

CHAPTER **11**

Sexuality, Marriage, and Relationships

The Radical Potential of Lawrence

JO ANN CITRON AND MARY LYNDON SHANLEY

On May 1, 2003, six weeks after the U.S. Supreme Court had heard oral arguments and eight weeks before it handed down its decision in *Lawrence v. Texas*,¹ Justice Sandra Day O'Connor addressed the students at Gonzaga College High School in Washington, D.C.² Following her prepared remarks, O'Connor was asked this question:

[For] much of the twentieth century, race was a burning issue facing the courts. Could you conjecture what the burning issue might be for the twenty-first century?

Her reply went largely unnoticed by the press, but it was stunning:

Yes, I think we see issues cropping up around the country relating to how [pause] homosexuals are treated, for example, legally, and we see a number of cases in that area.

Justice O'Connor was surely thinking not only about the pending decision in *Lawrence*, but also about the Supreme Court's earlier decisions in *Romer v. Evans* (1996)³ and *Bowers v. Hardwick* (1986),⁴ cases that profoundly influenced how she and the other Justices would ground their opinions in *Lawrence*.

At issue in the Texas case was the constitutionality of that state's Homosexual Conduct Law, which made it a crime to commit sodomy with a person of the same sex. *Lawrence* began when the Houston police received a report that someone with a gun was acting crazy inside a residence and entered the apartment of John Lawrence where they observed Lawrence and Tyron Garner engaging in anal intercourse. Both men were arrested, held in jail overnight, charged, and convicted before a Justice of the Peace of violating the state anti-sodomy law. Their challenge to the sodomy statute was unsuccessful at trial and the state appeals court, invoking *Bowers v. Hardwick*, rejected their appeal on both equal protection and due process grounds. Appeal to the U.S. Supreme Court followed and in a 6–3 decision the Court struck down the Texas statute: Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's opinion applying a due process analysis and explicitly overturning *Bowers v. Hardwick*; Justice O'Connor filed an opinion concurring in the judgment but analyzing the case under the Equal Protection Clause, an analysis that would have left *Bowers* intact; Justices Rehnquist and Thomas joined Justice Scalia's dissenting opinion taking the court to task for overruling *Bowers*, for finding a right to liberty under the Due Process Clause, for decreeing the end of all morals legislation, and for opening the door to gay marriage; and Justice Thomas wrote separately in dissent to opine that while the Texas law was "uncommonly silly,"⁵ the Constitution does not contain a general right to privacy or to liberty that would allow the court to grant petitioners relief.

Lawrence v. Texas was first and foremost a successful challenge to the state's authority to regulate sexual activity between consenting adults. Sodomy is now legal throughout the United States, regardless of the sex of the participants. But the significance of *Lawrence* goes far beyond a narrow holding that struck down the few sodomy statutes that had survived, largely unenforced, into the twenty-first century. The substantive due process analysis that eliminated the remaining sodomy statutes also eliminated from the law the misguided pronouncements of *Bowers v. Hardwick*. The *Lawrence* court rejected *Bowers's* moralistic and cramped approach to homosexual sex and instead characterized the issue as whether gay men and lesbians have "the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."⁶ In establishing that this is a right the Constitution will protect, the majority decision spoke eloquently of the importance of relationships, of the place of sex within those relationships, and of the significance of sexual conduct to individual autonomy and identity. And by analyzing the sodomy statute under substantive due process, the majority moved this case about homosexual sex into a line of cases that address the core social values of marriage and family, procreation and contraception,

and the rearing and education of children. Where *Bowers* spoke disparagingly of homosexuals as moral pariahs and social outsiders, *Lawrence* spoke respectfully of homosexuals as individuals whose intimate and family relationships are no less worthy of respect and constitutional protection than are those of their heterosexual counterparts. The emphasis on sex as worthy of constitutional protection because it is an important aspect of relationship not only marked a significant change in the posture of the Court toward a class of citizens who have, until now, enjoyed limited constitutional protection, but also created the potential to expand and deepen legal thinking about sexuality, marriage, and intimate relationship.

Framing the Issue

Romer v. Evans and Bowers v. Hardwick

Two prior cases form an indispensable background to *Lawrence*: *Romer v. Evans* and *Bowers v. Hardwick*. *Romer* was a 1996 case that struck down a popular referendum amending the Colorado state constitution to prohibit any branch of government from conferring legal protections upon homosexuals. The amendment opened the door to state-sanctioned discrimination against gays both publicly and privately. Justice Kennedy, writing for the majority in *Romer*, held that Amendment 2 violated the Equal Protection Clause, which says simply that no state shall deny to any person within its jurisdiction the equal protection of the laws. The civil rights movement is the history of how equal protection has been invoked to protect disfavored minorities from the political tyranny of the majority. Justice Kennedy reasoned that for Colorado to impose such wide-ranging legal disabilities upon a single named group was inexplicable by anything but animus toward the affected class. And because animus, without more, lacks any rational relationship to a legitimate state interest, Amendment 2 must fail. In holding that Amendment 2 did not meet even the rational relationship test, the court spared itself the agony of having to debate whether homosexuality was to become a new suspect class in America, which would require that any law affecting homosexuals be subjected to strict scrutiny.⁷ Justice O'Connor had joined Justice Kennedy's opinion in *Romer*, and she would have decided the Texas sodomy case the same way. In analyzing *Romer* under equal protection, the Court made it clear that what was at stake in the referendum fight was the civil rights of a despised minority; this would be Justice O'Connor's approach in *Lawrence* as well.

