fundamentally changed the relationship between gay Americans and their state governments. This part highlights some of the serious harms inflicted upon gay men and lesbians through state sodomy laws. After briefly reviewing the facts of *Lawrence*, it discusses the analysis employed by the *Lawrence* majority.

A. The Stakes: The Harms Inflicted by Sodomy Laws

Until the summer of 2003, when the Supreme Court announced its decision in *Lawrence* which struck down all sodomy laws as unconstitutional, state sodomy laws served malevolent purposes and resulted in great harm to gay men and lesbians. States used sodomy laws to construct a criminal class comprised of gay men and lesbians.[3] These laws were traditionally seen as anti-homosexual laws. Even those sodomy laws, such as the Georgia sodomy law at issue in *Bowers*, that proscribed all oral and anal sex — regardless of the genders of the participants — were often described as "homosexual sodomy" laws.[4] The primary effect of criminalizing sodomy was not to deter sodomy or to imprison those who committed sodomy, but to inflict "the stigma of criminality upon same-sex eroticism."[5] Therefore, sodomy laws served to equate homosexuality with criminality.

Categorizing gay men and lesbians as criminals provided a plausible excuse for those who wanted to discriminate and punish homosexuals

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[3] Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110-12 (2000) [hereinafter *Creating Criminals*].

[4] *See infra* notes 58-59 and accompanying text.

[5] JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, at 14 (1983).

regardless of any criminal laws. Once society determines that a person is a criminal, so the argument went, it is perfectly permissible to deny that person the rights and privileges that other law-abiding Americans take for granted. Labeled as criminals, gay and lesbian Americans were subjected to discrimination from government officials at local, state, and federal levels, from private organizations and businesses, and from their fellow citizens. Sodomy laws provided a basis for Americans to discriminate against gay and lesbian citizens, most visibly in the context of employment discrimination, custody battles, and immigration. Discrimination was probably more rampant, though less documented, on an individual level, such as landlords refusing to rent properties to people perceived to be gay.

During the McCarthy era, sodomy laws helped fuel a national witch hunt against gay workers within the federal government. At the time, the United States government adopted an official policy of discrimination against gay men and lesbians.[6] Anti-gay officials argued that gay employees were susceptible to blackmail because homosexuals were criminals.[7] Of course, gay employees were criminals only because the states had decided to criminalize private sexual conduct between consenting adults. In a tautological seizure of basic rights, the federal government justified its discrimination against gay Americans in the employment field by pointing to governmental discrimination against gay Americans in state criminal codes.

Following the lead of the federal government's anti-gay policies, state boards relied on sodomy laws to deny licenses to gay men and lesbians pursuing careers that required certification,[8] including doctors,[9] attorneys,[10] and teachers.[11] Teaching, in particular, represented a sensitive area because school officials were "reluctant to hire 'criminals.'"[12] Mere suspicion of homosexuality was enough to fire a

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[6] Leslie, *Creating Criminals*, *supra* note 3, at 137.

[7] Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1566 (1993).

[8] Terry Calvani, *Homosexuality and the Law — An Overview*, 17 N.Y. L.F. 273, 279 (1971).

[9] *See, e.g.*, CAL. BUS. & PROF. CODE § 2383 (West 1954).

[10] *See, e.g.*, Florida Bar v. Kay, 232 So. 2d 378, 379 (Fla. 1970); State *ex rel.* Florida Bar v. Kimball, 96 So. 2d 825, 825 (Fla. 1957) (disbarring attorney based, in part, on existence of state sodomy law).

[11] *See, e.g.*, CAL. EDUC. CODE §§ 13202, 13207, 13209 (Deering 1960); FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA 11 (1963); *see also* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

[12] Baker v. Wade, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982), *rev'd*, Baker v. Wade, 769 F.2d 289 (5th Cir. 1985).

teacher for violating the state's sodomy law.[13] Police departments[14] and prosecutors' offices[15] refused to hire gay men and lesbians, reasoning that sodomy laws rendered them criminals, and criminals could not be hired in any field related to law enforcement. In short, state sodomy laws provided the linchpin in the systematic discrimination against gay men and lesbians in a wide range of government employment opportunities.[16]

Many private employers followed the federal and state governments' lead and affirmatively refused to hire gay men and lesbians, who were automatically presumed to engage in criminal conduct.[17] Moreover, courts used sodomy laws to deny redress to any gay man or lesbian discharged on account of sexual orientation. The courts reasoned that if gay men and lesbians were criminals because of their sexual orientation, surely the very basis of their criminality could not be the basis for an employment discrimination cause of action.[18]

In custody battles between divorced couples — with one gay parent and the other straight — courts often treated gay parents as criminals who were, automatically, not entitled to custody of their own children.[19] In one case, the Alabama Supreme Court ruled that a lesbian mother could not raise her children because "the conduct inherent in lesbianism

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[13] *See, e.g., Baker*, 553. F. Supp. at 1128.

[14] *See, e.g.*, Childers v. Dallas Police Dept., 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982); Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB L.J. 997, 1035 (1994) (discussing Woodward v. Gallagher, No. S9-5776 (Orange Co., Fla. Cir. Ct. filed June 9, 1992), in which sheriff of Orange County, Florida, relied on state's sodomy law to fire deputy when his sexual orientation was discovered); *see also* City of Dallas v. England, 846 S.W.2d 957 (Tex. Ct. App. 1993) (holding that Dallas Police Department's policy making gay men and lesbians ineligible for employment was unconstitutional).

[15] *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc).

[16] Leslie, *Creating Criminals*, *supra* note 3, at 137-47.

[17] *See* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 911 (1997) ("In 1961, virtually all state and federal government agencies discriminated against employees thought to be gay or lesbian, a discrimination aped by the private sector.").

[18] Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[19] Sodomy laws provide a legal rationale for taking children away from fit parents. Many judges, like many ordinary citizens, fear and hate their fellow Americans who happen to be gay or lesbian. Some judges make little effort to hide their hatred and proclaim their prejudice from on high. However, some judges mask bench bigotry by relying on the existence of sodomy laws to legitimate decisions that would otherwise have no rationale beyond naked hatred. Finally, there may be a category of judges who bear no animus towards gay men and lesbians, but sincerely believe that the existence of sodomy laws necessitates legal rulings against gay and lesbian litigants.

is illegal in Alabama. [The mother] is continually engaging in conduct that violates the criminal law of this state."[20] Instead, the court awarded custody of the children to their father, a heterosexual with "a history of serious alcohol abuse and violence," who had previously threatened to kill the very children that the Alabama courts awarded him, because at least he was not gay.[21] Even when judges did not explicitly call the gay parent a felon, they used state sodomy laws to liken gay and lesbian parents to criminals.[22] Alternatively, courts took children away from gay parents by reasoning that the state sodomy statutes "embody a state interest against homosexuality."[23] Finally, some courts even relied on state sodomy laws to take children away from gay parents who resided in states without sodomy laws.[24] In sum, states used sodomy laws to tear children away from gay parents and to punish those parents for their sexual orientation.[25]

Historically, state law enforcement agencies brandished sodomy laws to blunt the development of a gay rights movement. Early efforts to form gay rights organizations failed, as homosexuals feared that merely attending meetings would forever mark them as criminals.[26] Law enforcement agencies treated organizational meetings to discuss the rights of gay men and lesbians as criminal enterprises. They based this decision on the assumption that whenever gay men or lesbians congregate, criminal sodomy is inevitable.[27] States used their sodomy

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[20] R.W. v. D.W.W., 717 So. 2d 793, 796 (Ala. 1998).

[21] *Id.* at 797 (Kennedy, J., dissenting); *see* J.B.F. v. J.M.F., 1998 WL 321964 (Ala. June 19, 1998).

[22] *See* Steve Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 887 (1985).

[23] Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 620-21 (1989) (citing Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Cracraft, J., concurring); Chaffin v. Frye, 45 Cal. App. 3d 39 (Ct. App. 1975); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982); Roe v. Roe, 324 S.W.2d 691 (Mo. Ct. App. 1985)). *Custody Denials to Parents in Same-Sex Relationships* cites *Chaffin v. Frye* in relevant part, "The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases. . . ."

[24] *See, e.g.*, Constant A. v. Paul C.A., 496 A.2d 1 (Pa. Ct. App. 1985); Leslie, *Creating Criminals*, *supra* note 3, at 152.

[25] *See* Leslie, *Creating Criminals*, *supra* note 3, at 147-52.

[26] Cain, *supra* note 7, at 1556. In the case of the first attempt at a gay rights group, the Society for Human Rights, founded in Chicago in 1924, the police hastened the group's demise through raids and arrests. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1082 (1997).

