

A Survey of Gay Rights Culminating in *Lawrence v. Texas*

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*"Homosexuality is neither a sin nor an abnormality but only a difference."*¹
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1. Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 513 (2002) (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1962) (comments revised 1980)).

I. INTRODUCTION

Homosexuality is determined by birth, just as are skin color and gender.² Similar to the rights of African-Americans and women in the past, rights of gay men and lesbians are finally being recognized after suffering a history of government discrimination.³ *Lawrence v. Texas*⁴ has the potential to do for gay men and lesbians what *Brown v. Board of Education*⁵ did for African-Americans and *Frontiero v. Richardson*⁶ did for women, that is, to make gay men and lesbians equal to heterosexuals in the eyes of the law and, through influence, the eyes of society.⁷

Prior to *Lawrence*, when the U.S. Supreme Court handed down its decision in *Bowers v. Hardwick*,⁸ gay men and lesbians' ascension to equality was halted and even pushed back.⁹ *Bowers* dealt a devastating blow to the gay rights movement by allowing states to continue criminalizing intimate sexual relations between homosexuals, thereby denying them a "sensitive, key relationship to human existence."¹⁰ The decision went beyond merely sexual conduct and essentially solidified the immoral stigma associated with homosexuals throughout America's history and openly endorsed widespread discrimination against gay men and lesbians.¹¹ The repercussions of *Bowers* echoed in the ears of gay men and lesbians throughout America in every facet of life for seventeen long years. That changed on June 26, 2003, when *Lawrence v. Texas* overruled *Bowers*.¹² This decision may become the most powerful force used by gay men and lesbians on their path to equality.

This note traces the condemnation of and discrimination against homosexuals from our nation's early history through the United States Supreme Court's privacy

2. C. Ray Cliett, *How a Note or a Grope Can Be Justification for the Killing of a Homosexual. An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African-Americans and Women*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 219, 253 (2003).

3. See *id.* at 219-20.

4. 123 S. Ct. 2472 (2003).

5. 347 U.S. 483 (1954).

6. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

7. *Frontiero*, 411 U.S. at 690-91 (striking down laws extending benefits to spouses of men but denying benefits to spouses of women and finding that classifications based on sex violate equal protection); *Brown*, 347 U.S. at 495 (striking down "separate but equal" laws, finding that segregation of African-Americans violated equal protection).

8. 478 U.S. 186 (1986).

9. *Id.* at 192, 196.

10. James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 LAW & SEXUALITY 159, 161 (2003) (quoting *Roth v. United States*, 354 U.S. 476, 487 (1957)).

11. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003) (O'Connor, J., concurring).

12. *Id.* at 2484.

decisions, and finally culminates in *Lawrence*. The Supreme Court decisions focused on here are those analyzing gay rights under the right to privacy portion of the Fourteenth Amendment's Due Process Clause. This note does not focus on claims brought under the Equal Protection Clause because it was the claims brought under the Due Process Clause that established the right to privacy, ultimately giving rise to the seminal decisions in *Bowers* and *Lawrence*.

II. A BRIEF HISTORY OF HOMOSEXUALITY

A. *Ancient Roots*¹³

Although the criminalization of sodomy has been a constant in many cultures throughout history, the definition has varied.¹⁴ Sodomy has always included homosexual conduct.¹⁵ The earliest Hebraic laws prohibiting sodomy viewed it as male homosexual conduct.¹⁶ As sodomy laws developed and became more widespread, they came to encompass oral and anal sex no matter who the participants were—same or opposite-sex, male or female.¹⁷ Sodomy in some areas even included bestiality.¹⁸ These laws covering both same and opposite-sex conduct defined sodomy as “unnatural sex act[s] which . . . [are] condemned,”¹⁹ and, “opposite of a natural sex act.”²⁰ Most sodomy laws today are of this type, applying to both same-sex and opposite-sex conduct.²¹ However, the application of these sodomy laws, regardless of the conduct they prohibited, was mostly towards prosecution of same-sex couples.²² Regardless of whether the sodomy laws cover only same-sex conduct or same and opposite-sex conduct, as one author noted, “at the end of the day, we all

13. *Bowers*, 478 U.S. at 192 (describing laws against homosexual sodomy as having “ancient roots”).

14. Major Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected in the Military by the Right to Privacy*, 171 MIL. L. REV. 91, 94-95 (2002).

15. *See id.*

16. *Id.*

17. *See* Adam Hickey, *Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy*, 111 YALE L.J. 993, 1030 n.1 (2002).

18. Baime, *supra* note 14, at 94-95; Bonnie Johnson, *Constitutional Law-Privacy and Equal Protection-Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians*, *Jegley v. Picado*, 25 U. ARK. LITTLE ROCK L. REV. 681, 699 (2003).

19. Johnson, *supra* note 18, at 699 (quoting *Conner v. State*, 490 S.W.2d 114, 115 (Ark. 1973)).

20. *Id.*; *see also* Baime, *supra* note 14, at 94 (quoting *United States v. Jones*, 14 M.J. 1008, 1010 (1982)) (defining oral sex as “unnatural or deviant” conduct).

21. Hickey, *supra* note 17, at 1030 n.1; *see, e.g.*, MINN. STAT. § 609.293(1) (2003) (“‘Sodomy’ means carnally knowing any person by the anus or by or with the mouth.”).

22. *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986).

know that the word 'sodomy' means one thing to most people, at least on first impression: men having sex with other men."²³

Homosexuality was tolerated, even accepted, by ancient societies such as the Greeks.²⁴ Greece was eventually consumed by the Roman Empire, and the Roman Empire was consumed by Christianity.²⁵ Not surprisingly, condemnation of homosexuals originated from Christian dogma.²⁶ Christians considered homosexuality inherently sinful and cited specific references in the Bible.²⁷ Chief Justice Burger in his concurring opinion in *Bowers* observed, "Condemnation of . . . [sodomy] is firmly rooted in Judeo-Christian moral and ethical standards."²⁸ In heterosexual conduct, "[S]odomy in marriage often leads to distaste, revulsion, and divorce[.]"²⁹ St. Thomas Aquinas believed that all non-procreative sex was sinful because it made "extraordinary demands on the body and led to disease."³⁰

Christianity's archaic view on homosexuals resonates into modern times. The American Lutheran Church's current position on human sexuality states, "This church regards the practice of homosexual erotic behavior as contrary to God's intent."³¹ Some Christians even view the AIDS epidemic as God's punishment for the sexual perversions of gay men.³² The Vatican viewed homosexuals as "intrinsically disordered,"³³ and preached to its followers that "[excusing]

23. Hickey, *supra* note 17, at 993 n.1.

24. Cliett, *supra* note 2, at 222.

25. *Id.*

26. Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 495 (2002).

27. *Id.* at 496 (quoting *Genesis* 19:1-11 (referencing the "sexual abuse of male visitors to Sodom"); *Leviticus* 20:13 ("The man who lies with a man in the same way as with a woman; they have done a hateful thing together; they must die"); 1 *Corinthians* 6:9-11 ("condemning sodomites"); 1 *Timothy* 1:8-11 ("condemning immorality with boys or men"); and *Romans* 1:22-27 ("[T]heir menfolk have given up natural intercourse to be consumed with passion for each other, men doing shameless things with men and getting an appropriate reward for their perversion")). By contrast, inconsistencies between the Bible and mainstream Christianity's stance against polygamy go unnoticed. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 166 (2001) (citing the books of *Genesis* and *Kings* as authority to engage in polygamy).

28. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

29. MURDOCH & PRICE, *supra* note 27, at 160.

30. *Id.* at 290.

31. Hermann, *supra* note 26, at 496 (quoting Brief on Behalf of Amici Curiae American Friends Service Committee, et al., at 15-25, *State v. Baxley*, 656 So. 2d 973 (La. 1995) (No. 94-2982), reprinted in, WILLIAM RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW*, 98, 99 (2d ed. 1997).

32. Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261, 273 (2002).

33. Hermann, *supra* note 26, at 497 (quoting SACRED CONGREGATION FOR THE DOCTRINE OF

homosexual relations . . . [is] in opposition to . . . the moral sense of the Christian people."³⁴

Christian condemnation of homosexuality made its way into legal texts.³⁵ As relevant to the United States, these Christian-inspired laws permeated English legal texts in the fourteenth century.³⁶ Punishment for homosexuality was appropriately barbarous for the age: "[T]hose who 'are guilty of bestiality or *sodomy* shall be buried alive in the ground.'"³⁷ Sir William Blackstone made the church-law influence even more apparent, writing that sodomy was a crime that "the express law of God, determine[s] to be capital. Of which we have a single instance . . . by the destruction of two cities by fire from heaven."³⁸ English monarchial and parliamentary legislation making sodomy punishable by death persisted until such laws were abolished in 1861.³⁹

As with most facets of American life, sodomy laws traveled zealously from England to the fledgling American colonies.⁴⁰ Early American settlers emigrating from England discouraged and shunned any non-procreative sexual activity as counter-utilitarian.⁴¹ "[T]he imperative to procreate dominated the social attitude toward and organization of sexuality."⁴² Basically, the prevailing attitude towards sexuality was: If you were having sex, it better be to make little workers, and if you were not, you should be out in the field plowing and tilling.⁴³ Sexual behavior that did not support reproduction, not even considering the "counterproductive" and "morally-wrong" acts of homosexuality, "was seen as deviant, [and] self-indulgent."⁴⁴ Reflecting the prevailing attitude, sodomy was a crime in all the original thirteen States when they ratified the Bill of Rights.⁴⁵ When the Constitution was drafted in 1787, only Pennsylvania had abolished the death penalty for sodomy.⁴⁶

THE FAITH, LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS 4 (Oct. 1, 1986)).

34. *Id.* at 497 (quoting SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS 8-9 (Dec. 29, 1975)).

35. *Id.* at 497-98.

36. *Id.*

37. *Id.* (quoting PAUL CRANE, GAYS AND THE LAW 11 (1982)).

38. Hermann, *supra* note 26, at 498 (quoting THE GAY ACADEMIC 70 (Louie Crew ed., 1978)).

39. *Id.*

40. Alexander, *supra* note 32, at 265.

41. *Id.*

42. *Id.* (quoting JOHN D' EMELIO, SEXUAL POLITICS, AND SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, 10 (1998)).