Against the majority's understanding in *Romer* that animus toward homosexuals is a civil rights issue was Justice Scalia's insistence that animus toward homosexuals is but a feature of the culture wars and that courts have no business standing on one side or the other of a cultural

divide.⁸ Coloradoans, Scalia argued, are politically “entitled to be hostile toward homosexual conduct.”⁹ In analyzing the issues *Romer* raised, Scalia notably looked not to civil rights jurisprudence but to *Bowers v. Hardwick*. If it is constitutionally permissible for a state to criminalize sodomy, Scalia reasoned, “surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”¹⁰

It is worth pausing to recall the details of *Bowers*, for it would loom over every aspect of the opinions in *Lawrence v. Texas*. Michael Hardwick was arrested by an Atlanta police officer who visited his home one morning carrying an arrest warrant in connection with a minor offense for which Hardwick had already paid the fine. The officer entered the house, found his way to a bedroom, pushed open the door, and came upon Hardwick and another man having oral sex. The police officer placed both men under arrest, watched as they dressed, handcuffed them, and drove them to the station where they were charged with violating Georgia’s sodomy law, a crime punishable by up to twenty years in prison.¹¹ The criminal statute at issue in *Bowers* applied to both heterosexuals and homosexuals and was initially challenged by John and Mary Doe, a married couple, along with Michael Hardwick. The Does claimed that the statute and Hardwick’s arrest under it had “chilled and deterred” them from sexual activity. However, the Federal District Court dismissed them from the case for lack of standing because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the law since it was rarely enforced and they had not been arrested.¹²

Had the Georgia law targeted homosexuals specifically, Hardwick could have challenged it on equal protection grounds. But because the statute—at least on its face—applied to all persons equally, Hardwick’s challenge looked to privacy and due process. Hardwick’s brief presented the Supreme Court with the following question: May the state send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral?¹³ With the heterosexual petitioners conveniently dismissed from the case, the U.S. Supreme Court disregarded the statute’s plain language and defined the question before it not as whether state prohibitions on sodomy were justifiable restrictions on sexual freedom for everyone, but rather “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”¹⁴ To such a question the Court, not surprisingly, responded “no,” and for the next seventeen years *Bowers v. Hardwick* was invoked to permit discrimination against homosexuals on the grounds that the activity that defines them enjoys no constitutional protections. This was the legal landscape that John Lawrence and Tyron Garner sought to rearrange.¹⁵

The facts in *Lawrence* were strikingly similar to the facts in *Bowers*. In both cases, police entered the home and found two men engaging in sexual conduct proscribed by a state statute. In both cases, the men were arrested. Whereas the state declined to seek an indictment against Michael Hardwick, the defendants in *Lawrence* were convicted and the convictions were affirmed. On appeal to the U. S. Supreme Court, both Texas and Lawrence and Garner agreed that the questions to be decided were (1) whether the Texas statute violated the Equal Protection Clause, (2) whether the Texas statute violated the Due Process Clause, and (3) whether *Bowers v. Hardwick* should be overruled.¹⁶ Because the Texas law proscribed only homosexual sodomy, the Court could have struck down the statute on equal protection grounds using the same theory enunciated in *Romer*, namely that there was no reason apart from animus to criminalize sodomy among homosexuals while allowing heterosexuals to practice it with impunity. Using the Equal Protection Clause to strike down the Texas law would have eliminated only those statutes that applied exclusively to homosexuals and would have permitted criminalization of sexual acts as long as the prohibitions applied to everyone.¹⁷ This was the approach Justice O’Connor advocated in her concurring opinion in *Lawrence*. She had joined Justice Kennedy’s opinion in *Romer*, and she would have decided *Lawrence* in the same way, holding that the Texas statute impermissibly denied the disfavored homosexual minority the protection of laws that applied to everyone else. She argued that the Texas statute was unconstitutional because there was no reason, apart from moral disapproval, to criminalize homosexual sodomy while allowing heterosexual sodomy to go unpunished, and moral disapproval of a particular group can never be a legitimate basis for the enactment of laws.

However, O’Connor’s was the lone voice on the *Lawrence* court to invoke equal protection. The other five justices who voted to strike down the Homosexual Conduct Law did so under the Fourteenth Amendment’s Due Process Clause: No state shall deprive any person of life, liberty, or property without due process of law. The *Lawrence* holding was actually quite narrow: The Constitution protects private sexual conduct between consenting adults from being criminalized, and this protection applies to otherwise permissible conduct regardless of particular sexual practices or the lifestyle of the participants.¹⁸ Writing for the majority, Justice Kennedy went out of his way to point out that the issue before the court did not involve “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹⁹ It involved only “whether the majority may use the power of the State to enforce [their moral] views on the whole society through operation of the criminal law.”²⁰ The Court answered that they may not. The conclusion reached by the majority under

a due process analysis was the same as the conclusion reached by Justice O'Connor under an equal protection analysis. What, then, was the significance of the Court's decision to analyze the facts in *Lawrence* under the Due Process rather than the Equal Protection Clause?

