

“LAWRENCE-IUM”: THE DENSEST KNOWN SUBSTANCE?

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“We are particularly hesitant to infer a new fundamental liberty interest from [Lawrence], whose language and reasoning are inconsistent with standard fundamental-rights analysis. . . . [T]he constitutional liberty interests on which the [Supreme] Court relied were invoked . . . with sweeping generality.”¹

“What *Lawrence* requires is searching constitutional inquiry.”²

I.

The Supreme Court’s 2003 decision in *Lawrence v. Texas*³ has spawned a cottage industry of law review symposia⁴ and other articles⁵ analyzing the decision, and offering sage predictions of how this unusually opaque decision will be interpreted in years to come. This “cottage” is a rather unwieldy structure, too, with larger rooms (symposia) and smaller ones (individual articles) being added on a monthly, if not weekly, basis. The interest is understandable, for although *Lawrence*’s only measurable accomplishment was to eliminate increasingly archaic anti-sodomy laws,⁶ the breadth and sweep of its language seemed to signal far-

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1. *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004).

2. *United States v. Marcum*, 60 M.J. 198, 205 (2004).

3. 539 U.S. 558 (2003).

4. Although several more such symposia have likely been published since this volume was published (in May, 2005), symposia in print at that time included, among many others: Symposium: *Equality, Privacy and Lesbian and Gay Rights After Lawrence v. Texas*, 65 OHIO ST. L. J. 1057 (2004); Symposium: *Lawrence v. Texas*, 46 S. TEX. L. REV. 245 (2004); Symposium: *Gay Rights after Lawrence v. Texas*, 88 MINN. L. REV. 1021 (2004); Symposium: *Privacy Rights in a Post-Lawrence World: Responses to Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 263 (2004).

5. See, e.g., Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509-544 (2005); Mary Ann Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75; Cass R. Sunstein, *What did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27.

6. *Lawrence*, 539 U.S. at 578. The statement in the text should not be read as minimizing the effect of those laws on the lives of gay people. For a comprehensive demonstration of the use of sodomy laws to deprive “queer people” (as seen by the laws) of a wide variety of rights that others take for granted, see Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. REV. 103 (2000). The cascading effect of *Lawrence*

reaching consequences for the GLBT⁷ community. In the words of Nan Hunter, “*Lawrence* is a breakthrough. It ends our wandering in law’s wilderness, uncertain in each case whether we would be treated with respect or contempt. . . . [It] made lesbians and gay men citizens instead of criminals. We are the newly naturalized, even if native-born, Americans.”⁸

The year-and-a-half following *Lawrence* has made clear, though, any and all predictions of the case’s reach are parlous. On the one hand, some courts have written as though *Lawrence* said nothing beyond the specific issue before the Supreme Court.⁹ On the other, some courts have read into *Lawrence* a broad commitment to full equality for gay and lesbian citizens.¹⁰ Given this disparity, perhaps the most that can (or should) be said is that, in writing the decision in *Lawrence*, Justice Kennedy sought to lay down the ground rules for the debate that was sure to follow.¹¹

Thus, the agnostic position—it’s impossible to say what *Lawrence* means—is the easiest and most defensible one to take. Indeed, in another article I have used the inconsistency of the post-*Lawrence* cases to that very end.¹² Here, I assay the question of *Lawrence*’s legacy more optimistically. Although the case’s interpretation may be evolving for many years to come—with contributions by, but by no means limited to, the Supreme Court itself—I want to argue that the apparently upside-down results in the post-*Lawrence* cases can be explained (if not

was not lost on the Court; it was celebrated by the majority, *Lawrence*, 539 U.S. at 574, and lamented by Justice Scalia in dissent. *Id.* at 589-90 (Scalia, J., dissenting).

7. The acronym in the text stands for “gay, lesbian, bi-sexual, and transgendered.” Use of this term is contestable in the context of *Lawrence*, both because it does not exactly fit all of the categories embraced by the letters “GLBT” and, more significantly, because it papers over the serious question whether the case delivers justice for those most at the margins. *See generally* Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage, and Biopolitics*, 11 WIDENER L. REV. 307 (2005).

8. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1137 (2004).

9. *See Williams v. Attorney Gen. of Alabama*, 37 F.3d 1232, 1251 (11th Cir. 2004) (Barkett, J., dissenting) (“Conceding that *Lawrence* must have done *something*, the majority acknowledges that *Lawrence* ‘established the unconstitutionality of criminal prohibitions on consensual adult sodomy,’” quoting *id.* at 1236) (emphasis in original).

10. *See Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (finding that the Massachusetts state constitution requires the issuance of marriage licenses to same-sex couples, and using language from *Lawrence* to bolster that conclusion); *Hernandez v. Robles*, No. 103434/2004, Slip Op.1 (N.Y. Sup. Ct. Feb. 4, 2005).

11. This point has been made most eloquently by my colleague Erin Daly. As she states, Justice Kennedy’s “pronouncements can not possibly determine the outcome of complex social issues, but they can set the parameters for their resolution. . . . It is . . . likely that his goal was to help Americans to engage in this debate, with human dignity as the touchstone.” Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 245-46 (2005).