43. *See id.*

44. *Id.*

45. Johnson, *supra* note 18, at 698.

46. MURDOCH & PRICE, *supra* note 27, at 2.

B. Rise of Homosexual Identity and Social Response

The concept of sexual freedom and recreation had to be established before homosexual identity could emerge.⁴⁷ Both remained elusive until the agrarian culture of America was transformed by the industrial revolution in the late nineteenth century.⁴⁸ The rise of the city replaced procreation with affection, pleasure, recreation, and curiosity in sex.⁴⁹ The stage for the rise of homosexuality was set.⁵⁰ The end of the nineteenth and beginning of the twentieth century, despite persisting moral and legal condemnation, saw the emergence of a homosexual underground.⁵¹ Subsequent to World War II, the gay culture in America began to envision greater acceptance.⁵²

It is this backdrop of emerging gay culture in America to which modern sodomy laws owe their pedigree.⁵³ As homosexuals became more confident and visible during this period, Christian morality was cited in full force as justification for criminalizing this outburst of homosexual activity.⁵⁴ Because many gay men at the time commonly dressed in drag, laws were accordingly enacted to eradicate any signs of homosexuality.⁵⁵ For example, a Chicago ordinance made it an offense for a person to appear in public "in a dress not belonging to his or her sex," while another in San Francisco stated, "It shall be unlawful for any person to appear in public, *with intent to deceive*, in the dress, clothing or apparel not belonging to or usually worn by persons of his own of [sic] her sex."⁵⁶ These laws permitted arrests and prosecutions of men merely for wearing items of women's clothing.⁵⁷ Under California law in 1966, six homosexuals were caught kissing, arrested for "lewd or dissolute conduct in a public place," and consequently registered as "sex offenders."⁵⁸

In contrast, there was extreme disparity between the punishments for the same crimes committed by homosexuals and heterosexuals: a public sodomy arrest could result in a 15-year prison sentence, while a public heterosexual intercourse arrest could result in a \$100 fine.⁵⁹ The Supreme Court simply overlooked all this, and even

47. See Alexander, *supra* note 32, at 265-66.

48. *Id.*

49. *Id.* at 266.

50. *Id.*

51. *Id.* at 266-68.

52. Alexander, *supra* note 32, at 268.

53. See *id.* at 267.

54. *Id.*

55. Hermann, *supra* note 26, at 506.

56. *Id.* (quoting CHICAGO, ILL., CODE § 2012 (1911) and SAN FRANCISCO, CA., ORDINANCE 819, § 1 (1903)).

57. *Id.*

58. MURDOCH & PRICE, *supra* note 27, at 143.

59. *Id.* at 160.

encouraged it, as exemplified by then Justice Rehnquist's 1978 comparison of homosexuals to a contagious disease.⁶⁰

Alongside Christian morality, science rose in the late nineteenth century as additional justification for criminalizing homosexuals.⁶¹ The study of homosexuality began in the mid-nineteenth century, causing medical professionals to label homosexuality as a congenital, psychological condition rather than an acquired trait.⁶² Homosexuality was understood as the inhibition of normal sexual dispositions and the catalyst of intrinsic perversion.⁶³ According to experts of the time, "homosexual behavior . . . can never lead to authentic pleasure, love or stability."⁶⁴ Coupled with the moral degeneracy of homosexuals, this psychopathological view stigmatized homosexuals as mentally diseased perverts and "sexual predator[s]" unable to control their perverse sexual desires, "posing a threat to heterosexual men, and especially to male youth."⁶⁵ Modern sodomy law thus developed around the notion of protecting the public against unwanted sexual attacks by homosexuals.⁶⁶ Ironically, records show that many of those arrested as sexual psychopaths under these laws were actually adult males engaging in consensual anal or oral sex.⁶⁷ Moreover, the scientists labeling homosexuality as congenital, thus creating scientific justification for early sodomy laws, were also the laws' most adamant opponents.⁶⁸ Although these scientists viewed homosexuality as an illness, they recognized that it was beyond an individual's control.⁶⁹ Punishing an individual for something beyond his or her control would be cruel and unfair,⁷⁰ and "legislation against homosexuality has no clear effect either in diminishing or increasing its prevalence."⁷¹ Stated differently, because homosexuality was congenital, sodomy laws had no deterrent effect on homosexual conduct and were therefore pointless.⁷²

60. *Id.* at 322.

61. Alexander, *supra* note 32, at 267 (citing JOHN D'EMELIO, *SEXUAL POLITICS & SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, 10 (1998)).

62. Hermann, *supra* note 26, at 502.

63. *Id.* at 515.

64. *Id.* at 528.

65. *Id.* at 515.

66. *See id.* at 516.

67. Hermann, *supra* note 26, at 517.

68. *Id.* at 504.

69. *Id.*

70. E. Lauren Arnault, *Status, Conduct, and Forced Disclosure: What Does Bowers v. Hardwick Really Say?*, 36 U.C. DAVIS L. REV. 757, 771 (2003); Herman, *supra* note 26, at 513.

71. Hermann, *supra* note 26, at 504 (quoting HAVELOCK ELLIS & JOHN SYMONDS, *SEXUAL INVERSION XIV* (1897)).

72. *See id.*

The Supreme Court's decision in *Boutilier v. Immigration & Naturalization Service*⁷³ clearly illustrates the legal effects of labeling homosexuals as mentally ill. Immigration law in the mid-1900's denied entry into the United States individuals with "psychopathic personalit[ies]," although what constituted "psychopathic personality" was undefined.⁷⁴ Boutilier applied for citizenship and disclosed that he had engaged in homosexual conduct in the past.⁷⁵ Based on his disclosure, the Immigration and Naturalization Service (INS) labeled Boutilier as a "sexual deviate," having a "psychopathic personality," and therefore subject to deportation.⁷⁶ The INS rejected Boutilier's psychiatrist's assertion that his homosexuality did not equate to him having a psychopathic personality.⁷⁷ Upon review of the INS's decision, the Supreme Court held that psychopathic personality clearly included "homosexuals and other sex perverts," despite the fact that homosexuals were never expressly mentioned in the language of the immigration statute.⁷⁸ The Court stated, "The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals . . ."⁷⁹ Like the INS, the Court ruled against Boutilier despite reports of examining psychiatrists finding Boutilier not to be a psychopath despite his homosexuality.⁸⁰ Recognizing the stigmatizing effect of the majority's decision, the dissenting justices noted that "[d]eportation is the equivalent to banishment or exile."⁸¹

The federal government also heavily relied on "scientific evidence" to label homosexuals as unfit for certain government work.⁸² The Department of Defense considered homosexuals security risks based on psychiatry labeling homosexuality as a mental disorder conducive of deviance and unreliability.⁸³ In the 1950s, the federal government instituted drastic reforms to purge its work force of homosexuals, with perhaps its single most devastating blow being President Dwight D. Eisenhower's "executive order listing sexual perversion as disqualifying *anyone* from a federal job."⁸⁴ "Perhaps as dangerous as the actual Communists are the secret perverts who have infiltrated our government in recent years."⁸⁵ Because "[o]ne homosexual . . .

73. 387 U.S. 118 (1967).

74. *Id.* at 120, 122.

75. *Id.* at 119.

76. *Id.* at 120.

77. *Id.*

78. *Boutilier*, 387 U.S. at 120, 122.

79. *Id.* at 120.

80. *Id.* at 132-33 (Douglas, J., dissenting).

81. *Id.* at 132.

82. Hermann, *supra* note 26, at 530-31.

83. *Id.*

84. MURDOCH & PRICE, *supra* note 27, at 38 (emphasis added).

85. *Id.* at 35 (quoting *Perverts Called Government Peril*, N.Y. TIMES, Apr. 19, 1950, at 25)).

[could] pollute a government office,"⁸⁶ gay men and lesbians were referred to as "Stalin's Atom Bomb."⁸⁷

Of course, there were those that opposed the view of homosexuals as mentally ill.⁸⁸ Sigmund Freud viewed homosexuality as a congenital condition, but instead of a sickness, he viewed it as a natural variation of one's sexual disposition.⁸⁹ He compared this variation of sexual disposition to the variation in one's libido.⁹⁰ Freud saw homosexuals as normal with no psychological deficiencies or impairment of their social functioning.⁹¹ He even noted many homosexuals as "distinguished by specially high intellectual development and ethical culture," citing such historic examples as Plato, Michelangelo Buonaroti, and Leonardo da Vinci.⁹² Freud regarded homosexuality as "neither a sin nor an abnormality but only a difference."⁹³ "[H]omosexuals were neither pathological, nor a threat to society."⁹⁴ As a result, Freud deemed treatment and deterrence unnecessary, and criminalization of homosexual conduct entirely inappropriate.⁹⁵ "Homosexual persons are not sick. They also do not belong in a court of law!"⁹⁶ "It is a great injustice to persecute homosexuality as a crime and cruelty, too."⁹⁷

Despite the general acceptance of homosexuality as a congenital trait, a number of psychiatrists argued that homosexuality was acquired.⁹⁸ They argued that homosexuality resulted from "faulty family dynamics and corrupting experiences resulting in skewed psycho-sexual development."⁹⁹ This argument led to the proposition that homosexuality was a curable mental illness.¹⁰⁰ One psychiatrist boldly stated, "today, psychiatric-psychoanalytic treatment can cure homosexuality

86. *Id.* at 37 (quoting S. DOC. NO. 81-241, at 4 (1950)).

87. *Id.* at 35 (quoting Dr. Arthur Guy Matthews, *Homosexuals are Stalin's Atom Bomb Against America*, BERNARR MACFADDEN'S VITALIZED PHYSICAL CULTURE, May 1953).

88. Hermann, *supra* note 27, at 504, 512-13.

89. *Id.* at 510-11, 513.

90. *Id.* at 511.

91. *Id.* at 510-11.

92. *Id.* at 512-13; *see also* MURDOCH & PRICE, *supra* note 27, at 273 (presenting another more modern example, Alan Turing, the gay mathematical genius who cracked Germany's encryption machines in World War II).