[27] *See* Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1977) (Rehnquist, J., dissenting), *cert. denied*, 558 F.2d 848 (C.A. Mo. 1977).

laws to target for extinction any venue in which gays might gather, including civil rights groups, gay bars, and gay student organizations at public universities.[28]

The full scope of the discrimination justified in the name of sodomy laws is impossible to document. Most gay men and lesbians suffered in silence; to report discrimination served only to invite more discrimination.[29] Beyond those areas already discussed, government officials invoked sodomy laws to justify extensive discrimination against gay men and lesbians in immigration,[30] housing,[31] and enforcement of solicitation statutes.[32] The Texas sodomy law alone had been used to justify cutting AIDS-related funding to gay organizations, to deny gay Texans protection under that state's hate crimes legislation, to exclude gays from state political conventions, to thwart gay couples from becoming foster parents, to deport gay immigrants, and to force Texas school teachers to instruct youth that homosexual conduct was criminal.[33]

In addition to discrimination, sodomy laws also encouraged anti-gay violence.[34] By labeling gay men and lesbians as criminals, sodomy laws taught heterosexual society that sexual minorities were not part of civilized society and should be treated as deviants.[35] Individuals who taunted, tortured, and even killed gay men and lesbians cast themselves as heroes — the "normal citizens" who were enforcing criminal sodomy laws against perverted outlaws who would otherwise go unpunished.[36] At the same time, sodomy laws deterred the gay victims of crimes, whether economic or physical in nature, from reporting burglaries and assaults committed against them. Police were generally unreceptive to reports made by gay men and lesbians, who officers regarded as criminals. In extreme cases, after taking the facts of the case, the police would arrest the gay victims for admitting a violation of the state

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[28] Leslie, *Creating Criminals*, *supra* note 3, at 153-60.

[29] *See* Eskridge, *supra* note 26, at 1027.

[30] Leslie, *Creating Criminals*, *supra* note 3, at 164-68.

[31] State v. Morales, 26 S.W.2d 201, 203 (Tex. App. 1992).

[32] Leslie, *Creating Criminals*, *supra* note 3, at 162-63.

[33] Christopher R. Leslie, *Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law*, 89 KY. L.J. 1109, 1131-32 (2000-2001) [hereinafter *Procedural Pretexts*].

[34] Leslie, *Creating Criminals*, *supra* note 3, at 122-27.

[35] *See* Brief of Amici Curiae American Psychological Association and the American Public Health Association, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 136 (1991).

[36] Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 233 (1994); Leslie, *Creating Criminals*, *supra* note 3, at 124.

sodomy law.[37] For the better part of the twentieth century, many police departments across the country used sodomy laws to harass and blackmail gay citizens.[38] Sodomy laws vested local police departments with the discretion to treat all gay men and lesbians as criminals who could be arrested, physically and verbally assaulted, threatened with exposure, or simply run out of town. Police departments abused that discretion.[39] The fear of police harassment made many gay men and lesbians rationally reticent to approach the police for assistance. This reluctance to report crime, in turn, made gay men and lesbians even more attractive targets for criminal activity.[40]

Sodomy laws not only encouraged heterosexuals to condemn and discriminate against gays, they also instructed generations of gay Americans in dangerous lessons of self-hatred. Sodomy statutes inflicted emotional trauma on those gay men and lesbians whose government informed them that they should loathe themselves as criminals.[41] Even those adolescent gays and lesbians who had never had sex, but were realizing that they were gay, were taught that they should hate themselves for having "criminal" thoughts.[42] The psychological toll exacted by sodomy laws was both insidious and overwhelming.

In sum, the stakes in *Lawrence* were high for gay Americans. The Supreme Court had the power to invalidate or endorse laws that had been used to oppress millions of Americans for the better part of a century. As Part III explains, *Lawrence* represented a once-in-a-generation opportunity. For many, the issue was simply whether they would ever live in a country that did not criminalize their very identity.

B. The Lawrence *Landscape*

In response to a report of a weapons disturbance, Houston police rushed to the home of John Lawrence.[43] Actually, no disturbance had occurred; a neighbor had filed a false report in order to harass Lawrence. When the police burst into Lawrence's residence, they found him engaged in consensual, sexual intercourse with Tyron Garner, another

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[37] *See, e.g.*, Associated Press, *R.I. Dropping Sodomy Case Against 2 Men*, TELEGRAM & GAZETTE (Worcester, Mass.), Sept. 9, 1997, at A2; Marion Davis, *Sex Charges Dropped Against 2*, THE PROVIDENCE J.-BULL., Sept. 9, 1997, at 1B.

[38] Leslie, *Creating Criminals*, *supra* note 3, at 127-35.

[39] *Id.* at 129-30.

[40] *Id.* at 125.

[41] *Id.* at 116-21.

[42] *Id.* at 117.

[43] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

man. The police arrested Lawrence and Garner, held them in custody overnight, and charged them with violating Texas' Homosexual Conduct statute, which criminalized so-called "deviate sexual intercourse" between individuals of the same sex.[44] A Justice of the Peace convicted the pair. Exercising their right to a de novo trial before the Harris County Criminal Court, Lawrence and Garner pled nolo contendere but argued that the Texas sodomy law violated both state and federal rights to privacy as well as equal protection guarantees. The judge rejected their claims, fined each man $200, and assessed them court costs totaling $141.25.

The men then appealed their convictions to the Court of Appeals for the Texas Fourteenth District, which held that the Texas sodomy law violated the state constitution. However, an en banc appeals court reversed the panel, rejected the defendants' state and federal constitutional arguments, and affirmed their convictions.[45] Regarding the privacy arguments, the en banc court treated *Bowers* as controlling.[46] The defendants then appealed to the Texas Court of Criminal Appeals, the court of last resort for criminal defendants in the State of Texas. That court declined to hear their case.[47] Their appeals within the Texas state courts exhausted, the men successfully petitioned the United States Supreme Court for certiorari.

C. Lawrence, *Liberty, and Privacy*

While the petitioners raised arguments founded in privacy and equal protection, the *Lawrence* majority declined to reach the latter claim. Instead, Justice Kennedy's majority opinion focused on whether the criminalization of private, adult acts of consensual, sexual intimacy violates the individual's "vital interests in liberty and privacy protected

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[44] Section 21.06, entitled "Homosexual Conduct," provided: "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 (2003). Section 21.01, in turn, defined "[d]eviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person." TEX. PENAL CODE ANN. § 21.01 (2003).

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

[46] *Id.* at 360-61.

[47] This is particularly suspicious, given that the Texas Supreme Court had reversed an earlier Texas appellate court ruling invalidating the Texas sodomy law. The Texas Supreme Court reasoned that the successful plaintiffs did not have standing because they had not been arrested and that the Texas Court of Criminal Appeals would resolve the matter should any Texans actually be arrested for engaging in private, consensual sodomy. *See* State v. Morales, 869 S.W.2d 941 (Tex. 1994). *See generally* Leslie, *Procedural Pretexts*, *supra* note 33 (discussing how Texas courts consistently manipulated procedural rules to prevent Texans from challenging constitutionality of that state's sodomy statute).

by the Due Process Clause of the Fourteenth Amendment."[48] After noting the earlier cases of *Pierce v. Society of Sisters*[49] and *Meyer v. Nebraska*,[50] the Court began its substantive discussion of privacy rights with *Griswold v. Connecticut*,[51] the case in which the Court first recognized a constitutional right to privacy and invoked this right to strike down a state law prohibiting the sale and use of contraceptives. While *Griswold* involved a challenge by a married couple, the Court's decision in *Eisenstadt v. Baird*[52] expanded the federal constitutional right to privacy beyond the marital relationship.[53] *Griswold* and *Eisenstadt* provided the foundation for a series of privacy cases including *Roe v. Wade*,[54] *Carey v. Population Services International*,[55] and *Bowers v. Hardwick*,[56] in which a deeply divided Court upheld the constitutionality of Georgia's sodomy law.[57]

The *Lawrence* Court directly confronted the holding in *Bowers*. The *Lawrence* majority first took issue with how the *Bowers* Court framed the legal issues before it. Although Georgia's sodomy law was, in fact, gender-neutral, the *Bowers* Court treated the criminal statute as gender-specific. The *Bowers* Court styled the question as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[58] The *Lawrence* Court repudiated the *Bowers* Court's false framing of the constitutional question at stake. The *Lawrence* majority properly saw the issue not as the absurdly narrow "right to engage in homosexual sodomy," but as the broader question of whether the state could criminalize noncommercial "personal relationships" between consenting

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[48] *Lawrence*, 539 U.S. at 564 (quoting Pet. for Cert. i).

[49] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[50] Meyer v. Nebraska, 262 U.S. 390 (1923).

[51] Griswold v. Connecticut, 381 U.S. 479 (1965).

[52] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[53] *Id.* at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[54] Roe v. Wade, 410 U.S. 113 (1973).

[55] Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (striking down New York law prohibiting sale or distribution of contraceptives to minors).

[56] Bowers v. Hardwick, 478 U.S. 186 (1986).

[57] *Bowers* represented the first Supreme Court to address whether state sodomy laws violated the constitutional right to privacy. Previously, in *Rose v. Locke*, 423 U.S. 48 (1975), the Court had held that the Tennessee sodomy statute was not unconstitutionally vague. The Court did not consider any privacy arguments.