12. John G. Culhane, *Writing On, Around, and Through Lawrence v. Texas*, 38 CREIGHTON L. REV. 493 (2005) [hereinafter Culhane, *Lawrence v. Texas*].

always defended) from a broad reading of the case. Let me offer specifics. The Eleventh Circuit's post-*Lawrence* decision upholding the constitutionality of Alabama's ridiculous statute banning the sale of "sex toys"¹³ seems almost squarely at odds with *Lawrence*'s statements protecting sexual privacy, while state court decisions using *Lawrence* as support for same-sex marriage¹⁴ may at first appear as an unwarranted extrapolation from a case that involved, after all, sexual privacy in one's own home. But under a different, broader, and admittedly more elusive reading of the case, these results may be less anomalous. That is not to say that the Eleventh Circuit's crabbed reading of *Lawrence* is in any way justified. It is not, as I will make plain. It is to suggest, however, that to use *Lawrence* as a broad sword to eliminate tangles of discrimination facing gay and lesbian citizens—including the prohibition on same-sex marriage—is to appreciate more fully the Supreme Court's message about human liberty and dignity.

This article proceeds as follows. First, I analyze the holding in *Lawrence*. I argue that *Lawrence* has both a narrow compass (roughly, "privacy") and a broad one (roughly, "liberty"), but that the Court's enigmatic language and use of precedent has occluded this duality, perhaps deliberately. Thus armed with my analysis of *Lawrence*, I proceed to a discussion of two classes of cases in which *Lawrence* has been invoked by one side, and resisted by the other. In one class of cases (involving sexual privacy, broadly speaking), the narrower reading of *Lawrence* may seem to fit the facts; in the other (same-sex marriage), only a reading that appreciates the extent of the Court's emphasis on liberty can advance the cause of full equality.

II.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.¹⁵

Lawrence held that states could not ban sexual intimacy between consenting adults. In so doing, the Court chose to proceed under substantive due process analysis, rather than under equal protection.¹⁶ Thus, of necessity, the Court

13. *Williams v. Attorney Gen. of Alabama*, 378 F.3d 1232, 1233 (11th Cir. 2004).

14. *Goodridge*, 798 N.E.2d at 941; *Hernandez*, *supra* note 10; *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 at *1 (Wash. Super. Ct. Aug. 4, 2004) (granting summary judgment to same-sex couples).

15. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

16. *Lawrence*, 539 U.S. at 574-75. The Court expressly stated that it was doing so because the due process protection was broader, not because the challenged statute could have survived equal protection analysis.

overruled *Bowers v. Hardwick*,¹⁷ the 1986 case that upheld, against a due process challenge, a Georgia law that prohibited sodomy.¹⁸ The path the Court took toward its holding, and the language it used, bear scrutiny.

Lawrence opens with the word “Liberty,” and concludes with the word “Freedom.”¹⁹ Moreover, in the very first paragraph of the decision, the case is characterized as “involv[ing] liberty of the person both in its spatial and more transcendent dimensions.”²⁰ Justice Kennedy’s decision to invoke liberty rather than privacy language at such critical points in the opinion turns out to be vital. Further, the Court’s discussion of the so-called privacy line of cases begins, interestingly, not with privacy cases at all, but with two older cases involving liberty: “There are broad statements of the substantive reach of liberty . . . in earlier cases, including *Pierce v. Society of Sisters* . . . and *Meyer v. Nebraska*. . . .”²¹ Although the Court swiftly left these cases behind to discuss the line of privacy cases than began in 1965 with *Griswold v. Connecticut*,²² anchoring the discussion in *Pierce* and *Meyer* is consequential. Those cases antedate the Court’s development of more precise tests for deciding whether a challenged law violates substantive due process, and cast their protection in broad terms. Both cases involved parents’ rights to direct the education of their children. In *Meyer*, the Court struck down a law prohibiting instruction in languages other than English, stating, without much elaboration that “the individual has certain fundamental rights which must be respected.”²³ This aphorism was clad in the language of liberty just two years later, when, in *Pierce*, the Court (by the same Justice McReynolds who wrote *Meyer*) found that requiring children between the ages of eight and sixteen to attend public school “unreasonably interferes with the liberty of parents and guardians[.]”²⁴ Thus, *Meyer* and *Pierce* recognize an autonomy of decision-making about the most fundamental questions confronting parents.²⁵

17. 478 U.S. 186 (1986) overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

18. GA. CODE ANN. § 16-6-2 (1984).

19. Dale Carpenter, *Is Lawrence Libertarian*, 88 MINN. L. REV. 1140 (2004).

20. *Lawrence*, 539 U.S. at 562.

21. *Id.* at 564, citing 268 U.S. 510 (1925) and 262 U.S. 390 (1923).

22. 381 U.S. 479 (1965).

23. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

24. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925). The Court’s further elaboration of this right was untethered to any specific constitutional mooring: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . [the child’s parents] have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* at 535.

25. I have discussed the relative roles of the parent and the state in educational decision-making in John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 382-85 (1992). The broader conception of liberty found in these education cases appears in other contexts, too. In the area of public health, for example, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), takes for granted a certain liberty interest in being free from a state-mandated, unwanted smallpox vaccination, but holds that public health concerns have greater

Thus, when the *Lawrence* Court moves to its discussion of the line of privacy cases that begins with *Griswold*, the *focus* is fresh. Although *Griswold* itself is described as involving "the protected space of the marital bedroom[.]"²⁶ the Court then glides out of the bedroom to emphasize the decisional autonomy of the actor: "After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."²⁷ And the decision itself, while perhaps "implemented" in the bedroom, is protected in the more "transcendental" sense. The government, Justice Kennedy stated, is forbidden to intrude "into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁸

That insight was strengthened in *Roe v. Wade*,²⁹ which the *Lawrence* Court accurately summarizes as holding that a woman's "right to elect an abortion [had] real and substantial protection as an exercise of her liberty. . . . *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny. . . ."³⁰ Justice Scalia concedes the point about *Roe* in his dissent, quoting *Roe*'s holding that "the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³¹ And that decisional autonomy was later coupled to the Court's more pointed affirmation of the dignity of the individual in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³² There, the Court reaffirmed *Roe*'s central holding and used language indicating a broad respect for persons.³³ As the *Lawrence* Court stated, *Casey* confirmed that liberty has a powerful "substantive force,"³⁴ and that it sweeps in decisions on a wide variety of properly personal issues—including "marriage, procreation, contraception, family relationships,

weight. *Id.* at 37-39.