93. Hermann, *supra* note 26, at 513 (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1962) (comments revised 1980)).

94. *Id.* at 512.

95. *Id.*

96. *Id.* (quoting Letter from Sigmund Freud (1903), *published in* DIE ZEIT).

97. *Id.* at 513 (quoting Letter from Sigmund Freud (Apr. 19, 1905), *in* 107 AM. J. PSYCHIATRY 786 (1951)).

98. Hermann, *supra* note 26, at 522.

99. *Id.*

100. Alexander, *supra* note 32, at 267; Hermann, *supra* note 26, at 526.

[so long as that treatment is] of one to two years' duration, with a minimum of three appointments each week—provided the patient really wants to change."¹⁰¹

The stereotype of homosexuals as mentally ill, immoral degenerates persisted until the late twentieth century.¹⁰² Sodomy laws reflecting those social attitudes persisted as well.¹⁰³

C. Modern Views

Social attitudes toward homosexuals have changed in many areas.¹⁰⁴ These include medicine, Christianity, community, and policymaking.¹⁰⁵ Although these modern trends are mostly favorable, stigmatizing views of gay men and lesbians still persist.¹⁰⁶

1. New Medical Characterization

Mental health professionals today view homosexuality as congenital and not "a matter of deliberate personal election."¹⁰⁷ Or in judicial terms, homosexuality is an immutable characteristic.¹⁰⁸ Homosexuality is no longer a disease or disorder.¹⁰⁹ "In 1973, the American Psychiatric Association [(APA)] took homosexuality off its list of mental disorders."¹¹⁰ "In one fell swoop, 15 million gay people were cured!"¹¹¹ And in 1972 the National Institute of the Mental Health Task Force recommended de-criminalization of homosexual behavior, finding no evidence of any underlying pathology as basis for punishment, or deterrent effect of criminal prosecution on homosexual conduct.¹¹² The Task Force Report stated that "statutes covering sexual acts should be recast in such a way as to remove legal penalties against [homosexual]

101. Hermann, *supra* note 26, at 526 (quoting Edmund Bergler, *Eight Prerequisites for the Psychoanalytical Treatment of Homosexuality*, 31 PSYCHOANALYTICAL REVIEW 286 (1944)).

102. See Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEXUALITY 119, 135 (2003).

103. *Id.* at 144-45, 148-49.

104. *Id.* at 135, 140.

105. Hermann, *supra* note 26, at 541; Yatar, *supra* note 102, at 140.

106. Hermann, *supra* note 26, at 541.

107. *Bowers v. Hardwick*, 478 U.S. 186, 202-03, n.2 (1986).

108. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

109. Alexander, *supra* note 32, at 270; Hermann, *supra* note 26, at 537, 543.

110. Alexander, *supra* note 32, at 270.

111. MURDOCH & PRICE, *supra* note 27, at 62 (quoting RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY* (1981)).

112. Hermann, *supra* note 26, at 536-37.

acts in private among consenting adults.”¹¹³ A recent study attempting to differentiate gay men from heterosexual men based on their pathology showed that the men were “indistinguishable, except in their sexual orientation.”¹¹⁴ Some gay men were even shown to be “capable of functioning at a superior social level.”¹¹⁵ Members of the Supreme Court have also adopted the view that homosexuality is not a mental disorder, but rather, a difference in sexual disposition.¹¹⁶ As Justice Goldberg put it, “being gay [is] like having ‘blue eyes or size 8 shoes.’”¹¹⁷ Some mental health professionals not only view sodomy laws as unnecessary, but also as damaging, asserting that, “sodomy laws are psychologically damaging because their mere existence causes homosexuals to be stigmatized as criminally deviant, fuels heterosexual prejudice and can produce self-destructive self-hatred among homosexuals.”¹¹⁸

2. Church Views of Homosexuality

Christianity still has great influence over the democratic process, with Christians comprising 84.2% of the U.S. adult population.¹¹⁹ However, the Catholic Church’s animosity towards homosexuals has declined compared to a century ago.¹²⁰ The Catholic Medical Association recognizes homosexuality as an involuntary congenital trait,¹²¹ and discrimination against individuals with a homosexual orientation is disapproved.¹²² This is a monumental step away from the church’s history of open condemnation of homosexuals. However, it is merely a step and not the ultimate goal of unflinching acceptance. The Catholic Medical Association still believes homosexuality can be altered by treatment¹²³ and the Catholic Church openly endorses the condemnation of homosexual acts.¹²⁴

113. *Id.* at 537 (quoting John M. Livingood, M.D., *National Institute of Mental Health Task Force on Homosexuality, Final Report and Background Paper* 6 (1972)).

114. *Id.* at 536.

115. *Id.*

116. See MURDOCH & PRICE, *supra* note 27, at 100.

117. *Id.* (former Justice Arthur Goldberg’s daughter-in-law, Barbara Goldberg, quoting Justice Goldberg).

118. *Id.* at 290.

119. Jeffrey L. Sheler, *The Ways of Worship*, U.S. NEWS & WORLD REPORT, at 9 (Special Collector’s ed. 2003).

120. Hermann, *supra* note 26, at 496-97.

121. *Id.*

122. *Id.* at 497.

123. *Id.* at 496-97; CATHOLIC MED. ASS’N, HOMOSEXUALITY AND HOPE, *available at* <http://www.cathmed.org/publications/homosexuality.html> (last visited Apr. 5, 2004).

124. Herman, *supra* note 26, at 497.

Despite the church's views towards homosexuality, its hold and influence over the judicial process is wavering.¹²⁵ Commentators point to Justice Stevens' dissent in *Boy Scouts of America* as suggesting that "religious opposition to homosexuality should not influence the law."¹²⁶ "Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. . . . Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have [sic] modified those opinions."¹²⁷

3. Community Views of Homosexuality

At the community level, social perceptions of homosexuals have drastically changed, due in part to the "understanding of homosexuality by psychiatry and psychology."¹²⁸ This understanding has contributed to a change in law and depictions of homosexuals in popular culture.¹²⁹ "While the justices of yesteryear could go through life oblivious to the homosexuals around them or pity them as lesser beings, the justices of today—no matter how cocooned—can't avoid bumping into openly gay people who are respected pillars of society."¹³⁰ There are an estimated five to twenty-five million homosexuals in the United States today.¹³¹

Public condemnation of homosexuals is now the minority view.¹³² A nationwide poll taken in 2003 revealed that fifty-four percent of Americans believe homosexuality is an acceptable alternative lifestyle,¹³³ compared to thirty-four percent in 1982.¹³⁴ Sixty percent feel that homosexual relations between consenting adults should be legal, compared to forty-three percent in 1977.¹³⁵ Today, seventy-two percent believe that homosexuals should be allowed to serve in the armed forces, while twenty-three percent believe they should be barred from military service altogether, compared with forty-one percent in favor and seventeen percent opposed

125. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 699 (2000).

126. Hermann, *supra* note 26, at 541 (paraphrasing Justice Stevens).

127. *Id.*

128. Hermann, *supra* note 26, at 543.

129. *Id.* at 495, 543.

130. MURDOCH & PRICE, *supra* note 27, at 7.

131. *Id.* at 290.

132. Frank Newport, *Six Out of Ten Americans Say Homosexual Relations Should Be Recognized as Legal*, GALLUP POLL NEWS SERV., May 15, 2003, LEXIS, News and Business.

133. *Id.*

134. Yatar, *supra* note 102, at 135-36.

135. Newport, *supra* note 132.

in 2000.¹³⁶ Eighty-eight percent believe that homosexuals should have equal rights when it comes to job opportunities, compared to fifty-six percent in 1977.¹³⁷

Another reason for more tolerance today towards homosexuals is America's growing comfort with sex. The Supreme Court has described sex as a "great and mysterious motive force in human life,"¹³⁸ and "a sensitive, key relationship of human existence central to . . . the development to human personality."¹³⁹ The appellants' attorneys in *Lawrence* stated, "Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals . . . For gay adults, as for heterosexual ones, sexual expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive."¹⁴⁰ Further, the APA and the American Public Health Association stated, "Today it is safe to conclude that a vast majority of all adult Americans—men and women, married and unmarried, heterosexual and homosexual—have engaged in the intimate conduct made felonious by Georgia [oral and anal sex]."¹⁴¹ Ninety percent of American heterosexual couples had engaged in oral sex at one time or another in their lives, and at least one-quarter of married couples under thirty-five had engaged in anal sex, with oral and anal sex being more common among the young.¹⁴² Three-quarters of Americans consider oral sex a "part of normal sex," and oral and anal sex to "substantially benefit" many relationships.¹⁴³ "Married men who engage in oral sex with their wives are happier with their sex lives and more satisfied with their relationships . . ."¹⁴⁴ Health professionals find reliance on vaginal intercourse alone not psychologically healthy.¹⁴⁵

Favorable social views towards homosexuals transfer to the private organizations they run. "By 1999, over half of the Fortune 500 companies included sexual orientation in their workplace anti-discrimination policies, and anti-discrimination policies in universities had become virtually standard."¹⁴⁶ In 1982, one U.S. employer offered health insurance benefits to domestic partners of its gay and lesbian

136. Yatar, *supra* note 102, at 136.

137. Newport, *supra* note 132.

138. Roth v. United States, 354 U.S. 476, 487 (1957).

139. Paris Adult Theater I v. Slaton, 413 U.S. 49, 63 (1973).

140. Petitioner's Brief at 11, 16-17, *Lawrence v. Texas*, 537 U.S. 1044 (2002) (No. 02-102), available at 2003 WL 152352.

141. MURDOCH & PRICE, *supra* note 27, at 289 (quoting Brief of Amici Curiae American Psychological Association and American Public Health Association at 5, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), available at, 1986 WL 720445 [hereinafter *Bowers* Brief]).

142. *Bowers* Brief, *supra* note 141, at 5-6.

143. *Bowers* Brief, *supra* note 141, at 8, 15; MURDOCH & PRICE, *supra* note 27, at 290.

144. *Bowers* Brief, *supra* note 141, at 15; MURDOCH & PRICE, *supra* note 27, at 290.

