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LAWRENCE v. TEXAS: THE DECISION AND ITS IMPLICATIONS FOR THE FUTURE

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In *Lawrence v. Texas*,[2] the Supreme Court held that Texas did not have the constitutional power to criminalize consensual homosexual sodomy that takes place in the home. It found that sodomy between consenting adults in the privacy of the home is a protected liberty interest[3] and that the state of Texas did not have a legitimate governmental interest in infringing it.[4] The decision raises a number of difficult and controversial aspects of constitutional interpretation.

The specific issue in *Lawrence* is part of the larger issue of when it is appropriate for the United States Supreme Court to imply a constitutionally protected right under the doctrine of

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

[3] U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[4] *Lawrence*, 123 S. Ct. at 2483.

substantive due process.[5] When is it appropriate for the Court to find that individuals have a constitutionally protected right in the areas of personal autonomy[6] or sexual privacy,[7] even though the right is not supported by the text of the Constitution?

Prior to *Laurence*, the United States Supreme Court had implied some fundamental constitutional rights in the personal autonomy privacy area.[8] For example, in *Skinner v. Oklahoma*[9] the Court recognized a fundamental constitutionally protected right to reproduce.[10] In *Griswold v. Connecticut*,[11] the Court held that married individuals have a constitutional right to purchase and use contraceptives.[12] The abortion cases generally hold that a pregnant woman has a constitutionally protected right not to reproduce.[13]

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[5] *Id.* at 2478 (finding that the issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986) was whether the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy).

[6] Alan B. Handler, Article, *Individual Worth*, 17 HOFSTRA L. REV. 493, 495 (1989) (defining personal autonomy as "the right in each individual to self-determination and personal choice").

[7] Symposium, *Sexual Privacy and the Public Life: Panel II Reviving Privacy?*, 67 GEO. WASH. L. REV. 1183, 1187 (1999) ("Sexual privacy is a vehicle and domain for sexual self-expression.").

[8] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (marriage); Roe v. Wade, 410 U.S. 113, 153 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation).

[9] 316 U.S. at 535.

[10] *Id.* at 545. *Skinner*, however, was decided on equal protection grounds.

[11] 381 U.S. at 479.

[12] *Id.* at 485-86. *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[13] *See, e.g., Roe*, 410 U.S. at 113 (holding that abortion was a fundamental right, guaranteed by the Due Process Clause); Planned Parenthood v. Casey, 505 U.S. 833, 896 (1992) (holding that a pregnant woman's right to choose to have an abortion is a protected liberty interest); Stenberg v. Carhart, 530 U.S. 914 (2000) (holding that law banning "partial birth" abortion that failed to include exception when necessary to preserve mothers' health imposed undue burden on right to choose abortion).

Supreme Court decisional law also recognizes a constitutionally protected right to marry.[14] In the *Griswold* case, Justice Douglas spoke about the importance of marriage. He explained that it is a special, intimate, and hopefully enduring relationship.[15] He was an expert on the subject. He was married four times.

Then there is the constitutional right to possess and view obscene materials in the privacy of the home.[16] For some, this right may be necessary in order to exercise the right to reproduce. There are limitations on the constitutional right of privacy.[17] In 1986, the Supreme Court rendered a very controversial decision in *Bowers v. Hardwick.*[18] In *Bowers*, the Supreme Court rejected a constitutional right on the part of homosexual individuals to engage in consensual sodomy even when it takes place in the privacy of their home.[19] The Court found that this activity is not

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[14] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 96 (1987); *Zablocki*, 434 U.S. at 386; Loving v. Virginia, 388 U.S. 1 (1967).

[15] *Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

[16] *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that the First and Fourteenth Amendments prevent the government from criminalizing mere possession of obscene materials held in the privacy of an individual's home). However, Osborne v. Ohio, 495 U.S. 103, 111 (1990), established that this right does not include child pornography.

[17] *See* United States v. Orito, 413 U.S. 139, 141-42 (1973) (noting that although the Federal Constitution protects a right to privacy in the home, the privacy right to possess obscenity in the home does not create a correlative right to receive, transport or distribute obscene materials); *Stanley,* 394 U.S. at 568 (noting that the states "retain broad power to regulate obscenity").

[18] 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472.

[19] *Id.* at 195-96 (stating "[p]lainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home," and providing as examples of non-immunized conduct the possession and use of illegal drugs, firearms,

deeply rooted in the nation's history and tradition.[20] Furthermore, the Court found that the criminalization of homosexual sodomy, even if consensual and in the privacy of the home, was supported by Texas' legitimate interest in promoting morality of all of the citizens in the state.[21]

Chief Justice Burger's concurring opinion stressed that homosexual sodomy had been prohibited for ages on end, and that its condemnation is firmly rooted in Judeo-Christian ethical standards. He quoted Blackmun's commentary that homosexual sodomy is a "heinous act," "the very mention of which is a disgrace to human nature."[22] Interestingly, this type of harsh language that we see in the concurrence of the Chief Justice in *Bowers* does not show up in the dissenting opinions of *Lawrence*.