26. *Lawrence*, 539 U.S. at 564-65, citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). In *Griswold*, the Supreme Court struck down a state law prohibiting the use of contraception.

27. *Lawrence*, 539 U.S. at 565, citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Eisenstadt* extended the right to use contraceptives to unmarried persons. *Id.*

28. *Lawrence*, 539 U.S. at 565, quoting *Eisenstadt*, 405 U.S. at 453.

29. 410 U.S. 113 (1973).

30. *Lawrence*, 539 U.S. at 565.

31. *Id.* at 595 (Scalia, J., dissenting), quoting *Roe*, 410 U.S. at 153.

32. 505 U.S. 833 (1992). Between *Roe* and *Casey* came *Whalen v. Roe*, 429 U.S. 589 (1977). Although that case involved more of an interest usually characterized strictly as privacy (the challenged statute required recording the identity of those who had obtained certain prescription drugs), the Court provided an early recognition that the privacy cases were not all of one ilk: "The ["privacy" cases involve] at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600.

33. Given the broad language the Court employed in *Casey*, it is ironic that the case actually permitted a broad range of restrictions on the woman's right to choose an abortion. *Cf.*, Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 219 (2005).

34. *Lawrence*, 539 U.S. at 573.

child rearing, and education.”³⁵ Such matters of fundamental choice are “central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment.”³⁶ Then, there appears in *Lawrence* this astonishing sentence: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”³⁷

Exactly how strong is the protection guaranteed by the Court’s decision in *Lawrence*? While the line of cases the Court discusses often speak of “fundamental due process” rights, not all of them use this talismanic phrase. In fact, as Justice Scalia notes, *Casey* itself never calls the right to an abortion “fundamental.”³⁸ Further, he states, *Griswold* was not based on substantive due process, and *Roe* was superseded by *Casey*.³⁹ From this, as well as from the *Lawrence* majority’s avoidance of the “fundamental right” phrase, Scalia concludes that the Court was applying a rational basis test—and that morality has always been considered a rational basis for legislation.⁴⁰

His analysis misses a third possibility, one that should have been obvious from a careful reading of the majority’s decision and the cases on which it relied. First, recall that the Court began with early (pre-privacy) cases establishing the individual’s right to liberty.⁴¹ *Pierce*, for example, never stated that the right of parents to direct their children’s education was “fundamental,” but rather that their rights could “not be abridged by legislation which ha[d] no reasonable relation to some purpose within the competency of the State.”⁴² Lest it be thought that the Court was intimating that a “rational basis” test applied to the rights in question, the same Justice only two years earlier had stated broadly, in another case involving the same parental right, that “the individual has certain fundamental rights which must be respected.”⁴³

Second, *Casey* itself demonstrates that the Court is moving, albeit sluggishly, away from the rational basis/strict scrutiny dyad.⁴⁴ Scalia is correct in noting that

35. *Id.* at 574.

36. *Lawrence*, 539 U.S. at 574, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

37. *Id.*

38. *Id.* at 595 (Scalia, J., dissenting).

39. *Id.* at 594-95.

40. *Lawrence*, 539 U.S. at 586-90.

41. See *supra* text accompanying notes 22-23, 25-26.

42. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

43. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). For a good discussion of the language used (and not used) in these decisions, see Mark Strasser, *The Lawrence Reader: Standhardt and Lewis on Women in Love*, 24 ST. LOUIS U. PUB. L. REV. 59, 66 (2005).

44. This same movement is evident in the Court’s equal protection jurisprudence. In *Lawrence*, Justice O’Connor’s equal protection-based concurrence noted that the Court now uses a “more searching” rational basis test “[w]hen a law exhibits . . . a desire to harm a politically unpopular group. . . .” *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring). That parallel movements are afoot in both areas of the law is consistent with Lawrence Tribe’s observation that

Casey never states that the right to obtain an abortion is fundamental, but the controlling joint opinion in that case certainly did not apply a rational basis test.⁴⁵ Rather, the Court looked to whether the challenged restriction posed “an undue burden” on the right.⁴⁶ This approach values both the state’s interest and the woman’s, without announcing any precise measurement by which the decision whether a burden is “undue” will be made. Consider the similarity of the purposely indeterminate balancing test called for by the “undue burden” standard to the following statement from *Lawrence*: “The Texas statute furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual.*”⁴⁷ Scalia’s reading aside, this conclusion does not reflect the use of a rational basis test, which would simply ask whether the state had any rational basis for criminalizing same-sex intimacy. Rather, the question is this: “Given the respect due the most personal, self-defining conduct, has Texas shown a need for this law?” That this more focused question is the right one to ask is supported by the Court’s further statement that “liberty gives *substantial protection* to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁴⁸ Because “[t]he State cannot demean their existence or control their destiny,”⁴⁹ gay people are entitled to some showing of real harm—beyond a vaguely specified, easily invoked “morality”—before their decisional autonomy can be suppressed. What, exactly, the state would have to show in order to justify such a law, remains unclear.