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

adults in private.[59] The Court then noted the importance of the sexual bond in intimate relationships.[60]

The *Lawrence* Court next attacked the historical underpinnings of the *Bowers* decision.[61] In response to the *Bowers* Court's assertion of a millennia of laws targeted against gay sex, Justice Kennedy countered that "early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally."[62] Only in the last third of the twentieth century did state legislators enact sodomy laws targeted directly at homosexuals.[63] Indeed, the Court noted that the category or concept of the homosexual did not even exist until the late 1800s.[64]

The *Lawrence* majority also questioned the *Bowers* Court's invocation of social norms to uphold the constitutionality of sodomy laws.[65] The *Bowers* majority pointed to the social norms of thousands of years ago to justify imprisonment and mistreatment of gay men and lesbians in the late twentieth century. In his *Bowers* concurrence, Chief Justice Burger asserted that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[66] Refuting *Bowers'* assertions, the *Lawrence* Court reasoned that social norms analysis actually supported the proposition that the constitutional right to privacy protects private sodomy between consenting adults. First, Burger's assertions about

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[59] The Court recognized that sodomy "statutes do seek to control a personal relationship that. . . is within the liberty of persons to choose without being punished as criminals." Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[60] *Id.* ("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.").

[61] *Id.* ("At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.").

[62] *Id.* at 570.

[63] *Id.* ("But far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century." (quoting *Bowers*, 478 U.S. at 192)).

[64] *Id.*

[65] The Court recognized the role of social norms in the criminalization of sodomy: "The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. But the *Lawrence* Court went further in analyzing what these social norms actually meant and how they have evolved both domestically and within the Western world as a whole.

[66] *Bowers*, 478 U.S. at 196.

ancient social norms were simply wrong.[67] Second, the *Lawrence* Court found *Bowers'* reliance on social norms of the past unpersuasive and instead looked to the social norms of modern society to determine the contours of the constitutional right to privacy.[68] Justice Kennedy found evidence of these social norms in two places: the international community and the progression of constitutional privacy law in the American states. The Court noted that international social norms in Western democracies had evolved to include protection of private, sexual conduct between consenting adults.[69] Finally, the *Lawrence* Court analyzed the emergence of a new social norm, as reflected by the response of American states to the *Bowers* opinion. At the time of *Bowers*, half of the states still maintained sodomy laws. After *Bowers*, half of those remaining twenty-five states had invalidated or repealed their sodomy laws. The *Lawrence* Court noted that states with same-sex sodomy laws were "mov[ing] toward abolishing them."[70] Far from accurately reflecting public opinion on sodomy statutes, *Bowers* provoked a contrary judicial and legislative response in many states. After *Bowers* temporarily closed the door on federal privacy arguments, sodomy law opponents turned to state courts to argue that sodomy laws violated state constitutional guarantees of individual privacy rights. Most of the state courts that did reach the merits of these challenges declined to follow *Bowers* and held that their sodomy laws violated the

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[67] Kenji Yoshino rightly takes the *Bowers* Court to task for ignoring John Boswell's widely acclaimed book, *Christianity, Social Tolerance, and Homosexuality*, which established that the "early Christian Church does not appear to have opposed homosexual behavior per se." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1791 (1996) (discussing and quoting JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 333 (1980)). The *Lawrence* Court, too, asserted that the *Bowers* Court should have been aware of the emerging recognition of the protection of decisions to engage in private sexual conduct with another consenting adult. *See Lawrence*, 539 U.S. at 571 ("As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults." (citing William Eskridge, *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 656)).

[68] *Lawrence*, 539 U.S. at 571 ("In all events we think that our laws and traditions in the past half century are of most relevance here.").

[69] *Id.* at 577 ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."). Kennedy noted explicitly that other Western democracies had rejected *Bowers*. *Id.* at 576 ("The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. *See P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, & ¶ 56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.").

[70] *Id.* at 571.

applicable state constitutional right to privacy.[71] In summing up its analysis of *Bowers*, the *Lawrence* majority concluded, "*Bowers* was not correct when it was decided, and it is not correct today."[72]

After disposing of *Bowers*, Justice Kennedy invoked a more sweeping panorama of privacy than had been envisioned by Supreme Court majorities in the past. He noted that Messrs. Lawrence and Garner were "entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[73] In contrast to the clear liberty interest at stake for gay and lesbian Texans, the State of Texas could proffer no rationale for maintaining such an intrusive and demeaning law.[74]

The *Lawrence* majority declared that this expansive view of liberty honored the intent of our dynamic Constitution. Old prejudices must give way to new freedoms as what American society once considered normal — whether it be forbidding women from practicing law,[75] prohibiting inter-racial marriage,[76] or criminalizing same-sex intimacy — is later revealed to be oppressive, mean-spirited, and unconstitutional.[77] In that vein, the Court concluded that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[78]

Commentators will no doubt continue to be critical of the *Lawrence* opinion. It comes as no surprise when the anti-civil rights groups aligned with the religious right criticize any move that recognizes the dignity of gay Americans. With Antonin Scalia as their leader, these groups cast themselves as targets in a culture war, in much the same

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[71] *See* Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996). The Texas courts, too, had earlier rejected *Bowers* and held that the Texas sodomy statute violated the state's constitution, but the Texas Supreme Court reversed the decision for lack of standing. State v. Morales, 826 S.W.2d 201 (Tex. App. 1993), *overruled on jurisdictional grounds by* 869 S.W.2d 941, 943 (Tex. 1994).

[72] *Lawrence*, 539 U.S. at 578 .

[73] *Id.*

[74] *Id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

[75] Bradwell v. Illinois, 83 U.S. (16 Wall.) 442 (1873).

[76] *See, e.g.*, Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 368 (Va. 1939) (holding antimiscegenation statute as constitutional).

[77] *See Lawrence*, 539 U.S. at 578 (stating that framers and ratifiers of Fifth and Fourteenth Amendments to U.S. Constitution "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

[78] *Id.*

manner that segregationists viewed themselves as victims of the twentieth century civil rights movement. But, beyond the usual suspects who reflexively rail against equal rights for gay Americans, some moderate commentators have also viewed the *Lawrence* majority's privacy holding as more broad than necessary and less principled than the equal protection argument advanced by the petitioners and adopted by Justice O'Connor in her concurrence. Part II notes the attractiveness of this position and Part III exposes its serious downside.

II. O'CONNOR'S SIREN SONG: THE ALLURE OF EQUAL PROTECTION

Justice O'Connor declined to sign on to Kennedy's majority opinion in *Lawrence*, and instead forged her own path to invalidate the Texas sodomy statute. In her concurrence, Justice O'Connor argued that the Texas law violated the Equal Protection Clause of the Constitution. After noting the basics of equal protection doctrine, Justice O'Connor recognized a fourth level of scrutiny in equal protection analysis: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[79] This suggests that there are four levels of scrutiny for equal protection analysis: strict scrutiny (race); quasi-strict scrutiny (gender); "a more searching form of rational basis review" (when a law exhibits a desire to harm a politically unpopular group); and rational basis scrutiny (for economic or tax legislation).[80] After providing examples of this "more searching form of rational basis review," Justice O'Connor reasoned that this "more searching" review applied in the case at hand because the Texas sodomy "statute makes homosexuals unequal in the eyes of the law by making particular conduct — and only that conduct — subject to criminal sanction."[81] She then explained how the Texas law inflicted real injury on gay Texans and that the state failed to proffer a legitimate governmental interest in treating its gay and heterosexual citizens so differently. Consequently, she concluded "that the Texas sodomy law

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[79] *Id.* at 580 (O'Connor, J., concurring in the judgment).

[80] Romer v. Evans, 517 U.S. 620, 632-33 (1996) (invalidating state law that precluded localities from protecting gay men and lesbians from discrimination); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (condemning law that required operators of home for mentally disabled people to obtain special use permit); Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (condemning law regarding unrelated individuals in household from receiving food stamps); Eisenstadt v. Baird, 405 U.S. 438, 447-55 (1972) (condemning law that prohibited distribution of contraceptives to unmarried persons).

[81] *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment).

banning 'deviate sexual intercourse' between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional."[82]

A. The Attractiveness of O'Connor's Concurrence

The equal protection concurrence garnered many fans.[83] Justice O'Connor's siren song is tempting for three reasons. First, the equal protection approach appears to address the harms of sodomy laws. Second, the holding would be narrow. The third, and most tempting, feature of the equal protection argument is that it is correct.

First, O'Connor recognized the harms that sodomy laws inflicted against gay Americans. She noted that "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[84] As a result of this criminal stigma, she observed, gay Texans suffered a variety of noncriminal punishments, including employment and housing discrimination, and the loss of custody of one's children.[85] However, as Part III of this Essay explains, the equal protection approach to invalidating sodomy laws would not necessarily have solved any of these harms.

The second tempting feature of the equal protection approach is its narrowness. This is what appealed the most to Justice O'Connor. At oral argument, she specifically asked what would be the most narrow way for the Court to strike down the Texas sodomy laws. The equal protection solution clearly appealed to Justice O'Connor because it did not require the Court to reverse *Bowers*.[86] This allowed her to invalidate the Texas sodomy law — which she understood to be constitutionally

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[82] *Id.* at 587.

[83] *See, e.g.*, James Q. Wilson, *Has the Supreme Court Gone Too Far? A Symposium*, 116 COMMENTARY 25 (Oct. 1, 2003), *available at* 2003 WL 6617819; John Leo, *The Supremes' Sophistry*, U.S. NEWS & WORLD REP., July 14, 2003, at 7; Jeffrey Rosen, *On Sodomy, the Court Overreaches*, THE NEW REPUBLIC, July 21, 2003, at 15.

[84] *Lawrence*, 539 U.S. at 581-82.

