Writing On, Around, and Through Lawrence v. Texas

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This paper departs from most of the other submissions to this symposium by focusing not on the inter-jurisdictional recognition issues that same-sex marriage raises in challenging and fascinating ways, but on the even less solid ground of predicting judicial decisions. In particular, I explore how Lawrence v. Texas and Goodridge v. Department of Public Health might be interpreted by courts in trying to decide the basic issue presented by same-sex marriage; namely, whether such unions are constitutionally required?

Just over a year has now gone by since Lawrence was decided, and the case is already beginning to leave a footprint on the case law. This paper approaches the issue of Lawrence’s legacy by looking at a
few cases that have nothing to do with same-sex marriage (at least not directly), and at another—Goodridge itself—which also relies on Lawrence; tellingly, in both the majority and the dissenting opinions. Therefore, Goodridge serves as a good example of the mixed message of Lawrence.

It seems likely that Lawrence and Goodridge will have quite different impacts on the evolving controversy over gay marriage. Most of this paper is devoted to Lawrence, which I argue is already becoming a sort of Rorschach test—courts see in it what they want. This “remarkably opaque” decision itself is therefore the best place to begin the discussion. I will argue that two features of Lawrence make the case easily avoidable as precedent by courts unsympathetic to the legal status of the GLBT community. First, the Court’s decision to anchor the holding in substantive due process instead of equal protection means that those seeking to invoke Lawrence will have to satisfy a court that the right they seek to have vindicated is fundamental. Equal protection arguments rely on disparity of treatment between two identifiable groups, and are therefore analytically simpler and cleaner. Second, the due process argument itself in Lawrence is difficult to apply to other contexts, both because of the inherent elasticity of the concept, and because Lawrence stopped just short of declaring the right to same-sex intimacy to be fundamental.

1. READING LAWRENCE

As is by now well-known, Lawrence declared that gay men and lesbians are “entitled to respect for their private lives.” Such respect means that the state cannot criminalize consensual, private sexual conduct between two members of the same sex. The Texas statute in controversy made criminal sexual conduct between members of the same sex, but contained no parallel proscription for opposite-sex couples. In a decision of staggering rhetorical breadth, the Lawrence court declared that decisions about sexual intimacy are within the liberty interests protected by the due process clause of the Fourteenth Amendment, and overruled its own seventeen-year old decision in Bowers v. Hardwick, which had held to the contrary.

When Lawrence was announced, it was hailed for the sweep of its reach and language. By locating its decision in substantive due pro-

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6. Lawrence, 539 U.S. at 563.
7. Id. at 578.
9. For example, the Human Rights Campaign, a national gay rights organization, issued a press release the day Lawrence was issued, calling the decision a “landmark”
cess, the Supreme Court made clear that the defect in the Texas law was not just that it treated gay people differently from heterosexuals, but that a law needed a better basis than an insufficiently specified "morality" to justify depriving gays of the liberty to express themselves in private, sexual conduct. Given that the Court was eager to repudiate Bowers—which, it correctly recognized, stood off to one side of the Court's jurisprudence on matters of privacy—it is not surprising that due process, rather than equal protection, was used. Bowers, after all, was an unsuccessful due process claim.

Justice O'Connor, whose concurring rhetoric in Lawrence suggests that she, too, regrets the decision in Bowers, preferred to focus on the narrower and perfectly sufficient ground that the Texas law treated homosexual and heterosexual conduct differently with no justification for doing so besides general moral disapproval. Thus, her concurrence is from the Romer v. Evans school of equal protection, which prohibits distinctions that are explainable only by animus against the group targeted.

While the reach of equal protection—which depends on finding disparate treatment—is narrower than that of substantive due process in theory, in practice it is difficult to predict the reach of this more nebulous concept. In the context of abortion rights, for exam-


10. As the Court stated, the state should not attempt "to define the meaning of a relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." Lawrence, 539 U.S. at 558, 567. Lawrence does not "decrees . . . the end of all morals legislation," id. at 599 (Scalia, J., dissenting), Justice Scalia's hyperbole notwithstanding. The list of laws that Justice Scalia believes are ruled out by Lawrence, see id., should be scrutinized to determine which of them involve innocent third parties or are otherwise supported by "properly public reasons." John Rawls, The Idea of Public Reason Revisited, 64 U. CHI. L. REV. 765, 776 (1997). Under this notion of political liberalism, one cannot rely wholly on comprehensive, and therefore insufficiently specified, moral views. Id. at 775. Only such vaguely supported laws should be deemed unacceptable in a secular democracy.