145. *Bowers* Brief, *supra* note 141, at 16; MURDOCH & PRICE, *supra* note 27, at 290.

146. Alexander, *supra* note 32, at 271.

employees for the first time.¹⁴⁷ Nearly two-dozen had done so by 1990.¹⁴⁸ By 1999, almost two employers a week were adding domestic partner benefits to their compensation plans.¹⁴⁹

Today, the list of scientific, professional, and religious associations that oppose criminalization of private adult sexual conduct includes “the American Psychological Association, the American Medical Association, the American Bar Association, the American Public Health Association and the National Association of Social Workers as well as prominent Jewish, Catholic, Episcopal, Lutheran, Methodist, Presbyterian, Church of Christ, American Baptist and Quaker organizations.”¹⁵⁰

Despite the modern trend towards treating homosexuals as equals to heterosexuals, the public attitude is far from an acceptable standard. There is still a great amount of social and cultural stigma which demeans the lives of gay men and lesbians in America.¹⁵¹ Today, fifty-six percent of Americans still express the belief that homosexual behavior is “morally wrong.”¹⁵² Anti-gay sentiment is especially still prevalent in the South, where fifty-two percent of southerners opposed decriminalization of sodomy and sixty-six percent said it was not an acceptable alternative lifestyle.¹⁵³ An illustration of an unacceptable standard of tolerance is when a teacher can still scold a seven-year-old boy and force him to repeatedly write “I will never use the word ‘gay’ in school again” after he told a classmate about his lesbian mother.¹⁵⁴ The same teacher told the boy that gay was a bad word, causing the boy to associate his family with a “dirty word.”¹⁵⁵

4. Policy-Making

a. Generally

At the policy-making level, federal and state legislation and the United States jurisprudence are moving towards extending equal rights to gay men and lesbians, but

147. *Id.* (quoting KIM I. MILLS & DARYL HERSCHAFT, STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 9 (1999)).

148. *Id.*

149. *Id.* at 272.

150. MURDOCH & PRICE, *supra* note 27, at 289.

151. Yatar, *supra* note 102, at 141; *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003).

152. David W. Moore, *Public to Bennett: Gambling's OK*, GALLUP POLL NEWS SERVICE, May 14, 2003, LEXIS, News and Business.

153. Hickey, *supra* note 17, at 1020-21 (citing George Gallup, Jr., *The Gallup Poll: Public Opinion 1996*, at 158, 213-14 (1999)).

154. Associated Press, *Boy, 7, Scolded for Mentioning Gay Mother*, available at http://abcnews.go.com/wire/US/ap20031202_1684.html (Dec. 2, 2003).

155. *Id.*

this progress is in no way complete.¹⁵⁶ At the national level, the federal government is slow to extend rights to gay men and lesbians.¹⁵⁷ State sodomy laws are still invoked to deny federal employment to gay men and lesbians.¹⁵⁸ Perhaps the most detrimental federal program pertaining to homosexual rights is the Clinton Administration's "Don't Ask, Don't Tell."¹⁵⁹ Under the "Don't Ask, Don't Tell, Don't Pursue" policy, now codified into law, "A member of the armed forces shall be separated from the armed forces" for homosexual affiliation or conduct.¹⁶⁰ The policy therefore requires homosexual service members to remain in the closet and celibate.¹⁶¹ The military reasons, and the legislature defers, that homosexuality is incompatible with military service because it endangers "the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."¹⁶² This weeding-out of homosexual service members not only brands them unfit for military service but also hinders their future job prospects.¹⁶³

On the positive side, with the APA's removal of homosexuality from its list of mental disorders, the federal government prohibited denying employment on the basis of sexual orientation in 1975.¹⁶⁴ In 1995, President Clinton issued an executive order that security clearances could not be denied on account of homosexuality,¹⁶⁵ and another in 1998 providing blanket protection for the entire federal civil workforce from discrimination based on sexual orientation.¹⁶⁶ After the APA publicized its new stance on homosexuality, the U.S. Surgeon General, perhaps influenced by *Boutilier*, notified the INS that the Public Health Service would no longer certify homosexuals

156. See Hermann, *supra* note 26, at 541; Jonathan Tatum, *A Closer Look at Bowers v. Hardwick: State and Federal Decisions Concerning Sexual Privacy and Equal Protection*, 19 *TOURO L. REV.* 183, 186 (2002).

157. Tatum, *supra* note 154, at 183.

158. *Shahar v. Bowers*, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997) (upholding Georgia Attorney General's firing of Robin Shahar based on the assumption that, as a lesbian, she must be violating the state's sodomy law); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (upholding the FBI's denial of a job to a lesbian because she would have to work in states with sodomy laws); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 147 n.21 (N.D. Tex. 1981) (upholding the denial of a non-officer position to a gay man because of Texas's sodomy law); *Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340, 1341 (Wash. 1977) (upholding the firing of a gay public employee because state sodomy law made him "immoral").

159. Yatar, *supra* note 102, at 145.

160. 10 U.S.C. § 654 (2000); Yatar, *supra* note 102, at 145.

161. Yatar, *supra* note 102, at 145.

162. 10 U.S.C. § 654; Yatar, *supra* note 102, at 145.

163. Yatar, *supra* note 102, at 145-46.

164. Hermann, *supra* note 26, at 540 (citing Exec. Order No. 12,968, 60 Fed. Reg. 40245, 40250 (Aug. 2, 1995)).

165. Exec. Order No. 12,968, 60 Fed. Reg. 40245, 40250 (Aug. 2, 1995).

166. Exec. Order No. 13087, 63 Fed. Reg. 30097, 30097 (May 28, 1998).

as psychopaths for immigration exclusion purposes.¹⁶⁷ Taking the Surgeon General's lead, Congress entirely omitted the deviate and psychopathic exclusion with the enactment of the Immigration Act of 1990.¹⁶⁸ Congress's enactment in 1990 of the Hate Crimes Statistics Act also mandated investigation of homosexual-biased hate crimes.¹⁶⁹

On the federal judicial level, with the Supreme Court's holding in *Lawrence*, gay men and lesbians now have the guaranteed right to engage in consensual sexual conduct in the privacy of their homes.¹⁷⁰ This holding creates enormous favorable implications for gay men and lesbians. The Court essentially opened the door for homosexual equality in all aspects of life, such as employment, military service, and even marriage. Future federal cases will cite *Lawrence* as precedent when considering extending rights to gay men and lesbians.

States are also slowly emerging as gay rights champions.¹⁷¹ In 1955, the American Law Institute, in its Model Penal Code, recommended against "criminal penalties for consensual sexual relations conducted in private."¹⁷² It justified its decision on three grounds: "(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail."¹⁷³ As a result, many states changed their sodomy laws to conform to the Model Penal Code.¹⁷⁴ All thirteen original states had prohibitions on sodomy.¹⁷⁵ When the Fourteenth Amendment was ratified in 1868, sodomy was a crime in thirty-two of the thirty-seven existing states.¹⁷⁶ In 1960, all fifty states outlawed heterosexual and homosexual sodomy.¹⁷⁷ However, by 2001 only nine states (Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia) prohibited both same and opposite-sex sodomy,¹⁷⁸ and

167. Hermann, *supra* note 26, at 539.

168. Compare Immigration and Nationality (McCarren-Walter) Act of 1952, 8 U.S.C. § 1182(a)(4) (1952) with Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (1990).

169. Yatar, *supra* note 102, at 140 (citing Hate Crime Statistics Act, 28 U.S.C. § 534 (1990)).

170. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

171. Johnson, *supra* note 18, at 686-87.

172. *Lawrence*, 123 S. Ct. at 2480 (quoting MODEL PENAL CODE § 213.2, cmt. 2 (1980)).

173. *Id.*

174. *Id.* at 2480-81.

175. Johnson, *supra* note 18, at 698.

176. *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

177. Johnson, *supra* note 18, at 686.

178. Brief of Amicus Curiae American Civil Liberties Union at 8, *Lawrence* (No. 02-102), available at 2002 WL 32101085; Yatar, *supra* note 102, at 144; see, e.g., ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3) (1977); FLA. STAT. ANN. § 800.02 (West 1993); IDAHO CODE § 18-6605 (Michie 1972) (imposing a prison term of not less than five years); LA. REV. STAT. ANN. § 14:89 (West 1975) (imposing a prison term of not more than five years); MISS. CODE ANN. § 97-29-59

four states prohibited only same-sex sodomy (Kansas, Missouri, Oklahoma, Texas).¹⁷⁹ With the *Lawrence* decision, Texas will soon be removed from that list.¹⁸⁰

States have also taken other affirmative policy steps to protect gay men and lesbians. A plethora of state, city, and county laws and ordinances prohibit employment discrimination on the basis of sexual orientation, applicable to state, local, and private employers.¹⁸¹ “[A]t least twenty-two states now include sexual orientation as a factor in laws criminalizing hate crimes.”¹⁸² “[S]even states and several dozen local governments extend health insurance and financial benefits not just to the spouses, but also to the same-sex partners of their employees.”¹⁸³

On the judicial front, “state-based challenges [to sodomy laws] are flourishing.”¹⁸⁴ State courts are increasingly protecting private, consensual homosexual conduct by interpreting their state constitutions as providing broader privacy guarantees than the federal constitution,¹⁸⁵ by utilizing a third-party harm analysis where homosexual conduct is allowed absent harm to others.¹⁸⁶

In Georgia, the same sodomy statute upheld in *Bowers* by the U.S. Supreme Court was struck down twelve years later in *Powell v. Georgia*¹⁸⁷ based on the right to privacy expressly granted in Georgia’s constitution.¹⁸⁸ The Georgia Supreme Court stated that Georgia’s constitutional privacy guarantee protected private, consensual, adult sexual activity, including homosexual sodomy.¹⁸⁹ “We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult

(1942) (imposing a prison term of not more than ten years); N.C. GEN. STAT. § 14-177 (1994); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1962) (imposing a five year prison term); UTAH CODE ANN. § 76-5-403(1) (1953); VA. CODE ANN. § 18.2-361(A) (Michie 1993).