[85] *Id.* (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992)). In addition to those explicitly itemized by the *Lawrence* majority and concurrence, the federal and state governments have employed sodomy laws to justify other forms of discrimination against gay men and lesbians, including in immigration, adoption, military policy, police harassment, and the development of gay-identified businesses and organizations. *See supra* notes 3-42 and accompanying text.

[86] *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

infirm — without admitting error in *Bowers*.[87] The equal protection approach provided a face-saving way to "fix *Bowers*" without actually reversing it. In taking this tack, Justice O'Connor noted that "*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished."[88] As a result, the equal protection rationale avoids the stare decisis issue that so riled Justice Scalia in his *Lawrence* dissent.[89]

The final, and perhaps most attractive, feature of O'Connor's equal protection argument is that it is undoubtedly correct. The Texas sodomy statute singled out gay Texans for criminal punishment for engaging in conduct that heterosexuals could engage in legally. Clearly, they were not given equal protection of the laws.

B. *The State's Arguments against Equal Protection*

Defending the Texas sodomy law against the equal protection attack, the State and its amici advanced three arguments, each more frivolous than the one before it. At least in its privacy argument, the State could point to *Bowers* and sing a paean to stare decisis. But the Supreme Court had never considered the equal protection argument against sodomy laws, so the State of Texas had to rely on its wiles, which turned out to be sorely missing.

First, the State argued that it had a good reason for discriminating against gay Texans. Its stated rationale was to uphold public morality by criminalizing so-called "homosexual deviate sexual intercourse."[90]

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[87] In her concurrence, O'Connor explicitly noted her participation in the *Bowers* majority and declined to repudiate her prior vote. *Lawrence*, 539 U.S. at 579. It may have been psychologically easier for the members of the *Lawrence* majority to reverse *Bowers* because none of the five members of the *Lawrence* majority opinion had signed on to Justice White's anti-gay screed in *Bowers*. Of the five, only Justice Stevens had been on the Court at the time of *Bowers*, and he had written an eloquent dissent in the case. So persuasive was Justice Stevens' writing in *Bowers* that Justice Kennedy's majority opinion in *Lawrence* quoted it liberally and opined that it should have been the majority opinion in *Bowers* all along.

[88] *Id.* at 581-82 (O'Connor, J., concurring in the judgment).

[89] *Id.* at 586-92 (Scalia, J., dissenting).

[90] Respondent's Brief in Opposition at 14, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102). Justice O'Connor acknowledged that the manner in which Texas enforced its sodomy law illustrated that the state was interested primarily in expressing disapproval of homosexuality. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment) ("And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.").

Justice O'Connor exposed the tautological nature of this supposed justification by explaining that "Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.'"[91] She opined that the Supreme Court "ha[s] never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."[92] In short, the mere decision to discriminate is not a legitimate reason to discriminate.

Second, the State argued that it was not discriminating against homosexuals as a class. The State of Texas argued that its sodomy law targeted homosexual conduct, not homosexual persons. The State had succeeded in convincing a Texas en banc appellate court that the law raised no equal protection problems because it applied equally to homosexuals and heterosexuals who engage in homosexual conduct.[93] There is a phrase that describes these heterosexuals who engage in homosexual conduct: closeted homosexuals.[94] Thus, the law targets all homosexuals, both open and closeted. Justice O'Connor was not fooled. After explaining the link between status and conduct,[95] she noted that "[t]hose harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by

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[91] *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment) (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)).

[92] *Id.*; *see also id.* at 584 ("[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law").

[93] Lawrence v. Texas, 41 S.W.3d 349, 353 (Tex. App. 2001) (en banc). Before the U.S. Supreme Court, one amicus brief asked the Court to look beyond how Texas entitled its sodomy law to make only "Homosexual Conduct" a crime and asserted, against all reason, that "[a]lthough 'homosexual conduct' is the title of Section 21.06, it may be applied to heterosexuals, homosexuals, lesbians or bisexuals." Brief of Amicus Curiae Concerned Women for America, in Support of the State of Texas, Respondent at 5, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[94] Of course, people can be bisexual, physically attracted to individuals of both genders. But, from a legal standpoint, courts treat these people as homosexuals. Courts treat both men and women who are bisexuals as homosexuals who should receive all of the punishment traditionally heaped upon homosexuals, including having their children taken away and being denied employment opportunities. *See, e.g.*, *In re* Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986). Similarly, the military prohibition on gay service members applies equally to bisexuals.

[95] *Lawrence*, 539 U.S. at 581-85 (O'Connor, J., concurring in the judgment) ("While 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. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

[the Texas sodomy law]."[96] In short, the law did, in fact, discriminate against homosexuals.

Third, in an apparent attempt to argue that Lawrence and Garner lacked standing to make the equal protection argument, several conservative organizations had the audacity to argue in their amicus briefs that "there is no evidence that the men are homosexuals."[97] None, except that they were having sex with each other.

In sum, under Justice O'Connor's framework, gender-specific sodomy laws that single out gay individuals for possible criminal prosecution violate the Equal Protection Clause. The rationale is narrow and correct, but what would have been the practical effects of a ruling based on Justice O'Connor's analysis?

III. THE TROUBLE WITH EQUAL PROTECTION

Justice O'Connor's concurring opinion is tempting. It appears to address the injuries inflicted by state sodomy laws. Yet, while acknowledging these injuries, she fails to articulate how the equal protection approach would actually remedy these harms and prevent them from occurring in the future. Her omission is with good reason, for there are three fatal flaws with the equal protection avenue to invalidating state sodomy statutes. First, the equal protection approach would have permitted states to circumvent the brunt of any Supreme Court ruling striking down the Texas sodomy law. Most sodomy laws would have survived a majority opinion written by Justice O'Connor and other sodomy laws, including Texas', could have been reconstituted as gender-neutral sodomy statutes. Second, an equal protection opinion would not have eliminated any of the harms that sodomy laws inflicted on gay Americans. Third, a *Lawrence* majority opinion based on equal protection would have squandered the only meaningful opportunity to reconsider *Bowers* in the foreseeable future. *Bowers* was a bad case with bad effects that gays needed to have stricken. Yet the O'Connor approach would have made it nearly impossible to challenge *Bowers* directly and have the case overruled in the future.

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[96] *Id.* at 580.

[97] Brief of Liberty Counsel as Amicus Curiae in Support of Respondent at 3, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 11, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) ("There is no record that these two men were homosexuals.").

A. Circumvention

Sodomy laws can be either gender-neutral or gender-specific. Gender-specific sodomy statutes make the criminality of sexual conduct dependent on the gender of the participants. Under these statutes, it is illegal for a man to perform fellatio, but not a woman, and it is criminal for a woman to perform cunnilingus, but not a man. In short, gender-specific sodomy laws criminalize same-sex sodomy while allowing heterosexual sodomy. Gender-neutral sodomy laws proscribe all oral and anal sex regardless of the participants' genders. Before *Lawrence*, most sodomy laws were gender-neutral. Of the thirteen states with sodomy statutes, nine maintained gender-neutral laws. The remaining four states — Texas, Oklahoma, Kansas, and Alabama — had converted their originally gender-neutral statutes to gender-specific ones, thus protecting heterosexuals while discriminating against homosexuals.

Justice O'Connor focused her equal protection analysis on the fact that Texas maintained a gender-specific sodomy law. Her opinion would have allowed the nine gender-neutral sodomy laws to survive because gender-neutral laws do not facially discriminate against gay individuals. The equal protection argument would have eliminated, at most, four sodomy laws. Furthermore, three out of the four states with gender-specific sodomy laws could have enacted new gender-neutral sodomy laws.[98]

Even though the gender-neutral sodomy laws would have survived a majority opinion authored by Justice O'Connor, she believed that an equal protection holding would have had the effect of eliminating all sodomy laws. She argued that states would repeal their sodomy laws rather than make them gender-neutral. She wrote that she was "confident. . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."[99] In addition, Justice O'Connor implied in

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[98] The one exception is Oklahoma. Oklahoma had maintained a gender-neutral sodomy law, which was challenged as unconstitutional by a heterosexual couple. The Oklahoma Supreme Court held that the Oklahoma sodomy law violated the state constitutional right to privacy. Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986), *reh'g denied*, 717 P.2d 1151 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986). But, in a gratuitous blow to gay citizens, the Court held that its decision did not reach the constitutionality of the sodomy law as applied to same-sex sodomy. As a result, Oklahoma cannot maintain a gender-neutral sodomy law. By state constitutional law, it can only have a gender-specific sodomy statute, which would violate the federal Constitution under Justice O'Connor's approach.

[99] *Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring in the judgment). In contrast, the

her concurrence that gays discriminated against under a gender-neutral sodomy law could still challenge that law as unconstitutional as applied.

Justice O'Connor's assumption, that states would rather have no sodomy law than a gender-neutral sodomy law, while well-intentioned, is demonstrably false. O'Connor seems confident that so long as states with sodomy laws had to proscribe both heterosexual and homosexual sodomy, then the democratic process within each state would lead to their repeal. Nowhere does Justice O'Connor acknowledge the nine gender-neutral sodomy laws in existence at the time that *Lawrence* was decided. These are states with shameful histories of civil rights abuses. Most of these are the same states that maintained antimiscegenation laws until the Supreme Court held them to be unconstitutional.[100] These states have maintained their gender-neutral sodomy laws for over a century.