In *Bowers*, Justice Powell concurred. He indicated that he may have voted the other way if Michael Hardwick had actually been convicted and incarcerated for engaging in homosexual sodomy.[23] His vote was critical because *Bowers* was a five-to-four

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stolen goods, and the commission of adultery, incest, and other illegal sexual activity).

[20] *Id.* at 192-94 (observing that proscriptions on sodomy had ancient roots since it was recognized as a criminal offense at common law).

[21] *Id.* at 196.

[22] *Id.* at 197 (Burger, C.J., concurring).

[23] *Bowers*, 478 U.S. at 197 (Powell, J., concurring). Justice Powell joined the decision of the Court because he agreed there was no fundamental substantive right under the Due Process Clause to engage in homosexual conduct. *Id.* However, he stated that the twenty year prison sentence authorized by Georgia's statute might raise a serious Eighth Amendment cruel and unusual punishment issue had Hardwick been tried, convicted, and sentenced for engaging in consensual sodomy in the privacy of his home. *Id.*

decision,[24] and so a lot of attention was given to his concurring opinion. In later years, Justice Powell reportedly told some of his law clerks and colleagues on the Supreme Court that he had never met a homosexual person, not realizing that one of the clerks to whom he was speaking was homosexual.[25] Four years after *Bowers* was decided, Justice Powell, in his speech delivered at New York University School of Law, stated that he regretted his vote in *Bowers*.[26] He stated that he probably made a mistake in that case and that he thought the dissenting Justices had the better argument.[27] I point that out because one of the themes of the Supreme Court's last term might be said to be the influence or the impact of Justice Powell on the Court's affirmative action and homosexual rights decisions. It may well have had an impact in

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[24] *Id.* at 186 (In *Bowers*, Justice White delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Blackmun filed a dissenting opinion, joined by Justices Brennan, Marshall, and Stevens).

[25] JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 521 (1994). Powell, in an attempt to understand the difficult issues presented by *Bowers,* sought the opinion of a law clerk who, in Powell's perception, was the more liberal of his four clerks. After the clerk opined that ten percent of the population was gay, Powell, shocked by this information and not knowing that the clerk himself was gay, declared that he believed he had never met a homosexual. *Id.*

[26] *Id.* at 530. Although Justice Powell would eventually provide the crucial vote upholding the constitutionality of the sodomy statute in *Bowers*, press releases issued around the time of the decision indicated that Powell initially voted to strike down Georgia's sodomy law. Though a possibly spurious story within the gay community, Powell purportedly implied four years after *Bowers* was decided that he would have voted the other way had he ever met a gay person. Symposium, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 650 (1992).

[27] JEFFRIES, *supra* note 25, at 530 (recounting Powell's recantation of his vote in *Bowers* and Powell's recognition, after a subsequent rereading of the opinion, that the dissent had the better argument).

Lawrence v. Texas, at least in terms of his post-vote confession that, "maybe I got that one wrong."

In *Lawrence,* the Supreme Court overturned *Bowers v. Hardwick* and held that the state does not have the authority to criminalize consensual homosexual sodomy that takes place in the home.[28] The holding is limited to consensual activity that takes place in private.[29] It does not cover sexual activity in public; it does not encompass sexual activity of children; it does not encompass activity that is the result of coercion by one individual against another; it does not encompass any type of activity engaged in for money.[30]

The basis of the Court's decision may be one of the most critical issues. The Court in *Lawrence* said, and I think carefully, that engaging in consensual homosexual sodomy is a liberty interest.[31] It is a liberty interest under the Due Process Clause of the Fourteenth Amendment. What the Court did not say is that engaging in homosexual sodomy is a fundamental constitutionally protected right. It did not say that engaging in homosexual sodomy is even a fundamental liberty interest, a specially-protected liberty interest, or a basic liberty interest. All

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[28] *Lawrence*, 123 S. Ct. at 2484 (explicitly overruling *Bowers* and holding Texas' statute making it a crime for two consenting same sex adults to engage in certain intimate conduct in the privacy of the home unconstitutional because the statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

[29] *Id.* (stating that the right to liberty under the Due Process Clause prevents the government from criminalizing sexual practices performed between consenting same sex adults in their private lives).

[30] *Id.*

[31] *Id.*

of those phrases have been used by the Court in its prior decisional law.[32]

I believe it is significant that the Court in *Lawrence* very carefully described homosexual sodomy as a liberty interest and nothing more. You might say, "What's the significance of that?" Well, it is potentially significant because when the Court has found that an individual has a fundamental constitutional right to engage in an activity, it has employed heightened judicial scrutiny. Further, the Court has said that phrases like fundamental liberty interest, specially-protected liberty interest, or basic liberty interest are equivalent to a fundamental constitutionally protected right.[33] Heightened judicial scrutiny imposes the burden on the government to justify its infringement on the particular right by demonstrating either a compelling stance or maybe something closely akin, like an important or significant interest.[34] On the other hand, when the Court has described the activity as being a mere liberty interest, my reading of the case is that the Court has normally applied what we call low level judicial scrutiny.