Properly and carefully read, *Lawrence* at least stands gay and lesbian people up as citizens entitled to respect, dignity, and autonomy of decision. The Court stated that it was limiting its holding to private conduct, but only because the case did not require more: “It suffices for us to acknowledge that adults may choose to enter upon [a personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁵⁰ But as the above discussion makes clear, the entire tenor of the opinion expands on the significant

due process and equal protection create a “double helix” of interlaced protection. Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

45. Scalia himself acknowledged this new standard in *Casey*, stating: “[T]he joint opinion . . . calls upon . . . judges to apply an ‘undue burden’ standard as doubtful in application as it is unprincipled in origin. . . .” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 985 (2003) (Scalia, J., concurring in the judgment in part and dissenting in part). *See also id.* at 964 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (decrying “a brand new standard for evaluating state regulation of a woman’s right to abortion—the ‘undue burden’ standard”). Scalia joined the latter dissent.

46. *Id.* at 874.

47. *Lawrence*, 539 U.S. at 578 (emphasis added).

48. *Id.* at 559 (emphasis added).

49. *Id.* at 578.

50. *Id.* at 567.

recognition, first expressed in *Romer v. Evans*,⁵¹ that “homosexual persons” exist *qua* persons—not simply as a series of disaggregated sexual acts. In addition to the statements already mentioned, the Court’s thoroughgoing rejection of *Bowers* contains numerous expressions of respect for the right of all persons—straight or gay—to choose the terms of their intimate relationships. Thus, *Bowers* “fail[ed] to appreciate the extent of the liberty at stake.”⁵² To cast the question as whether one has a fundamental right to “engage in certain sexual conduct” was to “demea[n] the claim . . . put forward, *just as* it would demean a married couple were it said that marriage is just about the right to have sexual intercourse.”⁵³ Note the Court’s purposeful equation of opposite-sex and same-sex couples.

Yet the limited reach of the actual *holding* of *Lawrence* has led some courts to ignore the case’s broader implications. In the pages that follow, I discuss the implications *Lawrence* holds for not only same-sex marriage, but what might traditionally be thought of as “pure” privacy cases (using the sex toys case as my stalking horse). I hope to show that *Lawrence* has, in an important sense, re-invented the privacy jurisprudence by changing the focus away from the “spatial” to the “transcendental.” Once the cases are re-cast as liberty cases, they can be assessed by how well they respect the core of decisional autonomy due life-defining acts and choices. Laws that interfere with the intrinsic exercise of these rights should be less defensible than those that interfere with their instrumental application.

III.

“I want to defy the logic of all sex laws.”⁵⁴

A recent flurry of decisions coming out of the Alabama federal courts provides a sobering early assessment of the potential reach and limitations of *Lawrence*. The decisions in *Williams v. Attorney General of Alabama*⁵⁵ (hereinafter designated as

51. 517 U.S. 620 (1996). A comprehensive discussion of *Romer* is beyond my purposes here, but that case (although proceeding under equal protection analysis) establishes the important principle that a state may not use animus against a group to ground laws disadvantaging that same group. *Id.* at 634. Justice Kennedy (who also wrote the majority opinion in *Romer*) expressly relied on *Romer* as well as on *Casey* to show that *Bowers* had been seriously eroded by the Court’s subsequent decision. *Lawrence*, 539 U.S. at 573-78.

52. *Lawrence*, 539 U.S. at 567.

53. *Id.* at 558 (emphasis added).

54. BECK, *Sexx Laws*, on MIDNITE VULTURES (DGC 1999), lyrics available at <http://beck.lyrics-songs.com/lyrics/3583>.

55. *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999) [hereinafter “*Williams I*”], *rev’d and remanded*, 240 F.3d 944 (11th Cir. 2001) [hereinafter “*Williams II*”], *on remand*, *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002), [hereinafter “*Williams III*”], *rev’d and remanded*, 378 F.3d 1232 (11th Cir. 2004) [hereinafter “*Williams IV*”].

Williams I, II, III, and IV) arose out of a case challenging a recently enacted Alabama law that augmented the State’s obscenity law by outlawing the distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”⁵⁶ The case’s procedural meanderings are especially instructive, because the first three decisions in the District and Circuit Courts pre-dated *Lawrence*,⁵⁷ while the latest opinion from the Circuit Court⁵⁸ had to confront the case’s impact on this obvious effort to regulate public morality.

The plaintiffs were an assortment of sellers and users of certain sexual devices. Although the statute by its terms banned only the sale of the devices, all judges agreed that users of the devices had standing to sue, since a prohibition on sale would affect their ability to use the products, as well.⁵⁹ The users, in turn, alleged a host of personal reasons for needing these devices to achieve orgasm—in one case, the plaintiff’s physician had advised their use.⁶⁰ The plaintiffs alleged that the law violated their rights to sexual privacy and (frankly) to sexual pleasure, and adduced the testimony of many expert witnesses to attest to the psychological and medical reasons for permitting such devices. The plaintiffs’ arguments were probably best summed up by one professor’s proffered statement that “sexual functioning is an important part of human mental health—not just for the purposes of reproduction, but also for promoting health, happiness, and relationship bonding.”⁶¹

In the pre-*Lawrence* era, the *Williams I* court’s characterization of the breadth of the right the plaintiffs asserted was the central issue. Accepting neither the plaintiffs’ invitation to frame the issue as whether the right to privacy covers private sexual activity not proscribed by law, nor the Attorney General’s suggestion that the plaintiffs were really seeking a constitutional right to use sex toys, the *Williams I* court saw the issue as “whether the concept of . . . privacy protects an individual’s liberty to use devices” such as those proscribed by the statute.⁶²

56. ALA. CODE § 13A-12-200.2 (2004). The law also bans production of such materials. *Id.* at (a)(3).

57. *Williams I, II and III* were all decided prior to 2003.