Justice O'Connor's analysis also fails to consider the extreme, irrational prejudice against gay Americans in many states. No former confederate state has ever repealed its sodomy law as applied to same-sex sodomy. Many southern states would rather criminalize all sodomy than remove the criminal label from homosexual activity. In reforming its penal code, the Texas Committee charged with restructuring that part of the Texas Penal Code dealing with sexual offenses was told in no uncertain terms that, while the Committee could repeal that part of the sodomy law that criminalized heterosexual sex, if the Committee sought to decriminalize any homosexual conduct, the entire penal reform would suffer defeat.[101] The legislature had invested years of work and effort into overhauling its penal code, but its hatred of homosexuals outweighed its investment in penal reform. In sum, if Justice O'Connor seriously believed that her opinion would have eliminated all sodomy laws, she was dangerously naive.

Lawrence majority noted that a holding on equal protection grounds could invite states to rewrite their gender-specific sodomy statutes as gender-neutral laws. *Id.* at 575 ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

[100] *Compare* Loving v. Virginia, 388 U.S. 1 (1967) (invalidating antimiscegenation statutes as unconstitutional), *with* Green v. State, 58 Ala. 190 (1877) (holding antimiscegenation statute as constitutional), *and* Dodson v. State, 31 S.W. 977 (Ark. 1895) (same), *and* State v. Jackson, 80 Mo. 175 (1883) (same), *and* State v. Kennedy, 76 N.C. 251 (1877) (same), *and* Frasher v. State, 3 Tex. App. 263 (1877) (same), *and* Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 368 (Va. 1939) (same).

[101] Randy Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Code Revision Committee*, 6 HUM. RTS. 29, 33-34 (1977).

Under O'Connor's scheme, gay Americans could still challenge gender-neutral sodomy laws, as applied, for violating the Equal Protection Clause.[102] Justice O'Connor saved for another day the question of whether a gender-neutral sodomy law might violate the Equal Protection Clause in an as-applied challenge.[103] But this overlooks *how* sodomy laws were enforced (e.g., through discrimination against gays) and the difficulty of challenging sodomy laws in court. Equal protection challenges to criminal laws based on disparate impact generally compare prosecution and conviction rates across groups. This approach is not suitable for an as-applied challenge to gender-neutral sodomy laws because sodomy laws are not enforced through traditional criminal enforcement; they are enforced through government-sanctioned discrimination. Courts are unlikely to grant standing to litigants seeking to argue that this method of enforcement violates the Equal Protection Clause because judges routinely require that a person be arrested in order to have standing to challenge a sodomy law. Discrimination alone may not be sufficient. Further, even when sodomy laws are enforced criminally, police departments and courts have historically denied access to the underlying data necessary to establish an as-applied equal protection claim against gender-neutral sodomy laws. Finally, the as-applied route might require that each state's sodomy law be attacked individually and struck down one at a time.[104]

B. Harms Remain

The invalidation of gender-specific sodomy laws alone would have done little to alleviate the suffering caused by sodomy statutes discussed in Part I. The nine gender-neutral state sodomy laws would survive Justice O'Connor's analysis and these would have been sufficient to visit a litany of horrors upon gay people. For decades before the Court's

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[102] The equal protection challenge in *Lawrence* was facial. The Texas law singled out gay and lesbian Texans for criminal condemnation. This was most clearly evidenced by the state's decision to title their sodomy statute the "Homosexual Conduct" law. TEX. PENAL CODE ANN. § 21.06 (2003).

[103] *Lawrence*, 539 U.S. at 584 ("Whether a sodomy law that is neutral both in effect and application, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today.").

[104] This magnifies the standing problems significantly. *See infra* notes 111-56 and accompanying text. The harmonic alignment of unlikely events would have to occur nine times, more if any of the states that had gender-specific sodomy laws before *Lawrence* simply amended their sodomy statutes to render them gender-neutral. For all of these reasons, despite the disparate impact, it would be exceedingly difficult for civil rights advocates to prove that gender-neutral sodomy laws violate the Equal Protection Clause.

opinion in *Lawrence*, state judges and officials interpreted their gender-neutral sodomy laws to apply only to gay people. For example, in the employment context, gay employees were assumed to violate gender-neutral sodomy statutes while heterosexuals were not questioned about their sexual activities. Robin Shahar's case is illustrative. Shahar had been hired to work as a staff attorney for the Georgia Attorney General's office in Atlanta. However, when he later discovered that Shahar was a lesbian, Attorney General Michael Bowers rescinded the (already accepted) job offer. He asserted that gay men and lesbians were more likely than heterosexuals to violate Georgia's gender-neutral sodomy law and that hiring a presumed violator of the criminal statute would undermine his office's credibility.[105] Heterosexual employees were subject to no such presumption.

In states with gender-neutral sodomy laws, courts routinely used the statutes to take away children only from gay parents, not heterosexual parents. Gay parents were assumed to engage in sodomy and, thus, be felons. Judges did not inquire into the sexual activities of the heterosexual parent.[106] For example, although Virginia maintained a gender-neutral sodomy statute, it employed its sodomy law to take children away from gay parents, but not straight parents who engaged in sodomy.[107] Courts apparently never invoked these same statutes to deny or affect custody, visitation, or any other rights of a heterosexual parent.[108]

Finally, the stigma against homosexuals would remain even if the petitioners in *Lawrence* had won on equal protection grounds. Gays would still be criminals; all same-sex intercourse would remain illegal. In contrast, some opposite-sex intercourse would be illegal (i.e., oral and

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[105] Arthur S. Leonard, *District Judges Rule on Intimate Associations of Public Employees*, EMPL. TESTING (UNIV. PUB. AM.), Dec. 1993, at 198; *see* Leslie, *Creating Criminals*, *supra* note 3, at 145-47.

[106] Stephen B. Pershing, *"Entreat Me Not to Leave Thee":* Bottoms v. Bottoms *and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 295 (1994); *see* In the Matter of the Appeal in Pima County, 727 P.2d 830, 841-42 (Ariz. App. 1986) (Howard, J., dissenting) (arguing that if bisexuals cannot adopt because they are presumed to have violated state's sodomy law, then juvenile courts should similarly inquire into sex lives "of every applicant, regardless of marital status and sexual preference, to determine whether his or her sexual practices violate" Arizona sodomy statute).

[107] *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1996) (taking children away from lesbian mother and awarding them to their maternal grandmother who cohabited with her boyfriend, in violation of Virginia law); Moore v. Moore, 183 S.E.2d 172 (Va. 1971) (granting custody of children to mother who left husband and cohabitated with cleric).

[108] Pershing, *supra* note 106, at 296.

anal) while some would be legal (i.e., vaginal).[109] This distinction allows judges, government officials, and laypeople alike to assume that sexually active gay adults are violating the law while heterosexual couples are not. The *Lawrence* Court noted: "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[110]

The replacement of gender-specific sodomy laws with gender-neutral statutes, while solving the equal protection problem as described by Justice O'Connor, would do nothing to remedy the harms actually caused by sodomy prohibitions. If a ban on homosexual sodomy is enacted because of hatred of homosexuals, but then the ban is folded into a prohibition on opposite-sex sodomy that everyone knows will be ignored and merely exists to withstand equal protection scrutiny, then we end up in a pre-*Lawrence* world. Even when sodomy laws were gender-neutral, state agencies (including courts) generally interpreted them to apply only to same-sex conduct. Gay citizens are still denied housing, employment, and custody of their children. Heterosexuals are afforded all of the rights of citizenship without any presumptions of criminal conduct, regardless of whether their sexual activity violates the letter of the state's gender-neutral sodomy law. In contrast, gay men and lesbians are presumed to engage in criminal conduct and are condemned accordingly. In sum, gender-neutral sodomy laws, in reality, operated as gender-specific statutes.

C. Lawrence *as the Perfect Storm: The Only Chance to Challenge* Bowers

If Justice O'Connor's concurrence had been the majority opinion, civil rights advocates would not have had another chance to successfully challenge *Bowers* in the foreseeable future, if ever. It would have been somewhere between unlikely and virtually impossible that any future litigant would have had standing and the necessary factual background to convince five Justices to reverse *Bowers*. *Lawrence* represented the one

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[109] O'Connor noted that the sodomy law condemned homosexuals as a class, regardless of actual conduct. For example, calling another Texan a homosexual constituted slander per se since the accusation "impute[s] the commission of a crime." Lawrence v. Texas, 539 U.S. 558, 583-84 (O'Connor, J., concurring in the judgment) (quoting Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (5th Cir. 1997); citing Head v. Newton, 596 S.W.2d 209, 210 (Tex. App. 1980)). Because homosexual sodomy would remain illegal under gender-neutral sodomy statutes, the accusation of homosexuality would still impute criminal conduct.

[110] *Id.* at 574.

and only opportunity to challenge the constitutionality of state sodomy laws.