I think that in constitutional decision-making, the level of judicial review is absolutely critical in the way cases are decided. For high level judicial review, there is a virtual presumption of unconstitutionality with no deference being given to the legislative judgment. On the other hand, when the Court uses low level

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[32] *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).

[33] *Id.*

[34] *Lawrence*, 123 S. Ct. at 2483. *See, e.g., Zablocki*, 434 U.S. at 378; Moore v. City of East Cleveland, 431 U.S. 494 (1977).

judicial scrutiny, there is a presumption of constitutionality, and a significant degree of deference is given to the legislative judgment. In a very large percentage of these cases, the legislative policy is held constitutional. Nevertheless, in *Lawrence*, the United States Supreme Court, although stating that the activity here was a liberty interest, held the Texas policy seeking to criminalize consensual homosexual sodomy to be a violation of substantive due process.[35] The Court said that Texas did not have a legitimate interest in infringing upon the individual's right to engage in the particular activity.[36]

During the oral argument the attorney for the state of Texas urged that, "We are trying to promote the morality of all of the citizens in the state of Texas."[37] Justice Breyer pressed the attorney for the state, "Tell us what is the legitimate interest on the part of the Texas to criminalize this consensual homosexual sodomy."[38] Counsel responded by quoting a nursery rhyme. "I do not like you, Dr. Fell. The reason why I cannot tell."[39] This apparently irritated Justice Breyer who said, "I would like a straight answer to my question,"[40] maybe not realizing the double entendre that was involved in asking for the straight answer.

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[35] *Lawrence,* 123 S. Ct. at 2484.

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

[37] Id. at 2486.

[38] Martin A. Schwartz, *Constitutional Basis of Lawrence v. Texas,* N.Y.L.J., Oct. 14, 2003, at 3.

[39] *Id.*

[40] *Id.*

The Court in *Lawrence* concluded that Texas did not have a legitimate governmental interest in promoting morality, which means that the legislative majority in Texas did not have power to decide what is moral and what is not moral for all of the citizens of the state. I read *Lawrence* as invoking a type of low level judicial scrutiny, with the Court saying the state of Texas in this case did not have a legitimate governmental interest justifying infringement of the liberty interest.

That does not mean that the decision was incorrect in terms of its outcome. Furthermore, if I am right that it is low level interest scrutiny, it is quite important low level scrutiny. This is because the United States Supreme Court rejected Texas' attempt to justify criminalizing homosexual sodomy on the basis of its purported interest in promoting the morality of its citizens[41] because the Court found that this is not a legitimate governmental interest.[42] That seems extremely significant because when cases come up in the future, and they are already beginning to surface,[43] it seems to me that one of the major arguments that the government will be expected to make on behalf of other governmental policies that disadvantage homosexuals is the governmental interest in morality. *Lawrence* holds that morality is not a legitimate governmental interest.

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[41] *Lawrence*, 123 S. Ct. at 2486.

[42] *Id.* at 2492.

[43] *See, e.g.*, United States v. Sampson, 275 F. Supp. 2d 49 (D. Mass. 2003).

I would read that ruling in the *Lawrence* case together with the Supreme Court's ruling in its 1996 decision, *Romer v. Evans,*[44] in the equal protection context that a government purpose to harm a politically unpopular group, namely homosexuals, is not a legitimate governmental interest.[45] If you put these two rulings together, that state interest in promoting morality is not a legitimate governmental interest and that the state does not have a legitimate governmental interest in harming a politically unpopular group, this would seemingly take away from the government two of the major arguments that could be advanced in support of the constitutionality of governmental policies that disadvantage homosexuals.

COMMENTS FROM PANELISTS

PROFESSOR HELLERSTEIN:[46] I agree with Professor Schwartz's analysis in terms of the level of scrutiny and where *Lawrence* might fit. The beauty of the case is that I do not know where it is going; I am not sure many people know where it is

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[44] 517 U.S. 620 (1996).

[45] *Id.* at 634 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

[46] Professor of Law, Brooklyn Law School; B.A., Brooklyn College; J.D., Harvard Law School. Professor Hellerstein teaches Constitutional Law, Civil Rights Law, and Criminal Procedure. He is an expert in criminal law and constitutional litigation; he has argued numerous appeals before the United States Supreme Court, the Second Circuit, and the New York Court of Appeals.

going. Also, I am not so sure that breaking down the level of scrutiny will have that much play. Here are my reasons for saying that: I believe that sometimes the United States Supreme Court leads our country. At times, when it has led our country in certain venues, it has gotten ahead of us and has subsequently paid a price for it. However, sometimes the Court lags behind. I think that in this case, the Court has caught up with what it perceived to be a particular status — the voluntary consensual relationships amongst adults.