11. See Lawrence, 539 U.S. at 581, 582 (O'Connor, J., concurring) (stating "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else"). As a practical matter, the Court's decision in Bowers had permitted lower courts, legislators, and other public actors to use same-sex orientation as an excuse to exclude members of the GLBT community from participation in many aspects of public life. Rhetoric aside, Justice O'Connor did decline to join the Court in overruling Bowers. Id. at 581.


13. Lawrence, 539 U.S. at 582 (O'Connor, J., concurring).

14. In an earlier article, I noted (uncharitably) of due process that "one might more easily chart the course of a mosquito than that of the Court." John G. Culhane, Uprooting the Arguments Against Same-Sex Marriage, 20 CARDOZO L. REV. 1119, 1162, n.201 (1999).
ple, the Court stated “intimate and personal choices . . . central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” But that sweeping statement led to a dead end in the Court’s decision that one does not have a constitutional right to end one’s own life through physician-assisted suicide; in that setting, the Court “required . . . a ‘careful description’ of the asserted fundamental liberty interest.”

Indeed, the tension between Bowers and Lawrence itself reflects the Court’s difficult-to-explain course on matters of liberty and privacy: while Bowers defined the interest in question quite narrowly (whether there was a fundamental right to same-sex sodomy), Lawrence grasped that the interest needed to be broadly defined as one’s right to make decisions about the most intimate acts of self-expression and definition.

The Lawrence Court rightly saw Bowers as a kind of anomaly. That case aside, the key to success in due process cases is to get close enough to the core of privacy cases. But what are the values and rights that the Court protects at that core? They have to do with marriage, procreation, and, as it’s now clear, sexual privacy. If one is looking for further positive signs from Lawrence, surely the central appearance of Eisenstadt v. Baird is good news; because that case is about the right of individuals, not just married persons, to make the fundamental choice about whether to have children and, the Lawrence court now concludes, with whom one wishes to be or become sexually intimate. Reading Eisenstadt through the lens of Lawrence suggests an expansive view of the rights of same-sex couples.

In sum, Lawrence recognizes that the Bowers approach is as “demeaning” as it is narrow, and that the liberty afforded by the 14th Amendment takes in the right to “control a personal relationship that . . . is within the liberty of persons to choose . . . .” And the expression of sexuality “can be but one element in a personal bond that is more enduring.”

17. See Bowers, 478 U.S. at 190.
18. Lawrence, 539 U.S. at 571-78.
21. Lawrence, 539 U.S. at 567 (stating “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring”).
22. Id.
23. Id.
24. Id.
But a closer reading of Lawrence reveals limitations that have already given courts license to ignore the decision even where it seems most applicable. The most glaring problem is the Court's failure to invoke the talismanic "fundamental rights" language that generally grounds decisions based on substantive due process. Justice Scalia did not miss the chance to point out this odd omission in his dissent.\textsuperscript{25} But one simply cannot read the decision in Lawrence without gaining the impression that the Court meant that sexual intimacy was a fundamental right, even if it avoided saying as much directly.

The most straightforward judicial acknowledgement of the problem that the resultant ambiguity creates for courts comes from an unlikely source: the United States Court of Appeals for the Armed Forces. In United States v. Marcum,\textsuperscript{26} the court addressed the issue whether non-forcible sexual acts between a sergeant and a subordinate were constitutionally protected as a result of Lawrence. It noted that courts interpreting the decision were in disagreement as to whether the rational basis test applies to laws challenging private sexual conduct, or whether the strict scrutiny brought to bear where fundamental rights were implicated governed.\textsuperscript{27} Noting that the decision could be read to support either position, the court declined to make this binary choice. Rather, the court concluded, "[w]hat Lawrence requires is searching constitutional inquiry."\textsuperscript{28} Such an inquiry requires transcending what the court called the column A / column B approach: either the conduct falls within the liberty interest protected in Lawrence, or it does not.\textsuperscript{29} Instead, the Marcum court embraced Lawrence's pronouncement that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."\textsuperscript{30} The court read this statement as "argu[ing] for contextual, as applied analysis, rather than facial review."\textsuperscript{31} Noting that such an approach was especially apt in the military setting, the court went on to find the challenged law—Article 125 of the Uniform code of Military Justice—constitutional insofar as it prohibited even "non-forcible sodomy" between military personnel of different ranks.\textsuperscript{32}