179. Yatar, *supra* note 102, at 144; see, e.g., KAN. STAT. ANN. § 21-3505(a)(1) (1993); MO. REV. STAT. § 566.090 (1995) (applying only to non-consensual activity); OKLA. STAT. tit. 21, § 886 (2002) (imposing a prison term of not more than ten years) (not covering heterosexual consensual behavior); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (holding statute unconstitutional by *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)).

180. See *Lawrence*, 123 S. Ct. at 2484.

181. *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2014-15 (2003) [hereinafter *Dev. in the Law*]; Yatar, *supra* note 102, at 138-40.

182. *Dev. in the Law*, *supra* note 180, at 2015.

183. *Id.*; see also Yatar, *supra* note 102, at 138-39.

184. Hickey, *supra* note 17, at 993-94.

185. Johnson, *supra* note 18, at 686.

186. *Id.* at 707.

187. 510 S.E.2d 18, 26 (Ga. 1998).

188. *Id.*

189. *Id.* at 24.

sexual activity.”¹⁹⁰ The only limiting factor the court placed on private acts conducted within the privacy of one’s home was third-party harm.¹⁹¹

The Arkansas,¹⁹² Kentucky,¹⁹³ Montana,¹⁹⁴ and Tennessee¹⁹⁵ Supreme Courts followed Georgia’s lead by invalidating their states’ sodomy laws based on privacy guarantees in their state constitutions and the third-party harm analysis.¹⁹⁶

b. Family Laws

In the sphere of family law, there are many inconsistencies in state courts’ extension of rights to homosexuals. Some have paved the way for progress, while others have used homosexuality to cruelly rip families apart regardless of the Supreme Court’s recognition of the fundamental nature of the family relationship¹⁹⁷ and health professionals’ assertions that same-sex couples “form family units just as stable, dependable and contributing to the commonwealth as any traditional nuclear family.”¹⁹⁸ The families affected, according to the 2000 U.S. Census, are “the more than 600,000 households of same-sex partners” nationwide.¹⁹⁹

190. *Id.*

191. Johnson, *supra* note 18, at 707.

192. See *Jegley v. Picado*, 80 S.W.3d 332, 353-54 (Ark. 2002).

193. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992).

194. See *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997).

195. See *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996).

196. Hickey, *supra* note 17, at 1007-08, 1017, 1019; see also Johnson, *supra* note 18, at 707.

197. See *Moore v. City of East Cleveland*, 431 U.S. 494, 496 n.2 (1977) (quoting *EAST CLEVELAND, OHIO, HOUSING CODE* § 1341.08 (1966)). The Court in *Moore*, noted East Cleveland’s definition of family:

“Family” means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

- (a) Husband or wife of the nominal head of the household.
- (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided however, that such unmarried children have no children residing with them.
- (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
- (d) Notwithstanding the provision of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
- (e) A family may consist of one individual.

198. MURDOCH & PRICE, *supra* note 27, at 290 (quoting *Bowers* Brief, *supra* note 140, at

The Supreme Court has explicitly recognized parents' fundamental right to raise their children free from government interference where there is no showing of any harm to the physical or mental health of the child.²⁰⁰ "The American Law Institute recently recommended that" a parent's sexual orientation not be considered as "a factor in child custody decisions."²⁰¹ This is in light of the "gayby boom," where as many as ten million children are being raised by same-sex parents today.²⁰² Despite the strong authority against it, states regularly rely on sodomy laws to take children from their gay parents, despite evidence of good parenting and happy, healthy children.²⁰³ An Alabama court best summarized the justification for these actions: "Sexual relations between persons of the same gender violate both the criminal and civil laws of this State Any person who engages in such conduct is presumptively unfit to have custody of minor children."²⁰⁴ Even in states where sodomy laws do not exist, courts have relied on the existence of sodomy laws in other states to justify separating parents from their children.²⁰⁵

In the area of adoption, "two states explicitly bar same-sex couples from adopting children."²⁰⁶ However, the majority of states permit same-sex couples to

n.35).

199. Petitioner's Brief at 17-18, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

200. *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972) (holding Amish parents had right to exempt their fourteen and fifteen-year old children from compulsory school attendance laws because no evidence of harm); *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944) (upholding child labor laws prohibiting parents from forcing nine-year old daughter to work); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923) (declaring unconstitutional laws prohibiting parents from teaching foreign language to their children).

201. Dev. in the Law, *supra* note 180, at 2005.

202. Johnson, *supra* note 18, at 713 (quoting Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger! Adjudicating Maternity for Non-biological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002)).

203. *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (denying mother custody of daughter because, as a lesbian, "she has chosen to expose the child continuously to a lifestyle that is [not] legal in this state"); *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982) (restricting gay parent's visitation rights because "[d]eviate sexual intercourse with another person of the same sex is a crime in the State of Missouri"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (denying mother custody of her son despite "the record show[ing] a mother . . . devoted to her son," because as a lesbian, she was presumably engaging in criminal acts in violation of Virginia's sodomy law); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (denying gay man custody of his son because his relationship with a man would expose his son to "conditions . . . which . . . are . . . unlawful").

204. *Ex parte H.H.*, 830 So. 2d 21, 37-38 (Ala. 2002) (denying mother custody of her child because, as a lesbian, she is presumably a criminal).

205. *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (denying lesbian mother expanded custody of her child because "permitting the . . . [mother] the freedom to travel could clearly place the children in a situation with the mother and . . . [her partner], where the adults could be subject to arrest and prosecution for deviant sexual behavior"); *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring).

206. Dev. in the Law, *supra* note 180, at 2014 (Florida prohibits adoption by homosexuals

adopt because, as one court noted, same-sex couples are in no way different than opposite-sex couples in wanting to promote "the security of their children" and to raise them in a way that is in the "best interests of the child."²⁰⁷

Same-sex marriage is probably the hottest topic in gay rights today. "Same-sex marriage remains illegal throughout [most of] the United States."²⁰⁸ States are reluctant to extend to gay men and lesbians this right, asserting that "same-sex marriage is not rooted in the nation's history or cultural tradition."²⁰⁹ Although marriage is an institution regulated by the states, the federal Defense of Marriage Act of 1996 codified the federal definition of marriage as the union of one man and one woman and gave states authority to not recognize same-sex unions legalized in other jurisdictions.²¹⁰ Two states' constitutions now similarly define marriage "as the union of one man and one woman."²¹¹

Prohibitions on same-sex marriage, however, are wavering. Other Western nations have already recognized same-sex marriages or domestic partner equivalents.²¹² Same-sex marriages have been legal in The Netherlands since 2001 and in Belgium since early 2003.²¹³ The Netherlands official definition of marriage includes "two persons of different sex or of the same sex."²¹⁴ Courts of two Canadian provinces have held limitations on same-sex marriages "unconstitutional and have ordered the government to address the issue by 2004."²¹⁵ Registered-partnership laws granting same-sex couples many of the same rights granted to opposite-sex married couples were legalized in Denmark in 1989, in Norway in 1993, in Sweden in 1995, in Iceland in 1996, and in Finland in 2002.²¹⁶ "Less expansive forms of same-sex unions were legalized in Hungary in 1998, in France in 1999, in Germany in 2000, and in Portugal in 2001."²¹⁷

In the United States, some progressive steps are also underway.²¹⁸ "The American Law Institute recently recommended that same-sex domestic partnerships

while Utah bans adoptions by same-sex couples).

207. *Id.* at 2020-21 (quoting *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999)).

208. *Id.* at 2006.

209. *Id.* at 2015.

210. *Id.* at 2015-16; Yatar, *supra* note 102, at 143.

211. Dev. in the Law, *supra* note 180 at 2014 (referring to ALASKA CONST. art. I, § 25 and HAW. CONST. art. I, § 23).

212. *Id.* at 2004-05.

213. *Id.* at 2004.

214. *Id.* at 2007 (quoting Wet Wan 21 December 2000 tot wijziging Van Boek 1 Van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (wet openstelling hawelijk), stb. 2001, nr. 9 (Neth.)).

215. Dev. in the Law, *supra* note 180, at 2005.

216. *Id.* at 2008.

217. *Id.*

218. *Id.* at 2005-06.

be recognized and accorded many of the same rights and responsibilities as traditional marriages.”²¹⁹ Four states have interpreted the Supreme Court’s recognition of marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”²²⁰ and a right “resid[ing] with the individual . . . [that] cannot be infringed by the State,”²²¹ as also extending to same-sex couples.²²² The question of whether same-sex marriage is rooted in the nation’s history and tradition—the justification for denying same-sex marriage fundamental right status—is being replaced with the question of whether the freedom to “choose one’s life partner” is rooted in our history and traditions.²²³

Accordingly, four states have recognized same-sex marriages.²²⁴ The Vermont Supreme Court’s holding in *Baker v. State*²²⁵ led the legislature in April 2000 to enact the Vermont Civil Union Act, the nation’s first civil union law, extending to same-sex couples virtually all of the rights and responsibilities under state law that opposite-sex couples are granted through marriage.²²⁶ The courts of Hawaii and Alaska held that prohibiting same-sex marriage violated their states’ constitutions.²²⁷ However, subsequent constitutional amendments in Hawaii and Alaska codified the notion that marriage was limited to opposite-sex couples.²²⁸ Regardless, the states’ court rulings were a significant step. Most recently, the Massachusetts Supreme Court also held that prohibitions against same-sex marriage violated its state constitution.²²⁹ The court defined marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”²³⁰

219. *Id.* at 2005.

220. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

221. *Id.*

222. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *5 (Alaska Sup. Ct. 1998); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

223. *Dev. in the Law*, *supra* note 180, at 2018 (quoting *Brause*, 1998 WL 88743, at *4).

224. *See Brause*, 1998 WL 88743, at *5 (Alaska); *Baehr*, 852 P.2d at 67 (Hawaii); *Goodridge*, 798 N.E.2d at 969 (Massachusetts); *Baker*, 744 A.2d at 886 (Vermont).

225. 744 A.2d at 886.

226. *Yatar*, *supra* note 102, at 137-38.

227. *See Brause*, 1998 WL 88743, at *5; *Baehr*, 852 P.2d at 67.