Federal courts will not entertain a plaintiff's cause of action unless the plaintiff can show that she has standing.[111] In the context of legal challenges to state sodomy laws, federal courts have often invoked standing doctrine in order to deny plaintiffs the opportunity to challenge the constitutionality of sodomy laws.[112] State courts have followed the federal courts' lead in using standing doctrine to protect sodomy laws against constitutional challenge.[113]

Both state and federal courts have imposed a raft of standing requirements on any plaintiff attempting to challenge the constitutionality of state sodomy laws. These include being arrested for sodomy that is private, noncommercial, and between consenting adults. These are just the requirements to get standing. In order to actually prevail in the litigation, the plaintiff also needs to be prosecuted and convicted, and to present his case to a sympathetic Supreme Court. Taken as a whole, these two lists suggest that to overturn the *Bowers* decision, ten separate events needed to occur: (1) the plaintiff needed to be arrested; (2) for an act of noncommercial sodomy; (3) in private; (4) with another adult; (5) who consented; (6) that resulted in a prosecution; (7) followed by a conviction; (8) after which the plaintiff decided to challenge the constitutionality of sodomy laws; (9) and appealed all the way to the Supreme Court, which granted certiorari; and (10) the Supreme Court had at least five Justices able to understand the real injuries inflicted by sodomy laws and were willing to overturn *Bowers v. Hardwick*. For all of these events to occur in one case would constitute a perfect storm. That all of these events did in fact occur in *Lawrence* illustrates the triumph of improbability over adversity.

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[111] Article III, Section 2 of the U.S. Constitution limits the jurisdiction of federal courts to adjudicate actual disputes. The Supreme Court has held that "to satisfy Article III's standing requirements, a plaintiff must show it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . ." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). For a background discussion on the various functions of federal standing law, see Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, WISC. L. REV. 29, 42-44 (2001) [hereinafter *Standing in the Way*].

[112] *See infra* notes 114-22 and accompanying text.

[113] *See* Leslie, *Standing in the Way*, *supra* note 111, at 56-66.

1. Arrest

Absent an arrest, many courts — both federal and state — denied standing to gay men and lesbians attempting to challenge the constitutionality of state sodomy laws. Before *Bowers*, in the federal cases of *Doe v. Commonwealth's Attorney for City of Richmond*[114] and *Buchanan v. Wade*,[115] the courts cited the plaintiffs' lack of arrest and invoked standing doctrine to uphold the sodomy laws of Virginia and Texas, respectively.[116] Even in *Hardwick v. Bowers*,[117] while the district court afforded Michael Hardwick — who had been arrested for having oral sex in his own bedroom with another man — standing to challenge the Georgia sodomy law because he had been arrested, the court simultaneously employed standing doctrine to prevent a married couple (the "Does") from intervening in the case.[118] The Eleventh Circuit affirmed the district court's dismissal of the Does for lack of standing because there was no credible threat of criminal prosecution since they had never been arrested.[119]

State courts followed the lead of the Eleventh Circuit by denying standing to plaintiffs who had not been arrested but wished to challenge the constitutionality of sodomy laws.[120] In Texas itself, a group of gay activists had convinced a state trial court and appellate court that the Texas sodomy law violated the right to privacy found in the Texas State Constitution.[121] However, without reaching the merits of the case, the Texas Supreme Court reversed the lower courts' decisions, reasoning that none of the plaintiffs had been arrested for committing sodomy and, therefore, did not have standing to challenge the statute's constitutionality.[122]

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[114] Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

[115] Buchanan v. Wade, 401 U.S. 989 (1971).

[116] *See* Leslie, *Standing in the Way*, *supra* note 111, at 45-46.

[117] Hardwick v. Bowers, 760 F.2d 1202, 1206 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

[118] *Id.*

[119] *Id.* The participation of the married couple would have necessarily changed the entire tenor of the Supreme Court's opinion in *Bowers*. The Georgia sodomy statute condemned all oral and anal sex, without reference to the gender of the participants, but the Court chose to characterize the law as condemning "homosexual sodomy" and belittle Hardwick's argument as a request that the Court recognize a fundamental right to homosexual sodomy. *Hardwick*, 478 U.S. 186 (1986). The participation of a married couple would have precluded the Court from framing the issue in such a facetiously fanciful manner.

[120] *See, e.g.*, Doe v. Bryan, 728 P.2d 443 (Nev. 1986).

[121] *See, e.g.*, State v. Morales, 869 S.W.2d 941 (Tex. 1994).

[122] *Id.*

John Lawrence and Tyron Garner, of course, easily satisfied the arrest requirement. The police had burst into Lawrence's home and arrested the two men for violating the Texas Homosexual Conduct law.

2. Consensual

Even after arrest for violation of a state sodomy law, an individual must prove that the underlying sodomy was consensual to get standing to challenge the state sodomy law as an unconstitutional infringement on privacy rights. Most sodomy laws simultaneously condemned all oral and anal sex, making no distinction between consensual and forcible sodomy. Courts believing the sodomy at issue to be forcible, however, would generally deny the criminal defendants standing to assert that the sodomy law violated any constitutional rights to privacy.[123]

Lawrence and Garner cleared this hurdle because they mutually consented to engage in sodomy. Even so, opponents of equal rights for gay Americans argued to the Supreme Court in amicus briefs that the Court should not entertain Messrs. Lawrence and Garner's challenge to the Texas sodomy law because the record in the case did not clearly establish that the sodomy was consensual.[124] Despite these desperate attempts to recharacterize the facts of the case, the Supreme Court (including Justice O'Connor in her concurrence) explicitly noted that the State of Texas had convicted both men for their *consensual* conduct.[125]

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[123] *See, e.g.*, People v. Sharp, 514 P.2d 1138 (Colo. 1973); Smashum v. State, 403 S.E.2d 797, 249 (Ga. 1991); State v. Goodrick, 641 P.2d 998 (Idaho 1982); State v. Thompson, 558 P.2d 1079 (Kan. 1976); Hughes v. State, 287 A.2d 299 (Md. App. 1972), *cert. denied*, 409 U.S. 1025 (1972); Dinkens v. State, 546 P.2d 228, 231 (Nev. 1976); State v. Armstrong, 511 P.2d 560, 563 (N.M. App. 1973); State v. Kasakoff, 503 P.2d 1182, 1183 (N.M. App. 1972); State v. Levitt, 371 A.2d 596, 599 (R.I. 1977); Santillo v. Commonwealth, 517 S.E.2d 733, 738-39 (Va. Ct. App. 1999); *see also* United States v. Brewer, 363 F. Supp. 606 (M.D. Pa. 1973) (denying standing to assert privacy rights for defendant convicted of sodomy in prison because consent may be illusory in prison environment).

[124] Brief of Amici Curiae Concerned Women for America, in Support of the State of Texas, Respondent at 6, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Liberty Counsel as Amici Curiae in Support of Respondent at 3, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief Amici Curiae of Texas Eagle Forum, Daughters of Liberty Republican Women, Houston Texas, and Spirit of Freedom Republican Women's Club in Support of Respondent at 4 in Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Amicus Brief of the American Center for Law and Justice in Support of Respondent at 4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief Amici Curiae of the Family Research Council and Focus on the Family in Support of Respondent at 5, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[125] *Lawrence*, 539 U.S. at 578-79.

3. Adults

Being arrested for consensual sodomy was still not sufficient to gain standing to challenge the constitutionality of the sodomy law. The criminal defendant also had to show that his partner in sodomy was another adult. Courts had consistently held that those who engaged in sodomy with minors did not have standing to challenge sodomy statutes, as those laws are applied to sexual acts between consenting adults.[126]

Both Lawrence and Garner were adults.[127] Because the record clearly established this, the amici for the State felt compelled to assert a more convoluted argument against the Supreme Court hearing the case: Several amici asserted that the men should not have been allowed to assert their privacy rights because the sodomy could have been incestuous.[128] Some briefs did so even after (in apparent race-baiting) noting that Lawrence was white and Garner was African-American.[129] The Court noted that both men were adults and it declined to address the incest speculation.

4. Private

For those individuals arrested for consensual sodomy with another adult, courts still refused to allow criminal defendants standing to assert that the law infringed upon constitutional privacy rights unless the defendant could also prove that his act of sodomy was in fact "private." Many courts then proceeded to manipulate the concepts of "public" and

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[126] *See, e.g.*, King v. State, 458 S.E.2d 98, 99 (Ga. 1995); Gordon v. State, 360 S.E.2d 253 (Ga. 1987); Hughes v. State, 287 A.2d 299 (Md. App. 1972); Miller v. State, 636 So. 2d 391 (Miss. 1994); State v. Worthington, 582 S.W.2d 286, 289 (Mo. App. 1979); Jones v. State, 456 P.2d 429, 430-31 (Nev. 1969); Moore v. State, 501 P.2d 529 (Okla. Crim. App. 1972). The age of the participants may be seen as a variation of the consent requirement in that minors cannot legally consent to engaging in sex with an adult. *See* State v. Worthington, 582 S.W.2d 286, 289 (Mo. App. 1979) (holding that thirteen-year old "is legally deemed incapable of consent to sodomy").

[127] The number two was important too; some federal courts have suggested that the inclusion of a third person in the sexual conduct could constitute a waiver of the private nature of the sexual acts and prevent the defendants from asserting their constitutional rights to privacy. Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied sub. nom.* Lovisi v. Zahradnick, 429 U.S. 977 (1976).

[128] Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 6, *Lawrence*, 539 U.S. (No. 02-102); Amicus Brief of the American Center for Law and Justice in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102).

[129] Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102).