\begin{itemize}
  \item 25. Id. at 586 (Scalia, J., dissenting).
  \item 26. 60 M.J. 198 (2004).
  \item 27. United States v. Marcum, 60 M.J. 198, 204 (2004)
  \item 28. Id., 60 M.J. at 205.
  \item 29. Id.
  \item 30. Id. (quoting Lawrence, 539 U.S. at 572).
  \item 31. Id. at 205.
  \item 32. Id. The court emphasized that the convicted sergeant had admitted knowing that "he should not engage in a sexual relationship with someone he supervised." Id. The court found in this the coercion, or inability to truly consent, that the Lawrence
This context-sensitive approach appears to have been exactly what the Lawrence Court had in mind. For example, when thinking of the “enduring personal bonds” that Lawrence valued, the state-sanctioned institution of marriage stands at the center. But the Court was sure to back away from any implication that same-sex marriage would soon be constitutionally required. First, in the language quoted above condemning the legislature’s effort to “control a personal relationship that . . . is within the liberty of persons to choose[,]” the omitted phrase qualifies the respect due the “personal relationship.” Justice Kennedy states, in an appositive clause, that such relationships may or may not be “entitled to formal recognition in the law.” And in the very next paragraph, he says that the state should stay out of defining a relationship “absent . . . abuse of an institution the law protects.”

In short, substantive due process, especially of the indeterminate variety invoked in Lawrence, does not get one to same-sex marriage (or indeed very far past consensual relations at all). One could note here that the Court was also receptive to an equal protection argument; indeed, the Court states that it chose due process precisely because it was broader. The Court’s noted that an equal protection analysis would allow it to ignore the substantive prohibition of the law and to focus on the equality of treatment issue. But the Court wanted to make clear that the substance of the challenged law in Lawrence was the problem. The Court was eager to declare that the state cannot issue an invitation to discriminate against gays and lesbians. And such discrimination would remain possible even if the law said certain conduct was objectionable no matter who engaged in it. The stigma could remain to the extent that the conduct was a proxy (at least in the legislators’ minds) for sexual orientation.

I want to use two cases, one from criminal law and one on the constitutionality of an adoption statute, to make a preliminary case that Lawrence’s breadth of language combined with the specificity of the right involved there can leave courts almost where they were before Lawrence—at least outside of the area of regulating private sexual conduct between consenting adults. Indeed, it is not even

Court had stated might take private conduct out of constitutional protection. Id. (quoting Lawrence, 539 U.S. at 578).

33. Lawrence, 539 U.S. 558, 567.
34. Id.
35. The statement in the text suggests that courts following Lawrence would also strike down laws against cohabitation (or fornication) and adultery. Although this seems the likeliest outcome, the Court might distinguish adultery laws from sodomy statutes by emphasizing Lawrence’s concern about marriage—an “institution the law protects.” Cohabitation bans seem inconsistent with Lawrence, but that might not stop courts from upholding them. Or perhaps courts will ignore Lawrence even in cases directly involving the sexual privacy rights that Lawrence sought to protect. See Williams
clear that courts applying Lawrence have even understood its central message about the constitutional infirmity inherent in treating private same-sex conduct differently from private opposite-sex conduct.

2. AVOIDING LAWRENCE

In Lofton v. Secretary of the Department of Children and Family Services,\(^{36}\) decided in early 2004, the 11th Circuit Court of Appeals had to settle the constitutionality of the Florida law that bars “homosexuals” (practicing ones, anyway) from adopting children. The court held that the statute passed muster; much of the argument was on the equal protection issue, where the court found that under the rational basis test usually (but incorrectly, in my view) applied to sexual orientation,\(^{37}\) the state had a rational basis for excluding same-sex couples from adopting.\(^{38}\) Had the court been willing to undertake the more “searching” type of rational basis review that cases such as Romer v. Evans\(^{39}\) seem to employ (“rational basis with bite”)\(^{40}\) and that Justice O’Connor explicitly recognizes in her Lawrence concurrence,\(^{41}\) the result might have been different. But because the Lawrence Court used substantive due process instead of equal protection, the doctrine of “searching rational basis” is not yet official law, and the illogical justifications for the ban survived.