58. *Williams IV*, 378 F.3d 1232 (11th Cir. 2004).

59. At times, however, the Appellate Court displayed incomplete appreciation of the notion that a ban on sale was tantamount to a ban on use. *Id.* at 1233. Nonetheless, the Circuit Court did express agreement with that principle, citing relevant Supreme Court precedent, at another point. *Id.* at 1242.

60. An entire article can and probably should be written about the effect of this law, and the type of sexual device it bans, on everyone *other than* heterosexual men who have little interest in sexual exploration. Only a man in a heterosexual relationship who is content with “vanilla” sexual intercourse and who has little interest in his female partner’s pleasure would be unaffected by this statute.

61. *Williams I*, 41 F. Supp. 2d at 1272.

62. *Id.* at 1275.

With the question thus stated, the *Williams I* court had little difficulty in concluding that substantive due process did not entail such a right. As the product of a District Court wary of venturing beyond the ambit of fundamental rights specifically recognized by the Supreme Court, the decision is understandable. Before *Lawrence*, the Supreme Court had never explicitly recognized a right to private sexual conduct; indeed, the district court noted that in *Carey v. Population Servs. Int'l*,⁶³ the Supreme Court stated that it had “not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults. . . .”⁶⁴ Thus, the District Court in *Williams I* was on safe ground in not recognizing a right that, under its formulation, would have been derivative of a right of sexual privacy that was itself not clearly established. The District Court did evince sympathy for those who had a medical need for such devices, but stuck to its guns: “The argument presupposes the existence of a fundamental right to engage in lawful, private, sexual activity.”⁶⁵ However, the District Court did ultimately invalidate the statute on the ground that it was not rationally related to the State’s legitimate interests in banning public displays of, or commencement in, obscene material, or in banning “sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation[,] or familial relationships.”⁶⁶

The *Williams II* court, applying a highly deferential form of rational basis analysis, reversed the District Court’s finding on that issue.⁶⁷ But this court was not persuaded by the lower court’s truncated analysis of whether sexual privacy was a fundamental right. Rather, building from the *Griswold* line of cases through *Eisenstadt* and *Casey*, the Circuit Court strongly suggested that sexual privacy was so protected, and demanded an answer to this question: Does “our nation ha[ve] a deeply rooted history of state interference, or state non-interference, in private sexual activity of married or unmarried persons [and does] contemporary practice bolste[r] or undermin[e] any such history[?]”⁶⁸

63. 431 U.S. 678 (1977).

64. *Id.* at 688 n.5 (1977), quoted in *Williams I*, 41 F. Supp. 2d at 1282.

65. *Williams I*, 41 F. Supp. 2d at 1284.

66. *Id.* at 1287.

67. *Williams II*, 240 F.3d at 949.

68. *Id.* at 955-56. Much of the writing and analysis by courts and commentators in the area of substantive due process revolves around how a right comes to be deemed “fundamental,” and therefore protected by the penetrating “strict scrutiny” analysis. This article makes little or no contribution to that debate, and not only because of space and scope constraints. First (especially after *Lawrence*), it is entirely unclear whether a right must be “deeply rooted” in order to be considered fundamental, and (as a corollary) at what level of generality that question must be asked. In cases such as *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court required “a careful description” of the asserted right, *id.* at 721, and held that only those rights deeply rooted and necessary to the concept of ordered liberty would be deemed fundamental. *Id.* at 720-22. But *Lawrence*, like *Casey* before it, is clearly more concerned about rights basic to any coherent notion

On remand, the District Court (*Williams III*) did the heavy lifting that the Circuit Court had demanded. In a decision that yet pre-dated *Lawrence*, the District Court undertook an exhaustive account of the history and legal tradition surrounding sexual relations between married and unmarried persons. This history, which began in the colonial period (seventeenth century) and ran through to twentieth century sexual privacy (and by that time extended more reliably to unmarried adults) convinced the District Court that proscriptions on sexual devices had been rare, and often incidental to other purposes (such as the banning of contraception). Moreover, such prohibitions, to the extent they did exist, were contradicted by the ready availability, during most of the past century, of “electromechanical vibrators” that women (and their physicians) began using as replacements for manual means of stimulation.⁶⁹

The *Williams III* court then connected these more recent developments to the emerging legal landscape, including not only the body of Supreme Court jurisprudence protecting privacy already discussed, but also the philosophy of the Model Penal Code (“MPC”), drafted in 1980. More explicitly than the zigzagging course of case law, the MPC strongly disapproved of criminal sanctions for consensual sexual relations. This disapproval extended to both married and unmarried persons.⁷⁰

The *Williams III* court was convinced of a fundamental right to sexual privacy, given the overwhelming evidence adduced by the plaintiffs, along with the Attorney General’s almost complete acquiescence in that presentation. Taking seriously the *Williams II* court’s directive on remand, the *Williams III* court concluded “that there is a history, legal tradition, and practice in this country of deliberate state non-interference with private sexual relationships between married couples, and a contemporary practice of the same between unmarried persons.”⁷¹ Once that central issue was decided, the District Court had no difficulty concluding that the liberty it had identified encompassed a right to use the kind of sexual devices that the statute prohibited, and that the ban, while incomplete, imposed too heavy a burden on the exercise of that right.⁷²

Unfortunately, all of the District Court’s diligence went for naught. By a 2-1

of liberty than about tradition, which may, after all, serve to freeze substantive due process. (In *Glucksberg*, for example, Chief Justice Rehnquist dug back to the Middle Ages in arguing that the right to die was not recognized through the ages. *Glucksberg*, 521 U.S. at 711). For a concise yet rich discussion of the point about the role of tradition in the recognition of fundamental rights, see Daly, *supra* note 33, at 224-30.