228. *See HAW. CONST.* art. I, § 23 (adopted 1998); *ALASKA CONST.* art. I, § 25 (adopted 1999).

229. *Goodridge*, 798 N.E.2d at 969.

230. *Id.* at 969.

III. THE RIGHT TO PRIVACY

It is in light of the liberalization of America that the right to privacy arose.²³¹ And from the recognized right to privacy, the rights to heterosexual sexual privacy and homosexual sexual privacy subsequently arose.

The concept of fundamental rights is familiar from constitutional law class. That is, certain rights are so fundamental to our way of life that the government may infringe on those rights only if it is necessary to achieve "a compelling government purpose."²³² Some of these rights are expressly mentioned in the Constitution,²³³ while others not enumerated in the text of the Constitution are recognized by the Supreme Court on a case-by-case basis.²³⁴ Predictably, difficulty arises when the Court must decide whether such unenumerated rights are sufficiently important to be regarded as fundamental.²³⁵ The fundamental right to privacy, where the right to sexual privacy lies, arose in such a way.²³⁶

The Court has expressly stated that rights are recognized as fundamental only if they are liberties "deeply rooted in this nation's history and tradition."²³⁷ The analysis is therefore whether the right claimed has been recognized in our country's history.²³⁸ However, one must question whether the Court actually follows this mandate based on its history of recognizing fundamental rights.²³⁹ As one author noted, "After *Eisenstadt*, the basis for the right to privacy was even less clear, because the Court there denied the role of tradition in deciding what acts must be protected."²⁴⁰ For example, in *Loving v. Virginia*,²⁴¹ a black woman and a white man were convicted of violating a Virginia statute that prohibited interracial marriage when they legally married.²⁴² The Framers of the Constitution, who allowed slavery, would never have envisioned its protection being used to legalize interracial marriage,²⁴³ and at the time *Loving* was decided, sixteen states prohibited interracial marriage.²⁴⁴ Despite such "history and tradition" against miscegenation, the Court held: "The freedom to marry

231. Cf. Kevin F. Ryan, *Lex et Ratio . . . Courts and the Culture Wars*, 29-APR. VT. B.J. 5, 7 (2003).

232. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 695 (2001).

233. *Id.* at 695 n.1.

234. Cf. *id.* at 696.

235. *Id.*

236. *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 736, 738 (9th Cir. 1986).

237. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

238. *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

239. Hickey, *supra* note 17, at 1001.

240. *Id.*

241. 388 U.S. 1 (1967).

242. *Id.* at 2.

243. MURDOCH & PRICE, *supra* note 27, at 170.

244. *Loving*, 388 U.S. at 6.

has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,"²⁴⁵ and, "[u]nder our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."²⁴⁶

Such inconsistency with history and tradition is apparent throughout the privacy decisions.²⁴⁷ This is evidence of the Court's willingness to depart from recognizing only those rights strictly based in history and tradition, and to recognize fundamental rights based on modern needs and standards.²⁴⁸ It is both unrealistic and impractical to assume that all rights deemed fundamental today have been recognized at one time or another in the past.²⁴⁹ This is exemplified in the aforementioned *Loving* decision and the privacy decisions discussed below.

The Court first recognized the right to privacy in 1891,²⁵⁰ when it observed, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."²⁵¹ The Court in 1928 elaborated further, "[T]he right to be let alone [by the government is] the most comprehensive of rights and the right most valued by civilized men."²⁵²

However, it was not until 1965, in *Griswold v. Connecticut*,²⁵³ that the Court first announced privacy as a fundamental right protected by the Constitution, irrespective of its lack of enumeration.²⁵⁴ *Griswold* also inherently gave rise to the right to sexual privacy.²⁵⁵ This case involved a state law prohibiting the use of contraception by married couples.²⁵⁶ The Court held the law unconstitutional based on the right to privacy.²⁵⁷ Collectively, the First, Third, Fourth, Fifth, and Ninth Amendments established a zone in which an individual's right to privacy was to be protected.²⁵⁸ The Fourth Amendment's guarantee of "the right of the people to be secure in their . . . houses" was found as a textual basis for a privacy right.²⁵⁹ As applied to this

245. *Id.* at 12.

246. *Id.*

247. *See Hickey, supra* note 17, at 1001-02.

248. Johnson, *supra* note 18, at 708.

249. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

250. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

251. *Id.* at 251.

252. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

253. 381 U.S. 479 (1965).

254. *See id.* at 482-84.

255. Arnault, *supra* note 70, at 761.

256. *Griswold*, 381 U.S. at 480.

257. *See id.* at 499.

258. *Id.* at 484.

259. U.S. CONST. amend. IV; *Griswold*, 381 U.S. at 484.

case, the Court found that the Fourth Amendment prohibited the police from “search[ing] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.”²⁶⁰ The Court also cited the Ninth Amendment as a textual basis for the right to privacy.²⁶¹ The Amendment states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁶² Justice Goldberg’s concurrence argued that the Ninth Amendment was enacted to protect fundamental rights not provided by the first eight amendments, and the first eight amendments were in no way meant to be an exhaustive list of guaranteed rights.²⁶³

The Court went on to state,

[Supreme Court jurisprudence] suggest[s] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance²⁶⁴ . . . [T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights²⁶⁵ . . . This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name.²⁶⁶

Based on those penumbras and emanations of the rights guaranteed by the Bill of Rights, the right to privacy was a “peripheral” right that could be inferred.²⁶⁷

Although *Griswold* established a fundamental right to privacy, that right was confined to the context of a married couple’s right to use contraception or, essentially, to engage in nonprocreative sex.²⁶⁸ *Eisenstadt v. Baird*²⁶⁹ expanded the privacy right to include nonprocreative sex between single persons.²⁷⁰ *Carey v. Population Services International*²⁷¹ expanded the right to minors.²⁷² These cases effectively recognized a general right to sexual privacy.²⁷³ However, after *Bowers*, as discussed

260. *Griswold*, 381 U.S. at 485.

261. *Id.* at 484.

262. U.S. CONST. amend. IX; *Griswold*, 381 U.S. at 484.

263. *Griswold*, 381 U.S. at 488-90 (Goldberg, J., concurring).

264. *Id.* at 484.

265. *Id.* at 486.

266. *Id.* at 486-87 n.1.

267. *See id.* at 484.

268. MURDOCH & PRICE, *supra* note 27, at 288 (quoting Brief for Respondent at 12, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), available at 1986 WL 720442).

269. 405 U.S. 438 (1972).

270. *Id.* at 454; see also Scott P. Johnson & Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy*, 105 W. VA. L. REV. 621, 621-22 (2003).

271. 431 U.S. 678 (1977).

272. *Id.* at 693.

273. Arnault, *supra* note 70, at 762.

below, the Court was unwilling to extend this general right of sexual privacy to homosexual conduct.²⁷⁴

*Roe v. Wade*²⁷⁵ expanded the right to privacy even further; the Court held that the right to privacy was "broad enough" for a woman to choose to undergo an abortion.²⁷⁶ The Court in *Planned Parenthood v. Casey*²⁷⁷ seemed to expand the right to privacy to protect all "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."²⁷⁸ The Court affirmed this basic principle, stating, "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."²⁷⁹ Although *Griswold* recognized the right to privacy, it did not indicate where privacy existed in the Constitution.²⁸⁰ *Roe* remedied this problem by tying the right to privacy to the Due Process Clause of the Fourteenth Amendment.²⁸¹ These concepts are later found at the heart of the arguments used in fighting for homosexual rights.²⁸²

The right to privacy took another major step in *Stanley v. Georgia*.²⁸³ *Stanley* involved the right to possess obscene, thereby illegal, materials in the privacy of the home.²⁸⁴ The Court held that although possessing the obscene materials would be justifiably illegal in public, this form of expression could not be regulated in the home.²⁸⁵ The Court effectively drew a line between the government and the home; for the government to intrude by regulation into the privacy of the home, it needed substantial justification.²⁸⁶ This additional "padding" of privacy created in the home also played an important part in protecting homosexual sodomy.²⁸⁷

As can be seen, the right to privacy must be systematically expanded on a case-by-case basis to include certain situations. *Bowers* was such a case, where the Court was first faced with the question of whether the right to privacy protected homosexual sodomy.²⁸⁸

274. *Id.*

275. 410 U.S. 113 (1973).

276. *Id.* at 153.

277. 505 U.S. 833 (1992).

278. *Id.* at 851.

279. *Id.*

280. See Hickey, *supra* note 17, at 1000.

281. Johnson & Alexander, *supra* note 270, at 625.

282. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (quoting *Planned Parenthood*, 505 U.S. at 851); *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986).

283. 394 U.S. 557 (1969).

284. *Id.* at 565.

285. See *id.*

286. *Id.* at 564; see also Hickey, *supra* note 17, at 1000.

287. See *Lawrence*, 123 S. Ct. at 2473.

288. *Bowers v. Hardwick*, 478 U.S. 186, 189-90 (1986).

IV. *BOWERS V. HARDWICK*

Bowers v. Hardwick has been deemed the most destructive force used against homosexuals in the United States,²⁸⁹ and, “[t]he most devastating gay legal setback of the 20th century.”²⁹⁰ *Bowers* effectively slammed the door on gay civil rights.²⁹¹ The gay-rights movement considered this its *Dred Scott* case.²⁹² Some believe “the case went far beyond the narrow question of privacy rights to the political status of homosexuals” and the morality of their conduct.²⁹³ *Bowers* has been perceived as “widely discredited precedent,”²⁹⁴ with Yale law professor Akhil Amar asserting, “*Bowers* is generally seen as an embarrassment.”²⁹⁵

A. *Facts and Majority Opinion*

On August 3, 1982, police officers showed up at Michael Hardwick’s house with an arrest warrant.²⁹⁶ Without Hardwick’s knowledge, the officers entered and began searching the house.²⁹⁷ Upon reaching the outside of a back bedroom door, the officers “pushed the door open and walked, uninvited and unannounced, into the candle-lit bedroom.”²⁹⁸ Officers discovered Hardwick and his male guest engaging in oral sex.²⁹⁹ Officers placed Hardwick under arrest while he protested, “What are you doing in my bedroom?”³⁰⁰ At the police station, officers ensured that everybody in Hardwick’s jail cell was aware that he was arrested for homosexual conduct, that he was in there for “cocksucking,” and that in jail he “should be able to get what he was looking for.”³⁰¹ Hardwick was charged with violating Georgia’s sodomy statute,³⁰² which provided:

289. Dev. in the Law, *supra* note 180, at 2027.

290. MURDOCH & PRICE, *supra* note 27, at 25.

291. See Stephanie Francis Ward, *High Court Upholds Gay Rights*, 2 No. 25 A.B.A. J. E-REPORT 1, ¶ 1 (June 27, 2003).

292. MURDOCH & PRICE, *supra* note 27, at 332 (quoting *Friend and Foe See Homosexual Defeat*, N.Y. TIMES, July 1, 1986, at A19). *Dred Scott* was the 1856 decision upholding slavery and ruling that blacks were “beings of an inferior order . . . so far inferior, that they had no rights which the white man was bound to respect.” *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856).