"private" beyond all recognition. While many courts held that a criminal defendant who had engaged in sodomy in a parked car,[130] public restroom,[131] or secluded wooded area[132] did not have standing to assert constitutional privacy arguments, some courts expanded the concept of "public sodomy" to include sexual acts that took place in a private club.[133] Read as a whole, the cases stood for the proposition that a criminal defendant could not assert privacy rights unless arrested for consensual sodomy in his own home with another adult.[134] Yet even then, some courts deemed the sodomy "public" and denied defendants standing to make constitutional privacy arguments if an invited adult guest was present in the bedroom during the sodomy.[135] In short, courts applied standing doctrine in sodomy cases in a manner that "create[d] a Catch-22: 'If you weren't caught, you don't have standing to assert any privacy rights. If you were caught, then the conduct was not private and you don't have standing to assert privacy rights.' Thus, caught or not caught, courts den[ied] standing."[136]

Lawrence and Garner achieved the hat trick of sodomy litigation when the Houston police stormed into Lawrence's bedroom and arrested the two adult men for engaging in truly private, consensual sodomy. It was nearly impossible to get arrested for and convicted of private sodomy because, in the vast majority of instances, if the defendant was caught, then judges concluded that the sodomy could not have been private. Only the bizarre fact pattern of *Lawrence* overcomes this incredibly

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[130] Carter v. State, 500 S.W.2d 368, 373 (Ark. 1973) (defendants sentenced eight years in prison for engaging in consensual fellatio in parked car and, yet, denied standing to argue that sodomy law constituted unconstitutional infringement of privacy rights).

[131] United States v. Lemons, 697 F.2d 832, 833 (8th Cir. 1983); State v. Jarrell, 211 S.E.2d 837, 840 (N.C. 1975).

[132] United States v. Buck, 342 A.2d 48, 49 (D.C. App. 1975) ("[P]articipants in an act performed in a 'public wooded area' cannot invoke a right to privacy even though they may have believed that because of the hour of the night and the density of the foliage, their behavior would go unobserved."); Stover v. State, 350 S.E.2d 577 (Ga. 1986); Neville v. State, 430 A.2d 570 (Md. App. 1981).

[133] Harris v. United States, 315 A.2d 569 (D.C. App. 1974); *see* Leslie, *Standing in the Way*, *supra* note 111, at 50 (discussing *Harris*).

[134] *See Buck*, 342 A.2d at 49 (D.C. App. 1975) ("[A]ny arguable right to privacy for persons engaging in [consensual sodomy] does not extend beyond the seclusion of the home."); Leslie, *Standing in the Way*, *supra* note 111, at 50-52.

[135] Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976), *cert. denied sub. nom.* Lovisi v. Zahradnick, 429 U.S. 977 (1976); *see* Neville v. State, 430 A.2d 570, 577 n.10 (Md. App. 1981); June A. Eichbaum, *Lovisi v. Slayton: Constitutional Privacy and Sexual Expression*, 10 COLUM. HUM. RTS. L. REV. 525, 537-38 (1978-79); Note, *The Marital Right of Privacy Does Not Protect a Husband and Wife Performing Sodomy in the Presence of a Third Person*, 45 GEO. WASH. L. REV. 839 (1977).

[136] Leslie, *Standing in the Way*, *supra* note 111, at 52.

difficult barrier of proving privacy even though caught in the act. Even so, anti-gay organizations argued in their amici briefs that Lawrence's challenge should be dismissed for a lack of standing because the record contained "no evidence" that the conduct was private.[137] Nevertheless, the majority implicitly rejected such baseless revisionism by explicitly noting that Texas had convicted Lawrence and Garner for *private* conduct.[138]

5. Noncommercial

Even if two adults were arrested for engaging in private, consensual sodomy, courts typically denied standing to the defendants if money was either offered or paid from one participant to the other.[139] This requirement raised no problem as neither Lawrence nor Garner was prostituting himself. Still, the anti-civil rights organizations in their amicus briefs implored the Court to hold that certiorari had been improvidently granted because there was no evidence in the record to indicate that the act was noncommercial.[140] The Court did not take the bait; it simply noted that the case did not involve prostitution.[141]

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[137] Several amici for the State asserted that there was "no evidence" that the sodomy at issue "was done in private, out of the view of the public or anyone else present in the room." Brief of Liberty Counsel as Amici Curiae in Support of Respondent at 3, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102); Amicus Brief of the American Center for Law and Justice in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief Amici Curiae of the Family Research Council and Focus on the Family in Support of Respondent at 5, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Concerned Women for America, in Support of the State of Texas, Respondent at 6, *Lawrence*, 539 U.S. 558 (No. 02-102) (nothing in record indicates "whether anyone else was present to observe the conduct"). At least one amicus brief asserted that not only was there no evidence that the sexual acts were not in private but that the men had set up the entire arrest in order to have standing to challenge the Texas sodomy law. Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 5 & n.2, *Lawrence*, 539 U.S. 558 (No. 02-102).

[138] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[139] State v. Baxley, 633 So. 2d 142 (La. 1994); State v. Gray, 413 N.W.2d 107 (Minn. 1987); *see also* People v. Parket, 109 Cal. Rptr. 354, 358 (1973).

[140] Brief of Amici Curiae Concerned Women for America, in Support of the State of Texas, Respondent at 6, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief of Liberty Counsel as Amicus Curiae in Support of Respondent at 3, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief Amici Curiae of Texas Eagle Forum, Daughters of Liberty Republican Women, Houston Texas, and Spirit of Freedom Republican Women's Club in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (No. 02-102); Amicus Brief of the American Center for Law and Justice in Support of Respondent at 4, *Lawrence*, 539 U.S. 558 (No. 02-102); Amici Curiae Brief of the Family Research Council and Focus on the Family in Support of Respondent at 5, *Lawrence*, 539 U.S. 558 (No. 02-102).

[141] *Lawrence*, 539 U.S. at 578-79.

6. Prosecution

Up until this point, the fact pattern of *Lawrence* mimics that of *Bowers v. Hardwick*. In both cases, police officers arrested men for engaging in private, consensual sex with another man. However, the post-arrest facts of the two cases diverge significantly. The district attorney in Atlanta declined to prosecute Michael Hardwick for engaging in consensual sodomy in his bedroom.[142] This decision by the prosecutor probably saved the Georgia sodomy statute from extinction in 1986. Justice Powell had initially provided the fifth vote for a majority opinion to strike down the sodomy law as an unconstitutional infringement of the right to privacy.[143] However, after the conference vote among the nine justices, Justice Powell had misgivings because Michael Hardwick had never been prosecuted.[144] Absent a prosecution, Powell believed that the case was "frivolous," brought "just to see what the court would do."[145] Because the district attorney did not prosecute, Justice Powell switched his initial vote from invalidating the Georgia sodomy law to upholding it. After he left the bench, Justice Powell admitted that upon reflection he believed that he ultimately voted the wrong way. He reiterated, however, that his vote was driven by the absence of prosecution and his belief that sodomy laws simply were not enforced.[146]

The facts of *Lawrence* prevented any of the sitting Justices from falling into the trap set for Justice Powell in *Bowers*. No one in Texas or on the high court could believe that the Texas sodomy statute was a dead letter. The police were making arrests when they found consensual sodomy occurring between gay adults and, when presented with cases, the district attorneys were prosecuting them.

7. Conviction

Beyond prosecution, it was important that Lawrence and Garner were actually convicted. The conviction brought home many of the dilatory

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[142] The district attorney dropped the sodomy charge after learning about the ACLU's interest in the case. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 458 (1999).

[143] Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1; Benjamin Weiser & Joan Biskupic, *Secrets of the High Court: Papers Afford a Rare Glimpse of Justices' Deliberations*, WASH. POST, May 23, 1993, at A1.

[144] Al Kamen, *Powell Changed Vote in Sodomy Case: Different Outcome Seen Likely If Homosexual Had Been Prosecuted*, WASH. POST, July 13, 1986, at A1.

[145] Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3.

[146] Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1.

effects of sodomy laws.[147] The fact that Lawrence and Garner were convicted convinced the Court that sodomy laws inflict real, tangible injuries. The convictions were critical in exposing to the Court some of the legal ramifications of sodomy laws. Both the majority and Justice O'Connor in her concurrence emphasized the practical harms visited upon men convicted of "homosexual conduct." They recognized the stigma attendant to conviction under the Texas sodomy law. In addition to the humiliation of having a criminal record, those convicted under the sodomy statute would have to register as sex offenders in at least four states.[148] O'Connor noted that convictions for violating the Texas Homosexual Conduct Law included disqualification or restriction from practicing certain careers in medicine, athletic training, and — one suspects tongue in cheek — interior design.[149] Though it was extremely unlikely that anybody would have been convicted of private, consensual sodomy with another adult, such a conviction is critical because it frames the facts and drives home the harm.[150] The facts of *Lawrence* prevented the Justices from committing Justice Powell's mistake in *Bowers* of believing that sodomy laws were harmless.