69. *Williams III*, 220 F. Supp. 2d at 1283-84.

70. *Id.* at 1292-94. The court also noted that states following the MPC had been moving steadily away from even token criminalization of “deviate” sexual intercourse. *Id.*

71. *Id.* at 1296.

72. *Id.* at 1296-99. As for the state’s interest in such a ban, the court stated that “the Attorney General has failed to offer even one state interest for the challenged statute, much less a compelling state interest.” *Id.* at 1300.

vote, an entirely different panel of Eleventh Circuit judges (the *Williams IV* court) rejected both the approach and the conclusions so carefully assembled by the lower court, and in the process, managed to almost completely eviscerate *Lawrence* of any impact at all. As I will show, only the dissenting judge was able to grasp the admittedly elusive essence of *Lawrence*.

The *Williams IV* majority took two independently erroneous steps in reaching its conclusion that the Constitution conferred no right to sexual privacy enforceable under substantive due process. Much of the discussion was taken up with an effort to discount the District Court's effort to ground the right to sexual privacy in history, tradition, and contemporary practices. This analysis was rife with error, most of which was dealt with ably by the dissenting judge.⁷³ Of greater interest for present purposes was the Circuit Court's response to *Lawrence* and the obvious respect and protection it afforded to decisional autonomy in the context of sexual privacy. In short, the majority blasted through *Lawrence* as though it did nothing, or next to nothing.

The *Williams IV* court began its discussion of the due process issue with a brisk reiteration of the state of the constitutional privacy law as it existed before *Lawrence*. *Carey* was again cited for the proposition that the Supreme Court, to that point, had "never indicated that . . . an activity [that] is sexual and private [is] entitle[d] to protection as a fundamental right."⁷⁴ Moving then to *Lawrence* itself, the *Williams IV* majority, repeating an error a different panel of Eleventh Circuit judges had committed in another post-*Lawrence* case,⁷⁵ also repeated the error that the dissenters made in *Lawrence*. Thus, the majority concluded that *Lawrence*'s omission of the "fundamental rights" incantation meant that the Supreme Court had applied the rational basis test. Warring with the dissenting judge in a pair of lengthy footnotes,⁷⁶ the majority resisted reading *Lawrence* as a coherent whole, preferring instead to characterize as "scattered dicta" any and all statements expressing the importance the Court assigned to the right of privacy.⁷⁷ Thus, the *Williams IV* court downplayed the Supreme Court's statement that "liberty gives substantial protection to adult persons in deciding how to *conduct their private lives in matters pertaining to sex*,"⁷⁸ somehow believing that the placement of this

73. *Williams IV*, 378 F.3d at 1250-60 (Barkett, J., dissenting).

74. *Id.* at 1236.

75. See *Lofton*, *supra* note 1. The case involved a challenge to a Florida law that prohibited gay people from adopting children. The court held that *Lawrence* had no application to that context, and accordingly applied an extremely deferential rational basis review standard in upholding the law. I have criticized the court's decision in *Culhane*, *supra* note 12, at 499-500.

76. *Williams IV*, 378 F.3d at 1237 n.7 and accompanying text.

77. *Id.* at 1236. This point was ably skewered by the dissent: "I know of no principle of interpretation that supports, in any way, the majority's characterization as 'scattered dicta' the Supreme Court's direct response to the question it granted certiorari to answer and that it found was necessary to resolve before disposing of the case." *Id.* at 1256 (Barkett, J., dissenting).

78. *Id.* at 1237 n.7, quoting *Lawrence*, 539 U.S. at 559 (emphasis in original).

statement within the Court's discussion of *Bowers v. Hardwick*⁷⁹ deprived the statement of directive force. In fact, though, the statement comes, as the *Williams IV* court acknowledged, in the Court's criticism of *Bowers*' failure to recognize the importance of the liberty interest involved there.⁸⁰ Since the Supreme Court overruled *Bowers* in *Lawrence*, the necessary implication is that the asserted liberty interest is entitled to the very same "substantial protection" that the *Bowers* Court refused to provide. As Judge Barkett succinctly noted in her devastating dissent: "Instead of heeding the Supreme Court's instruction regarding *Bowers*' error, the majority repeats it, ignoring *Lawrence*'s teachings about how to correctly frame a liberty interest affecting sexual privacy."⁸¹

Simply put, because the *Lawrence* Court did not state, in so many words, that the right to sexual privacy was "fundamental," the *Williams IV* court wrote as though the case said nothing new about the right to sexual privacy (beyond its narrow holding that the state may not criminalize same-sex intimacy). The entire course of the Supreme Court's decision in *Lawrence* was circumvented, with the *Williams IV* court finding that the cases relied on protected rights "closely related to sexual intimacy," but not such intimacy itself.⁸² Thus, laws such as Alabama's prohibitions on sexual devices still need only be justified under a rational basis analysis, and the *Williams IV* court set the stage for *Williams V*, *VI* and likely beyond by remanding the case to the lower court for a determination whether the statute could satisfy that deferential standard.⁸³

Although *Lawrence* is enigmatic in ways that predictably lead to confusion about its limits, *Williams IV* is impossible to justify under any fair reading of the majority's concern for decisional autonomy in the most intimate of settings. But a more nuanced analysis, by both the majority and the dissenting judge, could have furthered the discussion *Lawrence* opened about the relationship between the different interests protected by privacy rights (the "spatial" dimension of liberty) and liberty rights (the "transcendent" and more difficult-to-define dimension of liberty). If, as the dissent states at one point, the case is about the "right to be left alone," then the majority's approach is more difficult to attack categorically, at least without calling into question laws banning all obscenity, use of hallucinogenic substances to enhance sexual pleasure, and the like.⁸⁴ While challenges to such laws are, as the majority stated, logical implementations of John Stuart Mill's "harm principle,"⁸⁵ they are a long way from instantiation as a

79. 478 U.S. 186 (1986), overruled by *Lawrence*, *supra* note 3.