The Court references not only our own customs, but what is happening around the world as well.[47] Does this decision lead anywhere? I think that is the mystery. On the one hand, I believe it is a Magna Carta; it is momentous for the gay community because of the language Justice Kennedy uses when he begins his opinion. It is not, at that moment, something that is at a level of constitutional scrutiny. Rather, Justice Kennedy's choice of words has a thrust that goes deep into societal feelings and policies. In order to avoid actually specifying the level of scrutiny that should be employed and to make the decision consistent with prior rulings, Justice Kennedy explained that although the laws involved in *Bowers* "purport to do no more than prohibit a particular sexual act," their penalties and purposes have far more reaching consequences touching upon the most private conduct, sexual

[47] *Lawrence*, 123 S. Ct. at 2481 (discussing European views and actions undertaken contrary to the reasoning of *Bowers*).

behavior in the most private of places — in the home.[48] In short, they seek to control a personal relationship.

This opening salvo, and the essence of Kennedy's opinion for the majority, is such that it contains a momentous thrust of messages that is almost supra-constitutional. It is the Court speaking beyond pure legalisms. Does this mean, for example, that the prohibition against homosexual marriage will be held unconstitutional? What about the "don't ask, don't tell" policy of the military? What are the consequences of this in other applications?

PROFESSOR KAUFMAN:[49] I strongly agree with Professor Hellerstein's emphasis of the symbolic importance of the case. Putting constitutional doctrinal analysis aside, I think its symbolic effect cannot be overstated. We all read accounts of the reaction in the courtroom the day the decision was announced with people there openly weeping.[50] I have been told that Lawrence Tribe, who argued *Bowers*, described it as his single most painful loss; he was weeping himself as *Lawrence v. Texas* was

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[48] *Id.* at 2478.

[49] Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Skidmore College, 1970; J.D., New York University, 1975; L.L.M., New York University, 1992. Prior to serving as Vice Dean and Professor of Law at Touro Law Center, Professor Kaufman was a Managing Attorney at Westchester Legal Services, Inc. Professor Kaufman is a Reporter for the New York Pattern Jury Instructions. She has published primarily in the areas of civil rights and women in India.

[50] *See, e.g.*, Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's 86 Ruling*, N.Y. TIMES, June 27, 2003, at A1.

announced.[51] It has been described as the *Brown v. Board of Education*[52] of this issue.[53] I think one reason for its symbolic importance is, as Professor Schwartz described, the fact that *Bowers* itself was written in such an offensive way. It was written in a way that could not help but be perceived as demeaning. *Lawrence v. Texas* basically provides the Court's apology for that decision.

PROFESSOR SCHWARTZ: There are many concepts here to which we have to return. One is the implications of *Lawrence* for future challenges by homosexuals against government action that disadvantages them. The other is the symbolic importance of the decision. From the standpoint of those of us who teach constitutional law, if nothing else, we have to try to explain things to a group of law students. What makes sense and what doesn't make sense? That is not only important for students, but it is also important for attorneys who litigate constitutional issues and lower court judges who must know the principles and doctrines to use in deciding cases.

That is where I find parts of *Lawrence* troublesome; how does the decision fit into the whole constitutional doctrinal scheme of principles? Professor Hellerstein spoke about the glowing language and Professor Kaufman spoke about the decision going

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[51] David G. Savage, *Justices Take a Turn to the Left*, L.A. TIMES, June 29, 2003, at 1.

[52] 347 U.S. 483 (1954).

[53] Dean E. Murphy, *The Supreme Court: The Reaction; Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20.

far beyond the Constitution in terms of its importance; but the role of the Court is to interpret the Constitution. From that standpoint, it is somewhat disappointing that the Court would be so careful as to describe this activity as being just a liberty interest. It is disturbing that the Court would not take the next step and say this is a very intimate, very personal activity taking place in the privacy of the home — why is that not a fundamental constitutionally protected right? Professor Kaufman mentioned that Professor Tribe argued on behalf of Michael Hardwick in *Bowers v. Hardwick*. One of the best statements that Professor Tribe made about *Bowers* and *Lawrence* was that the question is not what the men were doing in the bedroom, but what was the State doing there?[54] That sums up the whole issue.

The other part of the decision which I again find troubling from the analytical standpoint — I have no problems with the outcome, that is, the overturning of *Bowers* — is the Court's ruling that morality is not a legitimate governmental interest.[55] Where is the support for that conclusion? The range of legitimate governmental interest is supposed to be captured in the concept of the police power. Police power is classically described as the government's interest in protecting or promoting the health,

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[54] Kristin Eliasberg, *Pride and Privacy as the Supreme Court Prepares to Hear a Landmark Gay-Rights Case, Advocates Debate Strategy*, BOSTON GLOBE, Mar. 2, 2003, at E1.

[55] *Lawrence*, 123 S. Ct. at 2483 (holding that although a particular practice has been traditionally viewed as immoral in a state that "is not a sufficient

welfare, safety, and morals of the community. The Court in *Lawrence* ruled almost by fiat that the state's interest in morality is not a legitimate governmental interest. If the Court had gone to the next level and held that consensual homosexual sodomy in the privacy of the home is a fundamental constitutional right that deserves heightened scrutiny, then perhaps the Court might reason that while morality is a legitimate governmental interest, it does not rise to the level of being a compelling or even significant governmental interest.