For one thing, deciding the case under substantive due process allowed the Court to accept the petitioners' invitation to overrule *Bowers v. Hardwick*, whose homophobia was a moral affront and a legal embarrassment. But the due process analysis had implications far beyond what happened to *Bowers*. Substantive due process is the doctrine that the Court has traditionally used to protect individual rights pertaining to marriage, procreation, contraception, family relationships, child rearing, and education. These rights are deemed "fundamental," a legal term of art for rights that, while not made explicit anywhere in the Constitution, are nevertheless thought to be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed."²¹ The majority's decision to analyze the statute under due process thereby moved a case about homosexual sodomy into a well-developed jurisprudence of privacy and fundamental rights involving the intimate associations of marriage and family from which *Bowers* had banished it. Central to that jurisprudence was the landmark case of *Griswold v. Connecticut* that established that the state's ban on contraception violates a married couple's right to privacy.

Griswold v. Connecticut

It could be said that modern privacy jurisprudence in this country was born at the moment that Justice Douglas, writing for the court in *Griswold v. Connecticut*, imagined the police entering the marital bedroom to search for "telltale signs of the use of contraceptives."²² The very idea was "repulsive" to notions surrounding the sanctity of both the marital bedroom as a *place* and the marriage relationship as an *association*. At issue in *Griswold* were two Connecticut statutes that authorized the state to imprison anyone found guilty of using or promoting contraceptives. The criminal statutes reached both the persons seeking to avoid pregnancy and the doctors and clinic workers who provided, prescribed, or even described contraceptives. The plaintiffs were directors of Planned Parenthood who had been convicted of advising married persons about how to avoid conception. The court held that the statutes violated the right to privacy by interfering with the intimate association of marriage. Seven justices concurred with Justice Douglas's opinion for the Court that a right to privacy exists and that it protects the marital relationship and secures the marital bedroom. But the Justices could not agree about where to find it.

Justice Douglas invoked privacy guarantees that hover somewhere in the vicinity of the First Amendment. Though not mentioned in the Constitution,

associational rights had long found protection there. The right of the people to assemble and to dissent has always been held critical to the operation of democracy. Protection of the political process has been augmented by protection of associations that yield social, legal, and economic benefits—all public matters. The move that *Griswold* made was to bring "intimate relationships" within the protection of "associations" that until then had a largely public meaning. "The present case," Justice Douglas wrote, "concerns a relationship lying within the zone of privacy":

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.²³

Marriage and the family occupy a "sacred" position in the panoply of human institutions and so deserve special protection. A law that "seeks to achieve its goals by means of having a maximum destructive impact upon that relationship"²⁴ cannot stand.

The right to privacy that Douglas invoked is part of what he termed the "penumbras" and "emanations" within the Bill of Rights—guarantees that find no explicit expression in the amendments but that figure in their implications. The associational rights that protect the marital relationship from government interference were for Douglas attached to the First Amendment. Justice Goldberg's concurring opinion found the right to privacy in the Ninth Amendment, which promises that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Justice White concurred but found the statute without any plausible justification; he could not see "how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationship."²⁵ Justice Harlan concurred and reaffirmed the position he had taken in his dissenting opinion in *Poe v. Ullman* (a case that upheld the very statute that *Griswold* would strike down) that a ban on contraception "violates basic values 'implicit in the concept of ordered liberty'" guaranteed by the Due Process Clause.²⁶ Harlan's dissent in *Poe v. Ullman* and its encore in his *Griswold* concurrence are critical statements in the development of the Constitutional doctrine of substantive due process, the doctrine at the heart of the sodomy cases.

The Due Process Clause is understood to have a substantive as well as a procedural component.²⁷ In its procedural mode, it guarantees that the government cannot deprive an individual of life, liberty, or property without providing notice and an opportunity to be heard.²⁸ In its substantive

mode, it guarantees that, absent a compelling state interest, the government cannot interfere with an individual's fundamental liberty interests, though considerable dispute circulates around identifying what those interests are. Strict constructionists resist identifying any right beyond those enumerated by the Bill of Rights or explicitly set forth elsewhere in the Constitution. However, over time the majority view has been that due process reaches beyond enumerated rights to embrace rights that are deemed "fundamental," that belong to the citizens of all free governments and the securing of which is the very reason that men and women enter into society. This is what Justice Cardozo meant by the phrase "implicit in the concept of ordered liberty" and what Harlan described in his dissent in *Poe v. Ullman*:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. ... The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.²⁹