As for substantive due process itself, the court was on safe (albeit unadventurous) ground in finding that Lawrence, strictly speaking, has nothing to say about adoption.\(^{42}\) The cases are easily distinguishable factually: Lofton involves minors as well as adults; no conduct is criminalized; and adoption, unlike private sexual conduct, involves state recognition of a relationship. Although one could make an argument that the Lofton court didn’t read Lawrence broadly enough, the court acted well within a defensible realm in declining to find Lawrence applicable.

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36. 358 F.3d 804 (11th Cir. 2004).
37. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817-27 (8th Cir. 2004).
38. Lofton, 358 F.3d at 817-27.
40. This phrase has become a favorite with law review writers. See, e.g., Gayle Lynn Pettinga, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L. J. 779 (1987).
41. Lawrence, 539 U.S. at 580 (O'Connor, J., concurring).
42. Lofton, 358 F.3d at 816.
Of greater interest in *Lofton* is the extent to which a federal appellate court was willing to openly criticize *Lawrence*’s substantive due process analysis. First, the court—ignoring the tone of the decision—noted that *Lawrence* did not announce any fundamental right, so that there’s nothing to push off from in trying to build the right to adopt. More surprisingly, the *Lofton* court stated that the *Lawrence* Court “didn’t locate the right directly in the Constitution . . .” and that the opinion contained “language and reasoning inconsistent with standard fundamental-rights analysis.” Finally, the “liberty interests on which the Court relied were invoked . . . with sweeping generality.” Thus, one might summarize the *Lofton* court’s view of *Lawrence* as follows: Because of the potential sweep of the Supreme Court’s decision, *Lawrence* does not mean much of anything—at least outside of the specific context of private, consensual sex.

*Lofton*’s unwillingness to apply *Lawrence* only underscores the obvious point that the case is not a universal solvent for every legal disability visited on the GLBT community. But another, much more dangerous case, shows that courts are already proving creative at ignoring *Lawrence* even where it seems plainly applicable. *A fortiori,* courts that do not want to use it to support same-sex marriage will not feel constrained to do so. This of course includes the Supreme Court itself, Justice Scalia’s screeched notwithstanding.

In 2002, the Kansas court of appeals decided *State v. Limon,* in which the constitutionality of a so-called “Romeo and Juliet” statute came under scrutiny. Such laws reduce the criminal culpability for non-forcible sexual relations where the disparity in age between the adult and the minor is small. In *Limon,* the defendant was 18, and the victim was 14. Thus, had the defendant been charged under the statute applicable to opposite-sex conduct, the crime would have been a minor felony. But Kansas’s statute was specifically limited to cases

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*


48. Kansas Statutes Annotated § 21-3522 (2003) provides:

(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the offender are the only parties involved and are members of the opposite sex.

(b) (1) Unlawful voluntary sexual relations as provided in subsection (a)(1) is a severity level 8, person felony.

(2) Unlawful voluntary sexual relations as provided in subsection (a)(2) is a severity level 9, person felony.
involving "members of the opposite sex."\(^{49}\) Because of this disparity, the defendant who had engaged in an act of non-forcible oral sex with the victim was charged and convicted under the more serious sodomy statute, which carried a substantial penalty; he was sentenced to a term of 206 months (more than seventeen years).\(^ {50}\) In upholding the conviction, the Kansas court of appeals rejected a challenge to the law's constitutionality,\(^ {51}\) and the Kansas Supreme Court ratified that decision by refusing to hear the appeal.\(^ {52}\) The day after deciding \textit{Lawrence}, however, the United States Supreme Court issued a terse decision in \textit{Limon} granting certiorari, vacating the court of appeals' judgment, and remanding for reconsideration in light of that case.\(^ {53}\)

Quite surprisingly, the result on remand was the same.\(^ {54}\) But the way in which the court reached its decision is a cautionary tale about the ways in which the unusual material of which \textit{Lawrence} is constructed allows courts to ignore it almost entirely, even where it seems most apt. Inasmuch as the Supreme Court directed the Kansas appellate court to reconsider \textit{Limon} in light of \textit{Lawrence}, one might expect the court to have looked closely at the latter case to see how it might be applied. But the court did no such thing, downplaying \textit{Lawrence}'s message that, as to matters involving sexual conduct, simple moral disapproval is insufficient to ground a statutory distinction between heterosexuals and homosexuals. The concurrence was worse; Judge Malone made a point of ignoring the Supreme Court's "suggestion" that \textit{Lawrence} might have something to do with the outcome of the remanded case: "\textit{Lawrence} is not applicable to either the law or the facts of this case."\(^ {55}\) The facts were different because \textit{Lawrence} involved two adults, whereas \textit{Limon} concerns a child;\(^ {56}\) the law was different because \textit{Lawrence} was a due process, not an equal protection case.\(^ {57}\)

In dissent, Judge Pierron took the same kind of nuanced view of \textit{Lawrence} that the \textit{Marcum} court had advanced. Acknowledging the differences between the facts before the court and those presented in

\(^{49}\) Id.