8. Victims Willing to Litigate

Conviction for engaging in private, noncommercial sodomy with another consenting adult solves the standing problem and frames the issues properly. Conviction, however, merely sets the stage. A successful challenge also requires willing players. Most people convicted of so-called "deviate sexual intercourse" would rather avoid becoming a public spectacle. The one prior challenge to the constitutionality of state sodomy laws almost never happened because criminal defendants were too ashamed or scared to press for their legal

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[147] In *Bowers*, Justice Powell did not think that sodomy laws had any effect because the criminal punishments available under sodomy statutes were never meted out. Merely being arrested for having consensual, adult sex in his own home did not make Michael Hardwick a sufficiently sympathetic litigant. The Justices in *Bowers* could not see the true impact of sodomy laws on the lives of gay men and lesbians.

[148] Lawrence v. Texas, 539 U.S. 558, 576 (2003) (noting Idaho, Louisiana, Mississippi, and South Carolina registration laws) ("This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition."). O'Connor, too, noted that the petitioners' convictions would force them to register as sex offenders if they were to move to a handful of States. *Id.* at 582-84 (O'Connor, J., concurring in the judgment).

[149] *Id.* at 581.

[150] *Id.* ("And while the penalty imposed on petitioners in this case was relatively minor, the consequences of convictions are not.").

rights in court. In Michael Hardwick's challenge, even though both Hardwick and his partner were arrested for violating the Georgia sodomy law prohibition on private, consensual oral sex, only one man had the courage to step forward and challenge the law's constitutionality. Hardwick's partner was a school teacher who refused to participate in litigation for fear that it would destroy his livelihood.[151] He paid a fine and fled the jurisdiction.[152] Unlike Hardwick's partner, Lawrence and Garner did not run from the media's glare. They argued for their civil rights publicly as a team. In doing so, they both provided a clean set of facts for the Supreme Court to evaluate the constitutionality of sodomy laws and the wisdom of *Bowers*. The men also humanized the issue by challenging the law as a couple.[153]

9. The Composition of the Court

Finally, even if all of the factual circumstances of the sodomy and the prosecutors' actions had fallen into place, gay rights advocates had no chance of overturning *Bowers* unless the Supreme Court were composed of a sufficient number of Justices willing to reconsider and reverse the 1986 opinion. Although six Justices in *Lawrence* voted to invalidate the Texas sodomy law, only a bare majority of five were willing to overturn *Bowers*. If one of those five had been replaced by an unsympathetic judge, then the result in *Lawrence* would have endorsed *Bowers* instead of reversing it. The Court, in fact, came perilously close to having such a pro-*Bowers* makeup. Justice Kennedy was present to author the *Lawrence* opinion reversing *Bowers* only because the Senate had years earlier rejected Robert Bork for that same seat. If the Senate had confirmed Bork as an Associate Justice, the result in *Lawrence* would most certainly have been different. Both on and off the bench, Bork proved himself to be hostile to equal rights for gay Americans. As a judge, Bork had explicitly held that the constitutional right to privacy does not protect gay Americans who wished to engage in private, consensual sodomy.[154] After leaving the bench, Bork made patently clear his opposition to

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[151] *See* IRONS, *supra* note 142, at 396.

[152] Hardwick himself had little to lose; he was openly gay and worked in a gay bar.

[153] *See* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993). Although it is possible that there could have been Doe challenges in the future had the *Lawrence* Court failed to reverse *Bowers*, Doe challenges remove the human element that is often important in gay rights litigation.

[154] Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), *reh'g denied*, 746 F.2d 1579, 1581 (D.C. Cir. 1984).

treating gay Americans with dignity. He represented the city of Cincinnati when it decided to make itself the only city in the country to explicitly exclude gay men and lesbians from antidiscrimination laws and in his books he argued against equal rights for gay Americans.[155] Without the Senate's rejection of Robert Bork to serve on the Supreme Court, millions of gay men and lesbians would remain criminals today.

10. Summary

But for this unlikely sequence of events, civil rights advocates may never have had a meaningful opportunity to convince the Supreme Court to reverse *Bowers* and strike down all American sodomy laws as unconstitutional. More particularly, the citizens of Texas would probably not have had another chance for either of that state's high courts — the Texas Supreme Court or the Texas Court of Criminal Appeals — to provide a definitive judgment on the constitutionality of the Texas sodomy law. The Texas Supreme Court had held that it would deny standing unless the law challenger had actually been arrested for private, noncommercial sodomy with another adult. However, such a criminal defendant would find himself in front of the Texas Court of Criminal Appeals, the very court that refused to grant certiorari to Messrs. Lawrence and Garner. The predicament of Lawrence and Garner demonstrates how the highest Texas courts had created a bind whereby they would never have to rule on the sodomy law's constitutionality.[156]

IV. IN PRAISE OF PRIVACY (OR LIBERTY)

Justice O'Connor's approach is tempting but ultimately flawed. Only the reversal of *Bowers* could truly eliminate the injuries inflicted by state sodomy statutes. And it did so in a manner that protected the rights of both gay and straight Americans. Most importantly, the privacy approach solved problems that the equal protection approach would have left uncured. Criminalization of same-sex sodomy visited a wide range of harms upon gay and lesbian Americans. These injuries are inflicted upon gay men and lesbians regardless of whether a given sodomy law is gender-neutral or gender-specific.

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[155] *See* ROBERT BORK, COERCING VIRTUE (2003); ROBERT BORK, SLOUCHING TOWARDS GOMORRAH (1997).

[156] After all, if not in this case, then never. This was the cleanest challenge to the sodomy law and the Texas high court on criminal matters still refused to hear the case.

The approach taken by the *Lawrence* majority eliminates the harms associated with sodomy laws altogether. For example, employers — both governmental and private — can no longer rely on sodomy statutes to justify firing or not hiring gay employees. Courts cannot invoke a state's sodomy law to deny custody of a child to a gay parent. Most significantly, the privacy approach banished the taint of criminality from gay identity. Gay men and lesbians need no longer think of themselves as criminals.

The *Lawrence* majority's privacy approach is also better than O'Connor's equal protection rationale because the majority opinion provides protection to heterosexuals as well. The privacy rationale strikes down all sodomy laws, whether gender-specific or gender-neutral.[157] Gender-neutral sodomy laws may hurt heterosexuals in some circumstances. Although all sodomy laws — even gender-neutral ones — were often interpreted as though they applied only to same-sex sodomy, heterosexuals were sometimes caught in the net of criminal codes proscribing consensual sex.[158] The equal protection approach would have left gender-neutral sodomy laws intact. Indeed, the equal protection approach may have led to a greater number of gender-neutral sodomy laws. The privacy approach eliminated all sodomy laws.[159] Thus, both heterosexuals and homosexuals enjoy greater personal autonomy under the majority opinion in *Lawrence* than they would if Justice O'Connor had prevailed.

CONCLUSION

Justice O'Connor's approach would certainly have been narrower than Justice Kennedy's majority opinion. But it also would not have ameliorated the true harms inflicted by sodomy laws. Justice O'Connor believed the equal protection holding would be sufficient because it would end overt discrimination against gay Americans based on sodomy laws, would lead states to repeal the remaining sodomy laws, and would allow gays to challenge any gender-neutral sodomy laws as unconstitutional as applied.

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[157] Lawrence v. Texas, 539 U.S. 558, 560 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). The State's intrusion into the bedroom raises the constitutional problem, irrespective of the sexual orientation of the adults involved.

[158] *See, e.g.*, Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976), *cert. denied sub. nom.* Lovisi v. Zahradnick, 429 U.S. 977 (1976).

[159] Of course, forcible sodomy and public sodomy remain illegal.

History would have shown Justice O'Connor to have been naively over-optimistic on all three counts. First, even under a regime of gender-neutral sodomy laws, gays would have continued to suffer discrimination, as they did before *Lawrence*, in those states that maintained gender-neutral sodomy laws. Gay men and lesbians would have been denied housing and employment opportunities; they would have had their children taken away from them in custody disputes; they would have suffered the taint of criminality. Second, states would not have repealed their gender-neutral sodomy laws. It is far more likely that states with gender-specific sodomy laws before *Lawrence* would have amended their laws to make them gender-neutral if O'Connor's concurrence had been the majority opinion in *Lawrence*. Third, despite the fact that the burden of gender-neutral sodomy laws would have fallen disproportionately on gay men and lesbians, they would not be able to overcome the standing hurdles that have historically protected sodomy laws from constitutional attack. The fact pattern in *Lawrence* shows the critical role of luck and circumstance in advancing civil rights through the American judicial system.

But for:

an irate and vindictive neighbor,

who made a false report that led police to,

two adult men,

who happened to be having sex,

which neither man paid for,

with no evidence of coercion,

at the time that police busted in their door,

overzealous cops who arrested them,

an overzealous district attorney who prosecuted them,

a state judicial system that convicted and fined them,

courageous men who were willing to face the media spectacle and public

> scrutiny to challenge the law,
>
> at a time when the Supreme Court could muster a bare majority of Justices
>
> to overturn *Bowers*,
>
> because of the Senate defeat of the nomination of Robert Bork in 1986,
>
> gay men and lesbians would still be criminals in much of the United States, subject to stigmatization, discrimination, harassment, and violence due to their criminal status.

The facts of *Lawrence* represented the perfect storm. And perfect storms rarely ever come to pass. Believers in basic civil rights and the American principle of equality should appreciate in awe the sequence of events in *Lawrence*: all of the necessary facts occurred; the police and prosecutors made all of the necessary mistakes; and, notwithstanding the concurrence of Justice O'Connor, five justices sailed the one correct course.