Much of Justice Harlan's dissent in *Poe* concerned the physical privacy of the home, but he rejected the notion that what is being protected is "home" as some kind of "place," as if an intrusion could be satisfactorily dealt with by the Fourth Amendment's guarantee of the right of the people to be secure in their houses. Fourteenth Amendment protections are needed because the presence of the contraception police in the marital bedroom represents

not an intrusion into the home so much as on the life which characteristically has its place in the home. ... Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.³⁰

Two considerations permeated the support for family privacy. One was the sanctity of families and the privacy needed to conduct family life. The other was sex. What married couples in Connecticut were deprived of was engaging in sex free from any fear of conceiving a child or contracting a venereal disease if they didn't use contraceptives, and fear of prosecution by the state if they did. As long as any legally permissible act of sexual

intercourse had to carry with it the possibility of pregnancy or sexually transmitted disease, Connecticut was interfering with sexual freedom. Whatever the *Griswold* decision might have *said* about the nobility of "family," what the case *did* was effectively to constitutionalize non-procreative sex for married people.

The unmarried had to wait to claim their sexual freedom until 1972, when Bill Baird gave a package of vaginal foam to a single woman attending one of his lectures. Massachusetts law prohibited single, but not married, persons from obtaining contraceptives for the purpose of preventing pregnancy. At issue in *Eisenstadt v. Baird* was whether the different treatment of married and unmarried persons violated the Equal Protection Clause.³¹ The Supreme Court held that it did. *Eisenstadt* recognized that marriage is not some magical status that merges two persons into an undifferentiated unit but is rather a coming together of two separate, autonomous individuals:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellect and emotional makeup. 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.³²

Eisenstadt's vindication of an individual's right to sexual expression did not depend upon the sanctity of family, home or the marital union. Brennan resisted reifying marriage and rejected the view that the sexual union of two married individuals is somehow different from the sexual union of two unmarried individuals. In addition, by framing what was at stake not as an intimate association, as *Griswold* had done, but rather as "the decision whether to bear or beget a child," *Eisenstadt* imagined an unmarried, autonomous individual for whom sex and procreation are disjoined terms.

Griswold's Legacy: Marital Privacy or Sexual Freedom?

Once "sex" became divorced from "procreation" (*Griswold*) and the right to sexual privacy was extended to single persons (*Eisenstadt*), what legal principle operated to confine the protection of sexual freedom to heterosexuals? This is the question at the heart of the sodomy cases. *Bowers* answered it by focusing on sodomy and detailing a long history of moral disapproval of homosexuality. But after *Romer*, it was not at all clear that mere moral disapproval could ever be a rational or legitimate reason for laws disfavoring a particular group. *Lawrence* answered the question by

talking about intimate associations and individual autonomy, and by referring to a long history of protecting fundamental rights such as marriage and family relationships.

Because the Texas law targeted homosexuals in particular, *Lawrence v. Texas* could easily have been decided on equal protection grounds and nothing need have been said about relationships, privacy, protected spaces, dignity, identity, autonomy, or personal rights, let alone marriage. Such an approach was preferred by Justice O'Connor, who had voted with the majority in *Bowers* and who would not vote to overturn it. O'Connor had also, of course, joined Kennedy's opinion in *Romer*, which held that expressing moral disapproval of homosexuality is not a legitimate State interest. The briefs had invited the justices to apply an equal protection analysis, and O'Connor was correct that equal protection was adequate to decide the relatively narrow question of the constitutionality of the Homosexual Conduct Law. Even Clarence Thomas thought the law "a waste of law enforcement resources" though he joined Scalia's dissent and voted to uphold it.³³ But Kennedy and the four justices who joined his opinion rejected the equal protection argument so readily at hand in favor of a due process analysis.

First of all, due process was the theory upon which the *Bowers* court relied and deciding *Lawrence* under equal protection would have left *Bowers* intact. *Bowers* had been relied upon for, among other things, the following: homosexuals are not permitted to serve in the armed forces; bisexuals may be discharged from the armed forces; the Defense Department may conduct expanded investigations of gay and lesbian applicants for secret security clearance; there is no right to commit adultery; a grandparent has no liberty interest in the adoption of her grandchildren; a prisoner has no right to HIV testing; a fireman does not have a fundamental interest in promotion; police departments may ask prospective employees about their homosexual activity; and the State may restrict surnames given to children at birth.³⁴ The *Lawrence* court bravely acknowledged that the shaky reasoning in *Bowers* had been the target of substantial and continuing disapproval and that its continuance as precedent "demeans the lives of homosexual persons."³⁵ Then, in considerable detail, Kennedy dismantled *Bowers* piece by shoddy piece. The *Bowers* court misapprehended the issue before it, which was not whether the Constitution confers a fundamental right to engage in sodomy but whether it protects "the most private human conduct, sexual behavior ... in the most private of places, the home."³⁶ Kennedy explained how the *Bowers* court misused history: there is no longstanding history of American law directed at homosexual conduct; how Justice Burger's contention that condemnation of homosexual practices was rooted firmly in the Judeo-Christian tradition was dubious at best; and how