\(^{52}\) State v. Limon, 2002 Kan. LEXIS 367 (denying review).


\(^{54}\) At the time of this writing (in late September, 2004) the Kansas Supreme Court had granted review of the case, see Limon, 83 P.3d at 229, but no decision had been issued.

\(^{55}\) Id., 83 P.3d at 241 (Malone, J., concurring).

\(^{56}\) Id.

\(^{57}\) Id.
Lawrence, Judge Pierron nonetheless concluded that "there are principles that serve as the basis for Lawrence ... which appear to be applicable to Limon's case." Since the Supreme Court directed reconsideration, it was logical to "presume it wishes [the court] to apply those principles to our case ...." Judge Pierron then linked Lawrence to Romer, just as the Supreme Court had done, and thereby accepted the Court's implied invitation to read Romer's protections into substantive due process analysis. Next, Judge Pierron asserted that Romer "appears to stand for the proposition that legislation impacting on sexuality is subject to analysis for constitutionality when it discriminates between different classes or groups of citizens." Thus far, Judge Pierron has no quarrel with the judges in the majority opinion; all would agree that a statute under constitutional challenge must be analyzed. But what is the standard to be applied?

As a practical matter, Judge Pierron adopted Justice O'Connor's "more searching form of rational basis review ...." from Lawrence. Because simple moral disapproval of the disfavored group does not suffice, Judge Pierron more carefully scrutinized the justifications put forward by the state in its effort to prop up the challenged law than did the judges in the majority, who quoted Supreme Court cases involving the most deferential rational basis test imaginable. For example, the majority quoted Heller v. Doe for the extreme proposition that a "classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" The court took this language seriously, appearing to hold that a statute could be overinclusive, underinclusive, unsupported by empirical evidence, and unsupported by the very rationales that the legislature or the state's attorney could come up with— if the court itself can think of some rationale on its own, the statute survives. In short, the scrutiny could not have been less searching.

As just one example of the "free pass" the court was willing to give the state, it accepted the outlandish argument that prohibiting same-sex conduct would further the state's interest in the prevention of "certain infectious diseases." The medical literature, the reader was assured without citation, "is replete with articles suggesting that certain

58. Id. at 244 (Pierron, J., dissenting).
59. Id.
60. Id. at 245.
61. Id.
64. Limon, 83 P.3d at 234 (quoting Heller v. Doe, 509 U.S. 312, 319-20 (1993)).
65. Id. at 237.
health risks are more generally associated with homosexual activity than with heterosexual activity."66 This is the reductio ad absurdum of "rational basis" review. If sexually transmissible diseases are the concern, one would expect a statutory scheme that would zero in on certain kinds of conduct, not the fact that the sexual partners were of the same gender. Specifically, the conduct that led to Limon's conviction was oral sex, which poses a much lower risk of transmitting many diseases than either anal or vaginal sex. And since sex of any kind between two women is unlikely to transmit HIV (surely the disease the court had in mind, although it did not so state), why would the law not grant the benefits of the less severe statute to two females engaging in non-forcible sexual conduct? That this rationale is ludicrous should not be surprising: it was certainly not anything the legislature even thought about. The statute was simply an artifact of the same sort of anti-homosexual animus that fueled the general anti-sodomy laws. But the court missed that point, and thereby ignored this lesson of Lawrence: it is unacceptable to use moral disapproval of a class to ground a law that doesn't otherwise have justification.

The other rationales adduced by the state—having to do with the state's interest in valuing marriage and relationships that lead to procreation over those that do not—made no sense at all, and Judge Pierron disposed of them easily.67 But the important signal sent by the Limon majority is that Lawrence is easily side-stepped by courts (and legislatures, derivatively) with an appetite to do so. Because the case arose under substantive due process, equal protection claims will gain no traction unless the court wishes to plumb Lawrence in the way that Judge Pierron and the Marcum court did. And the compass of application in the substantive due process context itself can be quite narrow, as Lofton reminds us.