So, here we have a holding that says morality is not a legitimate governmental interest, and I have to say that I see that as being troublesome in trying to teach this area of law. Has the Court not, in prior decisions, indicated that the government does have an interest in promoting morality?[56] For example, the government's power to prohibit the sale and purchase of obscene

[56] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (holding Indiana's "public indecency statute furthers a substantial government interest in protecting order and morality"); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding zoning ordinance forbidding adult theatres in proximity to residential areas based in part in city's interest in preserving quality of life); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding zoning law requiring dispersal of adult theatres based in part on city's interest in preserving character of community); Paris Adult Theatre I. v. Slaton, 413 U.S. 49 (1973) (holding states have legitimate interest in protecting children that justifies state regulating of adult theatres); Ginsberg v. New York, 390 U.S. 629, 636 (1968) (upholding the New York Court of Appeals holding that the State has the "power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults"); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press and 'social interest in order and morality' outweighs any benefits that may be derived from the protection of obscene utterances") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

material, what is that police power supported by?[57] The Court says, arguably, there is some correlation between obscenity and criminal activity.[58] Even with non-obscene sexually explicit materials, which is a big issue here on Long Island, why can the government control the locations of so-called adult entertainment sex shops?[59] A prime reason for this is that the government has an interest in raising the quality of life.[60] What does that mean? Maybe it is just another way of describing the government's interest in promoting morality.

JUDGE LAZER:[61] In a Court where the switch of one vote for political or other reasons turns all of the jurisprudence upside down from time to time, I think the distinction between liberty and basic/fundamental liberty is great for the brief writers, but difficult for the judges writing the opinion. Depending on how

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[57] *Ginsberg*, 390 U.S. at 636.

[58] *Id.* at 643.

[59] *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). *See also Young*, 427 U.S. at 50; *City of Renton*, 475 U.S. at 41.

[60] *Alameda Books,* 535 U.S. at 425 (recognizing reduction of crime as a substantial government interest).

[61] The Honorable Leon D. Lazer is a graduate of the City College of New York and received his LL.B from New York University Law School. Judge Lazer served as an Associate Justice of the Appellate Division, Second Department, from 1979 to 1986 and was a New York State Supreme Court judge from 1973 to 1986. He was a partner in the New York law firm of Shea & Gould; Town Attorney for the Town of Huntington, New York; member of the Temporary State Commission to Study Governmental Costs in Nassau and Suffolk Counties; Chair of Pattern Jury Instructions Committee of the New York State Association of Supreme Court Justices; author of many published judicial opinions; member of the American Law Institute; member of the American and New York State Bar Associations and the Association of Supreme Court Justices of New York State. Judge Lazer retired from the bench in 1986.

ideologically they want to go or how the fifth judge wants to go, the significance of those distinctions pales somewhat. How significant are those distinctions? Where are we going to go? A lot depends on who is going to succeed to the various seats on the Court. At that point, it can either become a fundamental liberty in the future or it can, in some way, be significantly eroded. What I am referring to, of course, is the difficulty of the entire concept of the nine non-elected folk who serve as an impartial law in the super legislature in the country. So, in my opinion, I think the decision moves us ahead to where the future is.

PROFESSOR SCHWARTZ: The fact that the Court did not describe the activity in this case as a fundamental constitutional right and did not use heightened judicial scrutiny certainly does not preclude it in a future case from saying it is a fundamental constitutional right and that heightened scrutiny is appropriate. In a future case, the Court can go back and look at *Lawrence* and say well, in *Lawrence* and in *Romer v. Evans* it was sufficient for us to say that the government did not have a legitimate governmental interest; we did not have to go any further in those cases.

The decision is interesting for the number of issues raised from the perspective of constitutional decision-making. It is also a decision that is interesting because of the way it was written. Justice Kennedy invokes for the Court a wide variety of legal sources. Let us first look at the issue of constitutional decision-making. For example, take the question of whether or not to

overturn *Bowers v. Hardwick.* That is always a big issue in constitutional decision-making when there is a prior precedent on point.[62] Do we adhere to it or do we overturn it? The Court had to decide whether to rest the decision on substantive due process grounds and overturn *Bowers v. Hardwick.* As Professor Kaufman said, *Bowers* was probably viewed as a type of blight on the Court's reputation, and maybe the harshness of that concurring opinion by the Chief Justice in some sense provided an easier justification for overturning the *Bowers* precedent, as if the Court was saying, let's get this one off the books, this is not a good decision to keep around. The Court in *Lawrence* discussed the stare decisis issue specifically: that is, was there justification for overturning *Bowers v. Hardwick*?[63] The Court said yes, there was, because it was not correctly decided back then and it is not correct today.[64]

Then there is the related issue that Professor Hellerstein refers to, namely whether to rely on equal protection or due process. If the Court goes the equal protection route and holds the Texas policy is unconstitutional on equal protection grounds, it can

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[62] *Lawrence*, 123 S. Ct. at 2483 ("[W]hen a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or society reliance on the existence of that liberty cautions with particular strength against reversing course.").