Burger's sweeping references to the history of Western civilization failed to account for pockets of civilization—Europe, for example—that had repealed or invalidated laws against homosexual conduct. Kennedy's criticism of Burger's cramped and self-serving view of history echoed Harlan's description of history's proper role in balancing the due process claims of the individual against the demands of society. History teaches "the traditions from which [the country] developed as well as the traditions from which it broke. ... [A]n apparently novel claim ... must take its place in relation to what went before and further [cut] a channel for what is to come."³⁷

Kennedy also pointed out that laws targeting homosexuals developed only in the final third of the twentieth century, that laws prohibiting sodomy were not enforced against consenting adults acting in private, that the rules of evidence made sodomy prosecutions difficult, and that criminal prohibitions against sodomy were directed not at homosexuals but at non-procreative sex generally. And, most importantly, however much homosexuality may be condemned by however many people, the majority may not use the power of the State to enforce their views upon all of society through operation of the criminal laws. As Justice Stevens had argued in dissent in *Bowers*, neither history nor tradition could save anti-miscegenation laws and neither history nor tradition should have been able to save anti-sodomy laws, regardless of the category of persons engaging in the practice. Invoking his fellow jurist's dissent,³⁸ Justice Kennedy pronounced that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."³⁹ Rarely does the Supreme Court speak so boldly and emphatically when rejecting its own precedents.

Just as remarkable as the ringing tones in which Kennedy dispatched *Bowers* were the respectful ones in which he described the liberty interest at the heart of the petitioners' challenge. The constitutional doctrines of privacy and liberty, while implicated in one another, are not coterminous, as the concurrences in *Griswold* made clear. Even now, some forty years after *Griswold*, privacy protections are analytically distinct from due process.⁴⁰ *Lawrence* might have been resolved by holding simply, as Douglas had done, that the petitioners had a right to privacy that the Texas statute infringed upon: they were consenting adults, they were acting in private, and their association was protected by the emanations and penumbras of the First Amendment. But to describe what is at stake as mere sexual conduct

demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. ... 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*.⁴¹

As has been observed many times, there was no evidence that Lawrence and Garner were life partners or that they were having anything but a casual sexual encounter when the police entered the apartment. But Kennedy's opinion characterized the matter as involving an association not unlike the intimate association in *Griswold*, which "described the protected interest as a right to privacy and placed emphasis on the *marriage relation* and the protected space of the *marital bedroom*."⁴²

A court's holding—the narrowest possible principle of law at the core of the decision—can usually be reduced to a single sentence. Everything else is dicta, words that surround but do not articulate, the legal principle that resolves the dispute. But judicial opinions are like any other piece of writing in containing subtext as well as text. The holding at the core of the *Lawrence* decision, that adults have a due process liberty interest in their private, consensual sexual conduct, is hardly an adequate expression of what the case *means*. This is precisely what Kennedy meant when he said that to characterize the stakes as "simply . . . sexual conduct" demeans the claim.⁴³ It would be hard to overstate the significance of the language Kennedy used to describe what is at stake here. By using phrases such as "intimate sexual conduct" and by referring repeatedly to "marriage," "the marriage relationship," and "the marital bedroom," Kennedy normalized homosexual sex, the homosexual relationships that expand upon sex, and the homosexual persons who engage in sex as one part of those relationships. Justice Burger's sodomites are no different from Justice Douglas's married folks who are having sex in the house next door, the one with the picket fence, whose bedrooms are "sacred precincts" that the police may not invade.

Moreover, the majority in *Lawrence* went beyond privacy in its spatial dimension to invoke liberty in its broader aspects. The right at issue here is not only the right of privacy that restricts the State from telling a man, sitting alone in his house, what books he may read or what films he may watch.⁴⁴ The decision begins with the word "liberty" and the paragraph is worth quoting in full:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant

case involves liberty of the person both in its spatial and more transcendent dimensions.⁴⁵

The Court both affirmed the importance of physical privacy, the sacred space of the home, and insisted that the freedom that protects it is not limited to particular places; adults must have the ability to define themselves, to assert and to discover who they are through "freedom of thought, belief, expression, and certain intimate conduct."⁴⁶ Having framed the case as one of personal liberty, the Court held that it "should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."⁴⁷

The defense of individual liberty under substantive due process is the theory that the Supreme Court has historically invoked to protect marriage,⁴⁸ procreation,⁴⁹ contraception,⁵⁰ family relationships,⁵¹ child rearing,⁵² and education.⁵³ The Court described the liberty interest at stake in *Lawrence* as akin to these. The question, as the Court posed it, was whether Texas could make it a crime for two persons of the same sex to engage in "intimate sexual conduct"—not "sodomy."⁵⁴ The Court's phrase was more than a euphemism. It signaled that whatever the sex of the actors, the activity of the *Lawrence* couple was no different from the activity of the imagined *Griswold* spouses or of the pairs of individuals in *Eisenstadt*. The spectral figure of the policeman in the bedroom that had so repulsed Justice Douglas became real first in *Bowers* and again in *Lawrence*. In 1986, the *Bowers* Court could hardly peer into that space without seeing a public history of moral disapproval. In 2003, the *Lawrence* Court looked into the same space and saw, remarkably, something akin to a marital bedroom.