293. Hickey, *supra* note 17, at 997; Johnson & Alexander, *supra* note 270, at 629.

294. David G. Savage, *Precedential Veto*, A.B.A. J., Mar. 2003, at 28.

295. *Id.*

296. MURDOCH & PRICE, *supra* note 27, at 278.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* (quoting PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 392 (1988)).

301. Cliett, *supra* note 2, at 226 (quoting WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW 217 (2d ed. 1997)).

302. *Bowers v. Hardwick*, 478 U.S. 186, 187-88 (1986).

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.³⁰³

Based on the sodomy law, Hardwick's consensual sexual conduct in the confines of his home could have put him in jail for twenty years and placed a felony on his record comparable to aggravated battery, first-degree arson, or robbery.³⁰⁴ However, Hardwick was not prosecuted.³⁰⁵

Hardwick subsequently brought suit challenging Georgia's sodomy statute.³⁰⁶ Even though he was not prosecuted, Hardwick asserted that the statute placed him in imminent danger of arrest for conduct inherent to his lifestyle.³⁰⁷ Hardwick's claim was dismissed by the federal district court for failure to state a claim and reversed by the Eleventh Circuit Court of Appeals before reaching the U.S. Supreme Court.³⁰⁸

The Supreme Court reversed the decision of the Court of Appeals and held Georgia's sodomy statute constitutional.³⁰⁹ It is interesting to note that the Court's opinion began with a disclaimer against any judgment against homosexuals: "This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."³¹⁰ However, a reader of the opinion must question whether this disclaimer was sincere or merely politically-correct based on Justice Burger's concurrence: "Condemnation of . . . [homosexual sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards."³¹¹ "Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"³¹² "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."³¹³

The Court presented the issue as whether the federal Constitution conferred "a fundamental right upon homosexuals to engage in sodomy."³¹⁴ Under privacy, the

303. GA. CODE ANN. § 16-6-2(a)-(b) (2003).

304. *Bowers*, 478 U.S. at 197-98.

305. *Id.* at 188.

306. *Id.*

307. *Id.*

308. *Id.* at 188-89.

309. *Bowers*, 478 U.S. at 189.

310. *Id.* at 190.

311. *Id.* at 196 (Burger, J., concurring).

312. *Id.* at 197 (Powell, J., concurring) (quoting BLACKSTONE COMMENTARIES).

313. *Id.*

314. *Bowers*, 478 U.S. at 190.

Court noted that it had only recognized the attenuated rights to child rearing and education, marriage, family relationships, procreation, contraception, and abortion, none of which “bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.”³¹⁵ Because it did not fit into one of the recognized privacy rights, the Court concluded that there was no fundamental right to engage in homosexual conduct.³¹⁶

Neither was the Court willing to expand the right to privacy to protect homosexual conduct.³¹⁷ The Court held that the right to engage in homosexual conduct had neither a textual basis in the Constitution nor as part of our nation’s history and tradition.³¹⁸ On the contrary, this nation had a history and tradition of criminalizing and condemning such conduct.³¹⁹ Based on this history, “pronouncing the notion that such conduct [homosexual sodomy] should receive protection as a fundamental right [is] ‘at best, facetious.’”³²⁰

The Court next refused to consider extending the right to privacy to protect homosexual conduct in the privacy of the home.³²¹ It discounted the connection between *Stanley* and the case at hand.³²² Analogizing to *Stanley*, where possession of illegal obscene materials was protected in the privacy of the home, *Hardwick* asserted that illegal public sodomy should, likewise, be protected in the home.³²³ The Court rejected this argument, asserting that not all illegal activities are protected just because they are conducted in the home.³²⁴ By protecting illegal sodomy within the home, the Court would expose to protection “adultery, incest, and other sexual crimes . . . committed in the home.”³²⁵

Finally, the Court rejected *Hardwick*’s claim that Georgia lacked a rational basis for its sodomy law, holding morality as sufficient justification.³²⁶ It stated, “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed,” and “[w]e . . . are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.”³²⁷

315. *Id.* at 190-91.

316. *Id.* at 192.

317. *Id.* at 194-95.

318. *Id.*

319. *Bowers*, 478 U.S. at 192-94.

320. *Dev. in the Law*, *supra* note 180, at 2004 (quoting *Bowers*, 478 U.S. at 194).

321. *Bowers*, 478 U.S. at 195-96.

322. *Id.* at 195.

323. *Id.*

324. *Id.*

325. *Id.* at 195-96.

326. *Bowers*, 478 U.S. at 196.

327. *Id.*

B. *The Dissenting Opinions*

The majority opinion was attacked passionately by Justice Blackmun in his famous dissent and similarly criticized by Justice Stevens' own articulate dissent.³²⁸ Justice Blackmun quickly recognized that the case was not about the right to engage in homosexual conduct, as the majority claimed, but rather "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"³²⁹ The plain language of Georgia's sodomy law did not discriminate against the participants engaging in the prohibited conduct—it regulated heterosexual as well as homosexual conduct.³³⁰ Thus the discriminatory overtones of the case were arbitrarily and unilaterally applied by the majority opinion.³³¹ By framing the issue as the right to engage in homosexual conduct, which was not present in the United States' history and tradition, the majority sought to justify its denial of Hardwick's claim.³³² Justice Blackmun therefore redefined the issue as whether the federal Constitution conferred a fundamental right upon adults to engage in consensual sexual conduct, regardless of the chosen partner, without government interference.³³³ Echoing Hardwick's attorney, a clerk of the Supreme Court also attempted to make that issue clear in a bench memo: "THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS. ALL SORTS OF PEOPLE DO THIS KIND OF THING."³³⁴

A little known fact about *Bowers* was the presence of a married couple who brought suit alongside Hardwick to invalidate Georgia's sodomy statute.³³⁵ John and Mary Doe were "chilled and deterred" from engaging in the activity prohibited by the sodomy statute in the privacy of their home based on the statute's existence and Hardwick's arrest.³³⁶ Regardless, the district court held, and court of appeals affirmed, that the Does did not have standing to sue because they "neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute."³³⁷ The Supreme Court seized the opportunity to skirt the matter to focus on homosexual conduct only: "The only claim properly before the Court. . . is Hardwick's [suit] We express no opinion on the constitutionality of the Georgia

328. *Id.* at 199 (Blackmun, J., dissenting), 214 (Stevens, J., dissenting).

329. *Id.* at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

330. *Id.* at 200.

331. *See Bowers*, 478 U.S. at 200.

332. *See Hickey*, *supra* note 17, at 998.

333. *See Bowers*, 478 U.S. at 199-201.

334. MURDOCH & PRICE, *supra* note 27, at 291 (quoting Memorandum from Daniel C. Richman to Justice Thurgood Marshall, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)).

335. *Bowers*, 478 U.S. at 188 n.2.

336. *Id.*

337. *Id.*

statute as applied to other acts of sodomy.”³³⁸ However, engaging in criminal behavior by practicing oral or anal sex in the confines of their home (as in *Hardwick*) would theoretically and legally put the Does in imminent danger of arrest as in *Hardwick*. The Georgia Attorney General conceded that the sodomy statute would be unconstitutional if applied to a married couple.³³⁹ The only explanation for this inconsistency was the majority’s obvious discrimination against homosexuals.

Based on his redefining of the issue, Justice Blackmun found ample support for protecting homosexual conduct under the right to privacy.³⁴⁰ He argued that because the right to privacy was found to protect the rights to contraception, nonprocreative sex, and conduct in the home, it must also protect consensual homosexual sodomy between adults in the home.³⁴¹ He stated, “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”³⁴²

Justice Blackmun similarly rejected the majority’s heavy reliance on the history and tradition of criminalizing homosexual sodomy based on morality as reason for denying *Hardwick*’s claim.³⁴³ The majority upheld the criminalization of sodomy merely because states “have done so for a very long time.”³⁴⁴ Quoting Justice Holmes, Justice Blackmun stated, “I believe that ‘[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.’”³⁴⁵ He further stated, “Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”³⁴⁶ Justice Stevens’ dissent added, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”³⁴⁷

When Justice Stevens asked Senior Assistant Attorney General Michael Hobbs why Georgia did not prosecute *Hardwick* if public morality was such a serious concern, Hobbs replied that enforcement was “very difficult.”³⁴⁸ Stevens responded,

338. *Id.*

339. *Id.* at 218 n.10.

340. *Bowers*, 478 U.S. at 199-214.

341. *See generally id.* at 203-09.

342. *Id.* at 208.

343. *See id.* at 199-200, 211-12.

344. *Id.* at 199.

345. *Bowers*, 478 U.S. at 199 (quoting Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897)).

346. *Id.* at 212 (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

347. *Id.* at 216.