[63] *Id.* at 2482 (stating the "instant case requires us to address whether *Bowers* itself has continuing validity").

[64] *Id.* at 2484.

rule in favor of the individual and against the state without having to overturn *Bowers v. Hardwick* because Texas is a state that criminalized homosexual but not heterosexual sodomy. That is the theme of Justice O'Connor's concurring opinion.[65] However, the majority said, in effect, equal protection is not enough.[66] The majority found that *Bowers* continuing as precedent demeans the lives of homosexual individuals and it must be confronted head-on.[67]

Next we come to the rich array of sources relied upon in the Court's decision. Who would have predicted that in rendering this decision on federal constitutional grounds that the Court would be relying upon state constitutional precedent, saying the decisions under some state constitutions that have been rendered since *Bowers* have undercut its validity?[68] Kennedy even used

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[65] *Id.* at 2484-85 (O'Conner, J., concurring).

[66] *Id.* at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

[67] *Lawrence*, 123 S. Ct. at 2478 (stating that accepting the issue in *Bowers* as "simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . . . ").

[68] *Id.* at 2480. *See* Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) (holding law criminalizing private homosexual conduct violates state equal protection provision); Powell v. State, 510 S.E.2d 18 (1998) (holding state sodomy statute unconstitutional as violative of the right to privacy under the Georgia Constitution); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (law prohibiting private homosexual conduct violates state constitutional right to privacy and state constitution equal protection clause); Gryczan v. State, 942 P.2d 112 (Mont. 1997) (law prohibiting same-sex sexual conduct violates state constitution; not justified by state's purported morality interest); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (law criminalizing private homosexual conduct violates state constitutional right to privacy).

international law sources. There is a decision cited from the European Court of Human Rights.[69]

Then there was this surprising development last term: the Court in *Lawrence* placed significant reliance on briefs submitted by amicus, including the American Civil Liberties Union brief.[70] However, the key brief was the brief by the history professors.[71] The history professors argued that the analysis of the historical condemnation of homosexuality in *Bowers* was too superficial, and perhaps it was not even all that accurate.[72] The history professors argued, and the Court agreed, that there had been less historical governmental condemnation of homosexual conduct and less governmental singling out of homosexual conduct for unlawfulness than the majority thought in *Bowers.*[73]

There is a great symbolic importance to the decision. This is a decision that is likely to spur some change both by government and in the private sector. Shortly after *Lawrence* was decided, it was reported that Wal-Mart, which is described as the world's

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[69] *Lawrence*, 123 S. Ct. at 2481 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981) (holding that provisions criminalizing sodomy in Northern Ireland violated "a person's right to respect for his private life in contravention of Article 8 of the European Convention on Human Rights.")).

[70] *Id.* at 2478 (citing Brief of Amici Curiae of the ACLU, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102)).

[71] Brief of Amici Curiae of Professors of History George Chauncey, et al., Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).

[72] *Id.* at 4 ("Recent historical scholarship demonstrates the flaws in the historical accounts endorsed by the Court and Chief Justice Berger [in *Bowers*].").

[73] *Lawrence*, 123 S. Ct. at 2478 (stating that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter"); Brief of Amici Curiae of Professors of History George Chauncey, et al., at 4

biggest retailer and biggest employer, adopted a policy barring discrimination on the basis of sexual orientation.[74] In the New York Times, there was an article that the California state legislature enacted a statute that provides that to be eligible to enter into large-scale contractual relationships with the state of California, the private party will be required to provide equal benefits for domestic partners in a nontraditional marriage situation.[75] Those are two significant developments already, and there most likely will be more.[76]

PROFESSOR HELLERSTEIN: When I said Magna Carta, I did not mean this was just a symbolic case; I meant that it had a thrust. This opinion, because it is under substantive due process liberty, is more intellectually honest than I thought *Romer v. Evans* was. I do not have a problem with a court "Lochnerizing"[77] on something that is as close to that as this

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(stating "contrary to the Court's assumption in Bowers, sodomy prohibitions have varied enormously in the last millennium. . . .").

[74] Ann Zimmerman, *Wal-Mart Adds Sexual Lifestyle to its Antidiscrimination Policy*, WALL ST. J., July 3, 2003, at B3.

[75] *In California, Equal Benefits for Partners are Mandated*, N.Y. TIMES, Oct. 14, 2003, at A23.

[76] *See, e.g.*, Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (2003) (holding that state law banning same-sex marriage violates state constitutional liberty and equality provisions because not rationally related to permissible purpose).