***Lawrence's* Legacy: Sexual Freedom or Heteronormativity?**

As several commentators have pointed out, there is no indication in the record that Lawrence and Garner were involved in anything other than the most transient sexual encounter. Katherine Franke argues that the Court "domesticated" the sexual acts between John Lawrence and Tyron Garner by portraying gay men "as domesticated creatures, settling down into marital-like relationships in which they can both cultivate and nurture desires for exclusivity, fidelity, and longevity in place of other more explicitly erotic desires."⁵⁵ Other commentators argue that "segments of the *Lawrence* opinion embody the heteronormative impulses of a court struggling to position the gay men before it as comparable to married persons, even though neither the record nor their attorneys suggested that John

Lawrence and Tyron Garner had anything other than a mutually desired fleeting encounter.”⁵⁶ To the Court’s statement that “[sexual conduct] can be but one element in a personal bond that is more enduring,” Franke asks, “More enduring than what? Than sex?”⁵⁷ To which one might respond, “Well, yes.” A sexual encounter can occur anywhere along the continuum between a one-night stand and a committed long-term relationship, whether or not that relationship is sanctioned by the State. As Carlos Ball observes, “the Texas sodomy statute implicated liberty interests associated with personal relationships as much as liberty interests associated with sexual conduct.” To the Court “it made no sense to discuss the freedom to engage in sexual conduct without bringing into the liberty analysis the ability of individual to form and maintain the kinds of personal relationships that often accompany that conduct.”⁵⁸ Thus, *Lawrence v. Texas* is immediately about sexual freedom and also potentially about marriage and other intimate or nonconjugal relationships.

As a legal opinion, *Lawrence* stands for the proposition that the due process clause protects a person’s liberty interest in exploring identity through sexual practices undertaken in private with other consenting adults, *no matter what those practices look like*. Yet the Court repeatedly reached beyond the sexual conduct that is its putative subject to position the sexual encounter within an array of intimacies. Both *Bowers* and *Lawrence* showed great respect for heterosexual marriage and deemed it worthy of constitutional protection. *Bowers* promoted heteronormativity by treating gay sexual practices with contempt and allowing them to be criminalized; *Lawrence* promoted it by normalizing homosexuality and making gay relationships look like marital ones. The *Lawrence* majority opinion embraced the population that *Bowers* spurned by eliding the differences between the “insiders” and the “outsiders.”

The liberty of the person in its spatial dimension protects what a person may do in the privacy of his home; the liberty of the person in its more transcendent dimension protects not just what a person does, but who a person *is*; not just association, but *autonomy*; not just conduct, but *identity*. As Justice Kennedy explained, quoting *Planned Parenthood of Southeastern Pa. v. Casey*:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁵⁹

This last is what Scalia scorns as *Casey*’s “famed sweet-mystery-of-life passage.”⁶⁰ The right to define one’s concept of existence for oneself is part of

what *Lawrence* defends, and this would suggest that the decision embraces far more than the “narrow version of liberty” that Franke attributes to it.⁶¹ The core of Blackmun’s dissent in *Bowers* was that the ability to define one’s identity, which is central to any concept of liberty, depends to a significant degree upon intimate sexual relationships.⁶² Certain sexual conduct, as Blackmun put it, “touches the heart of what makes [homosexuals] what they are.”⁶³ As Jamie Weinstein and Toby DeMarco put it, “The right to make autonomous, free choices about private, consensual, adult sexual activity is a central feature of this project of identity construction.”⁶⁴ *Lawrence* affirmed the right of individuals to make autonomous, free choices about acts that define their identities and constitute them as persons. One’s sexuality is part of what it means to be a particular person.⁶⁵ *Lawrence* draws upon both privacy and substantive due process to protect the sexual conduct that establishes an intimate relationship and also defines a personal identity. The law will protect both the association and the individual autonomy that combine to yield identity. Kennedy’s opinion transforms the sodomy cases into an exploration of the role of sexual conduct in forming a variety of intimate associations and personal relationships that privacy will protect.

The implications of the due process analysis that Kennedy applied did not stop with *Bowers* and the removal of proscriptions against sodomy. Although both Kennedy writing for the majority and O’Connor writing for herself were careful to distinguish laws that impose criminal penalties on the sexual conduct that defines homosexuals from laws that would grant legal recognition to homosexual relationships, Scalia complained in dissent that the reasoning in the *Lawrence* decision left no room for any principled denial of marriage to same-sex couples. He viewed the overruling of *Bowers* as a “massive disruption of the current social order”⁶⁶ and feared that O’Connor’s equal protection analysis left laws limiting marriage to opposite-sex partners “on pretty shaky grounds” because logically “preserving the traditional institution of marriage is just a kinder way of describing the State’s moral disapproval of same-sex couples.”⁶⁷ And because he believes that the Due Process Clause grants no right to liberty in the first place, he described the majority as having signed onto the homosexual agenda and impermissibly taken sides in the culture war.⁶⁸ “The Court today pretends that . . . we need not fear judicial imposition of homosexual marriage . . . Do not believe it,” he warned.⁶⁹ Scalia was, as we know, correct. Within five months of the issuance of the decision in the Texas sodomy case, the Massachusetts Supreme Judicial Court would construe civil marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”⁷⁰ In Massachusetts the sexual out-laws now have in-laws.