80. *Williams IV*, 378 F.3d at 1237 n.7.

81. *Id.* at 1251 (emphasis in original).

82. *Id.* at 1237 (emphasis added).

83. *Id.* at 1238 n.9. But given the court's dismissive view of *Lawrence*'s view of the limits of state regulation of morality *simpliciter*, *id.* at 1237 n.8, it seems unlikely that the District Court would be able to satisfy at least the *Williams IV* panel that the statute lacked a rational basis.

84. The majority makes precisely this point. See *Williams IV*, 378 F.3d at 1241 n.12.

85. *Id.* at 1240.

constitutional imperative. Further, the state has often asserted (as the *Lawrence* majority noted) the paternalistic right to protect citizens from even *self-harm*.⁸⁶ Granted, it is difficult, if not impossible, to maintain that the use of sexual aids to enhance sexual gratification (even auto-erotically) harms the person, and the court might have distinguished sex toys from other kinds of stimulation, such as drugs and obscene materials, which at least arguably harm someone.⁸⁷ And, as the *Williams I* court showed, the State's asserted interests beyond regulating personal conduct are not rational.⁸⁸ But these kinds of distinctions and analysis are entirely appropriate when privacy, understood as the right to be left alone, is the issue.

If, on the other hand, *Lawrence* is considered in its potentially broader capacity as a recognition of the individual's liberty to make the most important, self-defining decisions, the analysis would be different. *Lawrence* teaches that to criminalize the most intimate, defining behavior in which individuals engage is to "demean their existence." One's sexual relation to another human being lies at the very core of self-definition; one's relationships are part of who one is (and chooses to *be*).⁸⁹ If the state can prohibit such centrally constituting behaviors, it perforce can compromise their dignity in ways intolerable to the Fourteenth Amendment's guarantee of liberty. But what sorts of regulations reach to the core of this dignity, and which simply regulate particular instrumentalities by which individuals achieve sexual intimacy?

No clear line can be drawn here. The effort by some of the *Williams* plaintiffs to ground their claim in the medical need for sexual devices in order to experience sexual intimacy with their partners, although clinical, can be seen as an effort to get closer to the dignity and decisional autonomy that *Lawrence* requires protecting.⁹⁰ But as statutes (however ill-conceived or plain ridiculous) move

86. *Lawrence*, 539 U.S. at 567 (mentioning harm to a "person" as a legitimate reason for state regulation, without specifically excluding self-harm.).

87. Drugs (including alcohol, not incidentally) can harm the person taking them; as for obscenity, certain forms—notably, photographs of people whose consent may as a rule reasonably be questioned—could be thought (rightly or wrongly) to harm others. Once the harm from obscenity is defined, distinctions may be possible that might otherwise seem elusive; for example, the court in *Williams I* spent an uncomfortable amount of time discussing whether the appearance of dildos was relevant to whether they could be regulated as obscenity. *Williams I*, 41 F. Supp. 2d at 1291-93. But given that such items, whatever their appearance, harm no one, the discussion is irrelevant. The question should be whether the state can ban the use of sexual devices, period. In a recent decision, a federal district court in Pennsylvania read *Lawrence* to negate the federal obscenity laws, at least as applied to internet sellers of adult pornography. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005).

88. *Williams I*, 41 F. Supp. 2d at 1286, 1293.

89. See Daly, *supra* note 33 for an eloquent development of this point. She notes further that *Lawrence*, like *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), locates the individual whose dignity is at issue within a social and political context: "Implicitly, *Lawrence* recognizes the relationship between the public harms and private harms, just as [*Brown*] did before it." *Id.* at 241.

90. See *Williams I*, 41 F. Supp. 2d at 1265-66, 1276-77.

away from the core of self-defining conduct, their constitutionality is likelier to be sustained, at least under this reading of *Lawrence*. Of course, the two related types of liberty/privacy interests identified in the Supreme Court's line of substantive due process cases are mutually reinforcing, so that a sympathetic court could (and should) consider the effect of statutes like Alabama's on *both* the right to be left alone, and on how they affect individual autonomy and dignity.

IV.

Life isn't meant to be lived alone,
A life apart is a desperate fiction,
Life is an intermediate business;

A field of light bordered by love,
A sea of desire stretched between shores.

Marriage is the strength of union,
Marriage is the harmonic blend,
Marriage is the elegant dialectic of counterpoint,
Marriage is the faultless, fragile, logic of ecology:

A reasonable system of give and take,
Unfolding through cyclical and linear time.⁹¹

I hope that the discussion thus far has made apparent that Justice Scalia was indeed right (by his lights) to worry that *Lawrence* could lead courts (including the Supreme Court) to recognize the right of same-sex couples to marry.⁹² For reasons that can be legally captured by both a due process recognition of the dignity of the individual and a First Amendment affirmation that marriage is a valuable and expressive resource,⁹³ to deny membership in this institution is indeed to work a substantive deprivation of dignity and autonomy. Of course, David Cruz and others could be right in noting that *Lawrence*, like *Casey*, could be read only to stop the state from being "too" coercive in preferring heterosexuality over homosexuality (just as *Casey* allows the state to "prefer" fetal life over abortion),⁹⁴ but civil unions notwithstanding, it is hard to see how a categorical exclusion from marriage would not be seen as "coercive" in this way. After all,

91. Tony Kushner, *An Epithalamion*, in *THINKING ABOUT THE LONGSTANDING PROBLEMS OF VIRTUE AND HAPPINESS: ESSAYS, A PLAY, TWO POEMS, AND A PRAYER* (1995).

92. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

93. See David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001).

94. David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 Widener L. Rev. 247 (2005).

the Supreme Court itself has stated over and over again that the right to marry is fundamental.⁹⁵ Moreover, it has stated with specificity *why* marriage is a public good.⁹⁶ If the state cannot compromise the dignity of inmates by barring them from marrying—the issue in *Turner v. Safley*⁹⁷—then it would seem hard to justify keeping same-sex couples from doing so, now that (1) the Court has acknowledged that gay people exist *qua* people, entitled to dignity and respect;⁹⁸ and (2) same-sex couples are at least as able to profit from the goods of marriage as inmates.

Here is what Justice O'Connor had to say about these goods, even given the legitimate restrictions that inmates would face in attempting to live as one half of a couple:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimization of children born out of wedlock).⁹⁹

Absent a narrow (and surely inappropriate, post-*Lawrence*) focus on whether “consummation” is limited to “non deviant” sexual intercourse between a man and a woman, it is clear that every one of the identified goods can be realized by same-sex, as well as opposite-sex couples. Benefits aside (there is substantial reason to question the connection of such a wide array of benefits to married couples, independent of financial means), properly respected gay and lesbian people can and often do realize many of the benefits already. The state simply

95. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 926 (1992) (“throughout this century, this Court . . . has held . . . fundamental [the] right of privacy . . . against government intrusion in such intimate family matters as . . . marriage.”).

96. *Bowers*, 478 U.S. at 204-5 (Stevens, J. concurring) (“[W]e protect the decision whether to marry precisely because marriage ‘is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.’” (Citations omitted)).

97. 482 U.S. 78 (1987).

98. This seems a sufficient answer to the still-heard argument that the ban on same-sex marriage does not discriminate against gays and lesbians who remain free to marry someone of the opposite sex. I treat this argument with the contempt it deserves in John G. Culhane, *The Heterosexual Agenda*, 13 WIDENER L.J. 759, 781-82 (2004).

99. *Turner*, 428 U.S. at 95-96.

“demeans” our existence by refusing to ratify our commitments on a parity with those made by opposite-sex couples.¹⁰⁰

There is early evidence that state courts are beginning to appreciate the implications of *Lawrence* for same-sex marriage. *Goodridge v. Department of Public Health*¹⁰¹ made quick use of the decision, supporting its holding that the State could not withhold marriage licenses from same-sex couples by boring in on the foundational insight that *Lawrence* “reaffirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.”¹⁰² Even more recently, a New York trial court judge discovered a right to same-sex marriage in the alloy forged of the Supreme Court’s marriage cases (including *Turner v. Safley*) and the respect for decisional autonomy reflected in both *Lawrence* and in New York State decisional law that more clearly mapped out the protected area of due process.¹⁰³ This lengthy and careful decision may be a harbinger of decisions by more progressive state courts, where challenges to the same-sex marriage ban are brought under state constitutional law, causing judges to look to both federal and state precedent in crafting their decisions.

Justice Scalia’s prediction about the logical progression from *Lawrence* to same-sex marriage was surely made to galvanize support for the still-sputtering constitutional amendment banning same-sex marriage, and not because he believes that the Court is going to constitutionally require such marriages in the near future. As stated in the closing remarks, *infra*, *Lawrence* was likely intended to set the terms for debate about important issues concerning the GLBT community, not to pre-empt the lively discussions about gay rights going on in virtually every state. Nonetheless, he is right to notice that *Lawrence* does lead in that direction. Whether we will get there is another matter entirely.

V.

Lawrence leaves open many questions. But, it does answer this one: “Are gay and lesbian people entitled to be treated with respect as citizens with decisional and personal autonomy?” By responding in the affirmative, the majority has reached a conclusion that Scalia and his fellow dissenters cannot abide. For them, the Court should leave even this basic question to the vicissitudes of majority rule. Thus, when Justice Kennedy writes that “intimate conduct with another person . . . can be but one element in a personal bond that is more enduring[.]”¹⁰⁴ Scalia and his fellow dissenters have only sarcasm to offer in response. The Court

100. Justice O’Connor wrote the opinion in *Turner*, yet noted in her *Lawrence* concurrence that the state might be able to defend excluding gays from marrying by reference to protecting “the traditional institution” of marriage. *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring).

101. 798 N.E.2d 941 (Mass. 2003).

102. *Id.*

103. *Hernandez*, *supra* note 10, at 10-13.

104. *Lawrence*, 539 U.S. at 567.

“coos” the above statement, they say, “casting aside all pretense of neutrality.”¹⁰⁵ But the Court should not be neutral on the most basic questions of citizenship and respect; such neutrality properly comes into play only in deciding what rights and responsibilities follow from such basic recognition. In the end, the Scalia position is simply a disguised variation of the shopworn wish that the clock could be reset to a time when the GLBT community did not dare identify itself as such. But the cat is out of the bag. Gay and lesbian people, as well as others who have been sexual outliers to the law, have come to demand a place at the table. Now, at least and at last, we have been invited to break bread with our fellow citizens as we stake out our claim to liberty.

105. *Id.* at 604 (Scalia, J., dissenting) (parentheses omitted in quoted phrase).