[77] *See* Lochner v. New York, 198 U.S. 45 (1905); *see also* Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1056 n.21 (5th Cir. 1984) (discussing how the term "Lochnerizing" arose in relation to the period of substantive due process review where the Court invalidated state economic and social legislation for interfering with the liberty of contract).

a strict constructionist.[78]

The interesting thing to me about the Kennedy opinion is that it resurrects *Griswold* to a degree. In my classes in law school, Justice Douglas's penumbra became sort of a laughable thing. What do you mean penumbra? On the other hand, the issue of how much morality can be legislated remains an important and open question. When Justice Scalia says all of a sudden that the majority tells us we can tell the states about morality, he argues that the context for that debate is indeed large. The significance of Justice Kennedy's opinion is that he narrows it because he draws it back into the home, back into where most things are of the essence of life and command tolerance in any civilized society in terms of privacy. In terms of individual, intimate choice, the home is where it happens.

I am not disappointed, as Professor Schwartz seems to be, that the majority opinion has not articulated an even greater fundamental liberty interest rationale than it did. As Judge Lazer pointed out, there may have been an internal constraint in the manner in which the opinion was written given the political forces that abound. Also, the Court is savvy enough to know that after this decision is unleashed on the populace there will be a discussion on the issues of same sex marriage and homosexuality

[78] *See* Pierre Schlag, *Essay: Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1688 (1996) (stating that "for the strict constructionists, the very constitutive character of the Constitution means that it must be read cautiously, conservatively, and narrowly").

in the military. It would be inappropriate and unwise judicial writing for the Court to impale itself on a standard that it could not control with respect to these more complex issues. Thus, I have neither a problem with the Court's opinion nor do I have a disappointment with what it does not do.

PROFESSOR SCHWARTZ: The troublesome aspect is that it means there are occasions in which it is appropriate for the Court to render a decision simply policy driven that does not have a lot to do with interpreting the Constitution. One could say that is great when you wind up with let us say, *Brown v. Board of Education* or a decision like *Lawrence*, but what happens when we see a decision that is policy driven and we do not like the policy? Then what we do, of course, is we condemn the Justices. We say well, the Justices are not interpreting the Constitution; they are spinning out their own policy. That is the problem of going down that road.

Again, it is not to disagree with the decision, but maybe disagree with the way it was written. There is going to be a new wave of litigation now. It has already started in terms of challenges to other governmental policies and actions that disadvantaged homosexuals; that is public employment,[79] public

[79] *See, e.g.*, Snider v. Jefferson State Cmty. Coll., 344 F.3d 1325 (11th Cir. 2003) (involving male security officers suing the college president and dean of business operations for same-sex harassment).

benefits,[80] immigration policies,[81] custody issues,[82] and adoption issues.[83] Probably the two biggest and most visible issues are going to be the right to marry and the military.[84]

In terms of marriage, is it likely that the United States Supreme Court would now hold that homosexual individuals have a constitutionally protected right to marry? Just for myself, I think that it is doubtful that we are going to see that from the present Court. Justice O'Connor already said in her concurring opinion that *Lawrence* is not a case where the state has an interest in promoting something traditional, like the traditional notion of marriage,[85] so maybe she has already signaled her vote.

My instincts tell me that the careful way the *Lawrence*

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[80] *See, e.g.*, Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003) (discussing the right to all benefits and obligations of marriage under state law for same-sex couples).

[81] *See, e.g.*, Zhen Xiung Lin v. Ashcroft, No. 02-3699, 2003 U.S. App. LEXIS 23295, at *1 (3d Cir. Nov. 13, 2003) (affirming a refusal to grant asylum for a homosexual immigrant in the United States).

[82] *See, e.g.*, Taylor v. Taylor, 110 S.W.3d 731 (Ark. 2003) (reversing a circuit court order refusing a homosexual woman's claim for custody of her two children).

[83] *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (denying relief under the equal protection and due process clauses of the Fourteenth Amendment to homosexual couples prohibited from adopting children under state law).

[84] *See, e.g.*, Standhardt v. Superior Court of Arizona, 77 P.3d 451 (Ariz. Ct. App. 2003) (discussing the right of homosexual couples to obtain a marriage license in the wake of *Lawrence*); Hensala v. Dep't of the Air Force, 343 F.3d 951 (9th Cir. 2003) (stating "the Uniform Code of Military Justice has criminalized sex between service members of the same gender and provided that such conduct is an offense punishable by court martial").

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

decision was written signals that the marriage issue is probably going to be handled primarily on a state law basis, in state legislatures, and perhaps under state constitutional provisions. Some states have privacy provisions in their state constitutions.[86] States have equal protection provisions; they do not have to be interpreted the same way as the equal protection provision of the federal constitution. Some states, like Vermont, have equal benefits clauses.[87] I think if I was involved in this litigation, that is the route I would tend to go. Look for the change on the state level rather than on the federal constitutional level, especially on the right to marry.

PROFESSOR KAUFMAN: Recently, the Arizona Court of Appeals ruled that *Lawrence v. Texas* does not mean that states

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[86] *See, e.g.*, ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed"); ARIZ. CONST. art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law"); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein"); HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest").