Conclusion

Deciding *Lawrence v. Texas* on substantive due process grounds was a deliberate choice with far-reaching implications. Either privacy or equal protection would have been adequate to strike down Texas's sodomy statute, but a due process analysis was necessary to overturn *Bowers*, to affirm the dignity of homosexuals, and to extend the reach of the protections afforded sexual relationships. The liberty guaranteed by the Due Process Clause protects the freedom both to make choices, including choices about sexual activity, and to form intimate relationships. In ringing language, *Lawrence* affirmed both these freedoms. That is its radical potential. *Bowers* had said, "These homosexual sodomites are not decent people, and not like us," while *Lawrence* said, "These homosexual sodomites are decent people, and just like us." The change in moral judgment is of the utmost importance. Yet in both cases, the normative standard of a rights-bearing individual in a relationship is heterosexual. In *Griswold*, the case that articulated the nature of the right that has been extended to others, the subjects are a married heterosexual couple. In *Lawrence*, heterosexual relations remain the norm against which others are measured.

However, *Lawrence* contains language and concepts that would allow it to move beyond the marital paradigm to an affirmation of other kinds of relationships. The majority and dissenting opinions in the substantive due process cases that form the legacy on which *Lawrence* draws engage in an extended conversation over the importance of sexual freedom both to identity formation and individual happiness, and to the formation and sustaining of intimate associations. To charge that "sex gets figured, if at all, in *Lawrence* as instrumental to the formation of intimate relationships—it seems not to have a social or legal status in its own right"⁷¹ follows only one strand of the intertwined skein that runs from *Griswold* through *Lawrence*. At the same time that *Lawrence* hearkened back to *Griswold* and the protections given to marital sex engaged in primarily in "the marital bedroom," it also suggested, in Laurence Tribe's words, that "regardless of whether we label it 'autonomy' or 'agency,' we are speaking of a capacity of individuals to construct for themselves a life (including a sexual life) that is not completely beholden to societal power relations."⁷² The majority's declaration in *Lawrence* that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" has the potential to extend recognition and protection to a variety of relationships that enrich both individuals and society.

Notes

1. *Lawrence v. Texas*, 539 U.S. 558 (2003).
2. Her address was part of the Students and Leaders Program organized by Comcast and C-Span. Her complete remarks are available as a video clip at http://www.studentsandleaders.org/video/justice_oconnor.asp (accessed November 20, 2004).

3. *Romer v. Evans*, 517 U.S. 620 (1996).
4. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
5. *Lawrence*, 606.
6. *Lawrence*, 567 (emphasis added).
7. "Strict scrutiny" is the Court's most rigorous form of review, reserved under equal protection analysis for what are known as "protected categories" or "suspect classes." Strict scrutiny looks at laws affecting the categories of race and national origin and asks if they are as narrowly tailored as possible to promote a compelling government interest. The fact that few laws survive under this analysis has led commentators to note that strict scrutiny is strict in theory but fatal in fact. See Gerald Gunther, *Harvard Law Review* 1 (1972), 86.
8. *Romer*, 636 (Justice Scalia, dissenting).
9. *Romer*, 644 (emphasis in original).
10. *Romer*, 641 (emphasis in original).
11. *Hardwick* appeared at a municipal court hearing on the sodomy charges. Although the district attorney declined to seek an indictment at that time, the possibility of future prosecution remained open. *Hardwick* then brought his constitutional challenge. For a full account of the arrest and its legal aftermath, see Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians vs. the Supreme Court* (New York: Basic Books, 2001).
12. The 11th Circuit affirmed the dismissal. *Hardwick v. Bowers*, 760 F.2d 1202 (1985), 188, n2.
13. Brief of Respondent at 1, *Bowers v. Hardwick*, 478 U.S. 186 (1986).
14. *Bowers*, 190 (1986).
15. *Romer* was decided on equal protection grounds and so had no effect upon *Bowers*, a substantive due process case.
16. Brief of Petitioners, Respondent's Brief in Opposition, *Lawrence v. Texas*, 559 U.S. 558 (2003).
17. The only other states with same-sex sodomy laws were Oklahoma, Missouri, and Kansas.
18. That is, sexual activity, such as erotic asphyxiation, resulting in death might be criminalized under other applicable law.
19. *Lawrence*, 578.
20. *Lawrence*, 571.
21. *Palko v. Connecticut*, 302 U.S. 319, 325 and 326 (1937).
22. *Griswold*, 381 U.S. 479, 485 (1965).
23. *Griswold*, 486.
24. *Griswold*, 485.
25. *Griswold*, 505 (Justice White, concurring).
26. *Griswold*, 500 (Justice Harlan, concurring, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). In Justice Harlan's view there was no need to enunciate a new right to privacy; the Due Process Clause "stands ... on its own bottom."
27. Since at least 1887, courts have recognized that the Constitution bars certain governmental actions regardless of the fairness of the procedures used to implement them. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) and cases cited.
28. In some instances, the Due Process Clause is satisfied if the hearing occurs *after* the deprivation. The curiosity of a post-deprivation hearing is familiar to anyone who has heard the White Queen describe the plight of the King's Messenger: "He's in prison now, being punished: and the trial doesn't even begin till next Wednesday." Lewis Carroll, *Through the Looking-Glass*, 1872.
29. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Justice Harlan, dissenting).
30. *Poe*, 551–552 (Justice Harlan, dissenting).
31. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Massachusetts defended the differential treatment by arguing that the law was intended to discourage premarital intercourse, to protect the health of the community, and to prohibit contraception. The Supreme Court thought it plainly unreasonable that Massachusetts would prescribe pregnancy and the birth of an unwanted child as punishment for fornication; moreover, the health needs of the unmarried are presumably just as great as the health needs of the married. The court ducked the question of whether the state may impose a general prohibition on contraception by opining that whatever the rights of access may be, they must be the same for all.
32. *Eisenstadt*, 453 (emphasis in original; citations omitted).
33. *Lawrence*, 605 (Justice Thomas, dissenting).
34. *Lawrence*, 590 (Justice Scalia, dissenting).
35. *Lawrence*, 575.