348. MURDOCH & PRICE, *supra* note 27, at 297 (quoting Tr. Of Oral Arg., *Bowers v.*

"It would have been very easy in this case. . .," to which Hobbs answered, "perhaps so."³⁴⁹ Stevens continued, "Presented on a silver platter and they declined to go forward. It seems to me there is some tension between the obvious ability to convict this gentleman and the supposed interest in general enforcement."³⁵⁰ Additionally, prior to Hardwick's arrest, the Attorney General stated, the "last case [of sodomy prosecution] I can recall was back in the 1930's or 40's."³⁵¹

Ultimately, despite ample constitutional support to strike down Georgia's sodomy law, including Georgia's concession that the statute, though applicable to everybody, would be unconstitutional toward married couples,³⁵² Hardwick lost.³⁵³ In the larger picture gay men and lesbians lost. Immediately after *Bowers* was decided, the *Washington Post* inquired, "What now? Can we expect an army of police to be assigned peeping patrol, instructed to barge into bedrooms and arrest anyone who deviates from the most conventional sexual practice?"³⁵⁴ Fraught with inconsistencies and obvious discrimination, *Bowers* would be used mercilessly against homosexuals for another seventeen years until *Lawrence* was decided.³⁵⁵

V. *LAWRENCE V. TEXAS*

The key gay men and lesbians needed to release them from the chains of *Bowers* finally came on June 26, 2003.³⁵⁶ *Lawrence* overruled *Bowers* and "extended to homosexuals the same fundamental right to privacy that the Court [had] long accorded to heterosexual couples."³⁵⁷

A. *Facts and Majority Opinion*

The facts in *Lawrence* are similar to *Bowers*, involving a man arrested for violating Texas's sodomy law.³⁵⁸ Houston police officers "were dispatched to a private residence in response to a reported weapons disturbance."³⁵⁹ The police

Hardwick, 478 U.S. 186 (1986) (No. 85-140), available at 1986 U.S. Trans LEXIS 74, *12).

349. *Id.*

350. *Id.*

351. *Bowers*, 478 U.S. at 219 n.11 (quoting Tr. Of Oral Arg. at 4-5, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)).

352. *Id.* at 218 n.10.

353. *Id.* at 196.

354. MURDOCH & PRICE, *supra* note 27, at 331-32 (quoting *Barging into Bedrooms*, WASH. POST, July 1, 1986, at A14).

355. See Dev. in the Law, *supra* note 180, at 2027.

356. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

357. Ward, *supra* note 291, at ¶ 1.

358. *Lawrence*, 123 S. Ct. at 2475-76.

359. *Id.* at 2475.

officers entered the apartment of John Geddes Lawrence and observed Lawrence and Tyron Garner “engaging in a sexual act.”³⁶⁰ Lawrence and Garner were arrested, held in custody overnight and each charged, convicted, and each fined \$200 for violating Texas’s sodomy law.³⁶¹ The law stated: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”³⁶² “Deviate sexual intercourse” was defined as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another with an object.”³⁶³ The history of Texas’s sodomy law showed that in 1860, Texas adopted a law prohibiting anal sex for all persons.³⁶⁴ In 1943, Texas added to the statute prohibitions on oral sex.³⁶⁵ In the early 1970s, the general sodomy law was repealed and a new sodomy law was enacted that only prohibited same-sex anal and oral sex.³⁶⁶

Lawrence and Garner did not contest violating the sodomy law or the propriety of the police conduct leading to their discovery and arrest.³⁶⁷ However, they challenged the constitutionality of Texas’s sodomy statute for violating the Equal Protection Clause and privacy rights guaranteed by both state and federal constitutions.³⁶⁸ The criminal and appellate courts, relying on *Bowers*, both rejected Lawrence’s and Garner’s constitutional claims.³⁶⁹ Lawrence and Garner appealed to the U.S. Supreme Court and were granted *certiorari*.³⁷⁰

Because the Supreme Court recognized the case’s similarities to *Bowers*, its analysis was surprisingly simple.³⁷¹ One apparent difference was that the sodomy statute at issue in *Bowers* prohibited same and opposite-sex conduct, while the sodomy statute at issue in *Lawrence* prohibited only same-sex conduct.³⁷² Upon these similar facts, the Court mainly relied on the arguments presented in *Bowers* by analyzing the case under the right to privacy.³⁷³ Instead of following the *Bowers* majority, the Court mirrored its opinion to Justices Blackmun and Stevens’ dissents. Like Justice Blackmun, the Court pointed out the *Bowers* Court’s “own failure to

360. *Id.* at 2475-76.

361. *Id.* at 2476.

362. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).

363. TEX. PENAL CODE ANN. § 21.01(1) (Vernon 2003).

364. Petitioner’s Brief at 5 n.2, *Lawrence* (No. 02-102).

365. *Id.* at 5.

366. *Id.*

367. *See Lawrence v. Texas*, 123 S.Ct. 2472, 2475-76 (2003).

368. *Id.* at 2476.

369. *Id.*

370. *Id.*

371. *See id.* at 2477.

372. *Lawrence*, 123 S.Ct. at 2477.

373. *Id.*

appreciate the extent of the liberty at stake.”³⁷⁴ Expanding on Justice Blackmun’s framing of the issue, the Court articulated the issue as whether individuals had the right to control personal relationships and “the most private human conduct, sexual behavior, and in the most private of places, the home,” which included the right to engage in homosexual conduct.³⁷⁵

The Court recounted the fundamental right to privacy under the Fourteenth Amendment established by the line of cases from *Griswold* to *Romer v. Evans*.³⁷⁶ The Court concluded that this privacy right was broad enough to protect homosexual sodomy.³⁷⁷ History and tradition were discounted by the Court, which stated “‘History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry’ . . . This emerging recognition should have been apparent when *Bowers* was decided.”³⁷⁸ And majoritarian morality was held not sufficient justification for the sodomy law.³⁷⁹

“[*Bowers*] continuance as precedent demeans the lives of homosexual persons. . . [It] 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.”³⁸⁰ Texas’s sodomy law was therefore held unconstitutional for violating an individual’s right to sexual privacy.³⁸¹

B. *The Dissenting Opinions*

The dissenting opinions authored by Justices Scalia and Thomas were also not novel, predictably following the *Bowers* majority opinion. The dissenting Justices first focused on judicial formalities rather than liberty interests and policy concerns in addressing Lawrence’s claim.³⁸² Justice Scalia argued to follow *Bowers* based on *stare decisis*, claiming that overturning a case “rendered a mere 17 years ago” would jeopardize those relying on its ruling, and be contrary to Supreme Court practice of precedential consistency.³⁸³

Justices Scalia and Thomas followed *Bowers* by arguing that the Court had never recognized the right to engage in homosexual sodomy.³⁸⁴ Because homosexual

374. *Id.* at 2478.

375. *Id.*

376. *Id.* at 2476-82.

377. *Lawrence*, 123 S. Ct. at 2484.

378. *Id.* at 2480 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

379. *Id.* at 2480, 2484.

380. *Id.* at 2482, 2484.

381. *Id.* at 2484.

382. *Lawrence*, 123 S. Ct. at 2488-98 (Scalia, J., dissenting).

383. *Id.* at 2488.

384. *Id.* at 2492.

sodomy was not a fundamental right, Texas need only show a rational basis for the sodomy law.³⁸⁵ Accordingly, Texas's moral justification was sufficient.³⁸⁶

VI. FUTURE IMPLICATIONS AND CONCLUSION

Lawrence v. Texas was decided correctly, if a little late coming. Throughout history, discrimination against gay men and lesbians has resulted in sodomy laws branding homosexuals with a criminal "scarlet letter."³⁸⁷ This "anti-homosexual prejudice is fed by 'fear and ignorance' and 'supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our deference than the Emperor Justinian's belief that homosexuality causes earthquakes.'"³⁸⁸ As Justice Brandeis once wrote, "Men feared witches and burnt women."³⁸⁹ Thus, gay men and women were condemned and criminalized. The Supreme Court in the past failed to interpret the rigid boundaries of the Constitution to protect these individuals. This is in clear contravention to the founder's intent and the Constitution's purpose to protect individuals against government tyranny and oppression. To meet this purpose, interpretations of the Constitution must rightly reflect changes in social values and attitudes.³⁹⁰ Thomas Jefferson once stated:

I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.³⁹¹

Justice Kennedy in *Lawrence* invoked this same principle more than two hundred years later when he broke the narrow, rigid constitutional boundaries erected in *Bowers* by extending gay men and lesbians the right to engage in intimate conduct:

385. *Id.* at 2494-95.

386. *Id.* at 2495.

387. Johnson, *supra* note 18, at 707-08 (quoting *Jegley v. Picado*, 80 S.W. 3d 332, 354 (Ark. 2002) (Brown, J., concurring)).

388. MURDOCH & PRICE, *supra* note 27, at 154 (quoting petition for writ of certiorari in *Schlegel v. United States*, 397 U.S. 1039 (1970)).

389. *Whitney v. California*, 274 U.S. 357, 376 (1927).

390. Johnson, *supra* note 18, at 708.

391. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (inscribed at the base of the Jefferson Memorial), <http://www.nps.gov/thje/memorial/inscript.htm>.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³⁹²

If our Constitution is the defender of justice and individual rights, it must recognize that "[I]t would be cruel and unusual punishment to imprison someone . . . 'for private conduct based on a natural sexual urge and with a consenting partner.'"³⁹³ Regarding history and tradition, "[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."³⁹⁴

Lawrence is a milestone in the fight for gay equality, and although there is obvious immediate import in this decision, the most important aspect of *Lawrence* is its implication for the future. By ruling under due process rather than equal protection, the Court not only overruled *Bowers*, it also effectively held that sexual conduct was a protected right regardless of the sexual orientation of the participants.³⁹⁵ By making no distinction between heterosexuals and homosexuals, the Court viewed the two groups as equals.³⁹⁶ The Court essentially opened the door to homosexual equality in all aspects of life, such as employment, military service, and even marriage.³⁹⁷ Future courts will cite *Lawrence* as precedence and policymakers will rely on the Court's constitutional interpretation when considering extending rights to gay men and lesbians.

Because of *Lawrence*, today there is no need to make a distinction between same and opposite-sex conduct. In time, there will be no need to make a distinction between homosexuals and heterosexuals.

392. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

393. MURDOCH & PRICE, *supra* note 27, at 307 (quoting Justice Powell).

394. *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

395. *Lawrence*, 123 S. Ct. at 2482.

396. *See id.*

397. Ward, *supra* note 291, at ¶ 1.