[87] VT. CONST. art. 7 provides:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

have to recognize a right to marry for same sex couples.[88] It held that Arizona had a valid policy preference to reserve formal marriage to heterosexual couples and that the policy preference reflected the state's interest in recognizing marriage for the importance of encouraging childrearing.[89]

Now, of course, the obvious response is, but you do not limit heterosexual marriage to people who are able to procreate; you do not prevent octogenarians from marrying. The difficult question, of course, is if there were to be a federal constitutional challenge launched, what would the standard of review be? On the equal protection front in *Romer*, the Court did not apply heightened scrutiny.[90] It did not have to since the classification could not satisfy even rational basis review, and the Court is not inclined to find new suspect classifications.[91] If you rely on the right to marry, the problem there becomes, in part, definitional. The right to marry has been discussed in terms of the importance that states have recognized in heterosexual unions, and it is not clear that the Supreme Court will apply that in the context of

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[88] *Standhardt,* 77 P.3d at 465.

[89] *Id.* at 463-64.

[90] *Romer*, 517 U.S. at 631 (applying the rational relationship test to the facts in dispute).

[91] *Id.* at 632-33 ("The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served.").

homosexual unions.

PROFESSOR. SCHWARTZ: Even under fairly low level scrutiny, prisoners have a constitutionally protected right to marry.[92] The Supreme Court's decision in *Turner v. Safley*[93] is filled with all kinds of platitudes about marriage, and the Court stressed that most inmates will be released at some point. Therefore, marriage could be meaningful for them.[94] However, this is definitely going to be one issue to watch on all levels. There is a federal statute, the Federal Defense of Marriage Act,[95] which is not hospitable to same-sex marriage.

PROFESSOR KAUFMAN: Thirty-seven states have similar laws.[96]

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[92] *See, e.g.*, In re Goalen, 414 U.S. 1148 (1974) (holding that inmates nearing their release dates have a right to marry upon recommendation of their treatment team).

[93] 482 U.S. at 78.

[94] *Goalen*, 414 U.S. at 1149.

[95] The Federal Defense of Marriage Act, 1 U.S.C. § 7 (2003), provides in pertinent part:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

[96] *See, e.g.*, Lynn D. Wardle, *Revisiting Doma: Protecting Federalism in Family Law*, 58 OR. ST. B. BULL. 21, 23 n.12 (1998) (discussing thirty of the thirty-seven states that have these particular marriage laws). They are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Montana, Michigan, Mississippi, Montana, North

PROFESSOR. SCHWARTZ: The federal statute provides the judicial definition of marriage.[97] It says one male, one female; you cannot have multiple spouses.[98] Then there is another provision that says if one state does recognize homosexual marriage, no other state is required to recognize that marriage in its state.[99]

Just a few moments on the military policy, there are actually a couple of military policies here. One of the most visible is the "Don't Ask, Don't Tell Policy." Pre-*Lawrence*, every circuit court that dealt with the constitutionality of this policy found it was constitutional.[100] I guess the question now is whether that is likely to change after *Lawrence*. I will give my take on it. Whenever there is a challenge to a military policy, the challenging party thinks, "I have the case; this is the one that is going to overturn the policy." Historically, the individual winds up being disappointed. Historically, you wind up with a decision that is written focusing on the importance of giving deference to the expertise of the military leaders, meaning the President and the Congress.[101] That

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Carolina, North Dakota, Nebraska, Oklahoma, Nevada, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Washington.

[97] 1 U.S.C. § 7.

[98] *Id.*

[99] 28 U.S.C. § 1738c (2003).

[100] *See, e.g.*, Holmes v. Calif. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Walmer v. United States Dep't of Def., 52 F.3d 851 (10th Cir. 1995).

[101] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (rejecting equal protection challenge to law requiring only males to register with Selective

perhaps is going to be one of the interesting aspects here, whether that deference will continue with respect to this policy. There is a case that was just argued before one of the Military Justice Courts of Appeals.[102] The case involves a challenge to a provision in the Uniform Code of Military Justice which says anyone who engages in any type of sodomy activity and who is a member of the military is guilty of a crime.[103] Actually, what it says is guilty of sodomy, I guess there is another provision that says it is made a criminal offense. The account of the oral argument in the National Law Journal indicated to me that the judges on the military tribunal viewed this as a very serious issue. They asked questions about the level of scrutiny.[104]

PROFESSOR KAUFMAN: Yes, and apparently the Defense Department has instructed the Joint Service Committee on Military Justice, which is a body of military lawyers, to review Article 125 in light of that.[105]

Service; exemption for women is substantially related to government's interest in raising combat troops); Korematsu v. United States, 323 U.S. 214 (1944) (finding that the Court could not reject the judgment of the military and Congress that there were disloyal members of the population who constituted a menace to the national defense and safety).

[102] United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003).

[103] 10 U.S.C § 925 Art. 125 (2003) provides: "(a) Any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

[104] John D. Hutson, Opinion, *Don't Ask Don't Tell, Retire a Bad Military Policy*, NATIONAL LAW JOURNAL, Aug. 11, 2003, at 30.

[105] *Sodomy Ruling Spurs Challenges to Military's Policy on Gays*, THE WASHINGTON POST, Aug. 4, 2003, at A01.

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