36. *Lawrence*, 575.
37. *Poe*, 542–543 (1961) (Justice Harlan, dissenting, emphasis added, internal quotation marks omitted).
38. Justice Blackmun's passionate and eloquent dissent in *Bowers* is far more often quoted than is Justice Stevens's. But Kennedy may have chosen to quote Stevens because he was a sitting member of the *Lawrence* court.
39. *Lawrence*, 578.
40. It could be argued that in the contraception and abortion cases after *Griswold*, the distinctions between privacy and due process became more blurred than they were in 1965. The point that *Lawrence* makes about the constitutional theories of equality of treatment and due process, that they "are linked in important respects, and a decision on [either] advances both interests" (575), is equally true of privacy and due process.
41. *Lawrence*, 567 (emphasis added).
42. *Lawrence*, 564–565 (emphasis added).
43. *Lawrence*, 568.
44. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (private possession of obscene matter cannot be criminalized even if the matter itself is unprotected).
45. *Lawrence*, 562.
46. *Lawrence*, 562.
47. *Lawrence*, 564.
48. *Loving v. Virginia*, 388 U.S. 1 (1967).
49. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
50. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
51. *Prince v. Massachusetts*, 321 U.S. 158 (1944).
52. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
53. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
54. *Lawrence*, 562.
55. Katherine M. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 (June 2004), 1408–09.
56. Nan D. Hunter, "Living with *Lawrence*," *Minnesota Law Review* 88 (May 2004), 1138, citing Kendall Thomas, "Our *Brown*? Reading *Lawrence v. Texas*" (January 4, 2004) (unpublished manuscript).
57. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," 1408.
58. Carlos A. Ball, "The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of *Lawrence v. Texas*," *Minnesota Law Review* 88 (May 2004), 1212.
59. *Lawrence*, 574, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).
60. *Lawrence*, 588 (Justice Scalia, dissenting).
61. The *Lawrence* Court's rejection of equal protection analysis was a strong affirmation of an individual's right to freedom of sexual expression, for it struck down *all* remaining sodomy laws, not just those targeting homosexuals. *Lawrence* thus places *all* non-procreative sexual intimacy beyond the reach of the state's penal code. This aspect of the decision affirms a right to sexuality and sexual expression.
62. *Bowers*, 205 (Justice Blackmun, dissenting).
63. *Bowers*, 211 (Justice Blackmun, dissenting).
64. Jamie Weinstein and Tobyn DeMarco, "Challenging Dissent: The Ontology and Logic of *Lawrence v. Texas*," *Cardozo Women's Law Journal* 10 (Winter 2004): 423–65, 423.
65. Laurence Tribe, "The 'Fundamental Right' that Dare Not Speak Its Name," *Harvard Law Review* 117 (April 2004), 1911. Also see Justice Blackmun in *Bowers*: "It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."
66. *Lawrence*, 591 (Justice Scalia, dissenting).
67. *Lawrence*, 601 (Justice Scalia, dissenting, internal quotes and emphasis omitted).
68. *Lawrence*, 602 (Justice Scalia, dissenting).
69. *Lawrence*, 604 (Justice Scalia, dissenting).
70. *Goodridge v. Department of Public Health*, 440 Mass. 309, 343 (2003). The Massachusetts decision was based upon its own state Constitution and did not rely upon U.S. Supreme Court jurisprudence, though both the majority and the dissenters cited *Lawrence* liberally.

71. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," 1417. Franke's contention that the Court relied on "a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty" (1400) similarly seems to ignore important dimensions of the decision.
72. Tribe, "The 'Fundamental Right' that Dare Not Speak Its Name," 1911.