3. APPLYING LAWRENCE TO SAME-SEX MARRIAGE: GOODRIDGE AND BEYOND

Because Lawrence has thus far lacked broad judicial impact even in cases, such as Limon, where it seems easily applicable, what can it offer on the subject of marriage? On the one hand, the Court—and especially Justice O'Connor, in her concurrence—backed away from signaling any position on same-sex marriage. On the other hand, perhaps Justice Scalia was on sound footing in fearing that the logic and thrust of Lawrence support same-sex marriage, even if the Court is not (yet) willing to so acknowledge.

66. Id.
67. Id. at 246-49.
After all, sex, marriage, and privacy are subjects obviously connected to each other. And the Supreme Court has repeatedly traced these connections, most recently in *Lawrence* itself. In turn, *Lawrence* is invoked several times in *Goodridge*. It is likely that the Massachusetts Supreme Court was emboldened by *Lawrence*, even though nothing in *Goodridge* specifically relies on it. In short, *Lawrence* helps the court get to a result that it likely would have reached anyway. It is worth exploring just how and where *Lawrence* was mentioned in *Goodridge*.

In one place, early in the discussion of the relationship between equal protection and due process arguments, the court cited *Lawrence* for the simple proposition that a decision on due process advanced equal protection jurisprudence as well.68 As noted above, although this proposition is simple, it was missed by the *Limon* court in spite of the Supreme Court’s directive to consider how *Lawrence* might affect a case grounded in an equal protection challenge.

A few pages later, *Lawrence* appeals at the head of a parade of Supreme Court cases that the *Goodridge* court gathered into this broad statement: “[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual’s liberty and due process rights.”69 In citing *Planned Parenthood of Southeastern Pa. v. Casey*,70 *Zablocki v. Redhail*,71 *Roe v. Wade*,72 *Eisenstadt v. Baird*,73 and *Loving v. Virginia*,74 the *Goodridge* court recognized that, taken together, the Supreme Court’s privacy and marriage cases form a strong latticework of protection for same-sex couples (and the individuals who comprise them) that the state can only with difficulty tear down. *Lawrence* is an important part of that structure, but likely one that could be extracted without causing its collapse.

*Goodridge* was a 4-3 decision, and two of the dissents demonstrate that *Lawrence*, either alone or in combination with the Supreme Court’s line of privacy, can only build a wall of protection around same-sex couples seeking to mar­ry if the court of decision supplies the mortar. Justice Spina focused on the privacy cases underpinning of *Lawrence*, and argued for limiting its reach to privacy cases—here, the argument goes, the state respects that privacy.75 *Lawrence* was

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68. *Goodridge*, 798 N.E.2d at 953.
69. *Id.* at 959.
72. 410 U.S. 113 (1073).
73. 495 U.S. 438 (1972).
74. 388 U.S. 1 (1967).
75. *Goodridge*, 798 N.E.2d at 978 (Spina, J., dissenting).
placed in a line with the other privacy cases—Eisenstadt and Griswold v. Connecticut—but given no effect beyond that context. Justice Cordy’s dissent similarly pulled marriage and the privacy cases apart in a Baroque effort to show that the marriage cases use procreation to anchor the fundamental right to enter the institution, while the privacy cases focus on procreation and sexual conduct—not on marriage itself.\textsuperscript{77}

These disagreements are likely inevitable, at least in the short term. In the end, though, the Goodridge court’s remaining invocation of Lawrence may prove the most significant. At the very start of the opinion, the court quotes Lawrence’s admonition that a court’s obligation is not to “mandate its own moral code.”\textsuperscript{78} And then the Goodridge court notes that Lawrence “reaffirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.”\textsuperscript{79} In so remarking, the Massachusetts Supreme Court echoes David Cruz’s insight that marriage is an expressive resource that is importantly self-constitutive: “[m]arriage is potentially, and perhaps normatively, one of the most intimate of associations. [Marriage] is held out to the heterosexually identified as an appropriately important aspect of their adult identity.”\textsuperscript{80}

Such full appreciation of the implications of Lawrence for same-sex marriage may be what Justice Scalia most feared, although I do not think it likely that the current Supreme Court will insist on this interpretation. Nonetheless, Lawrence does say that our laws and traditions give constitutional protection to choices about marriage, procreation, contraception, family relationships and child rearing.\textsuperscript{81} Then, after quoting from Casey, the Court places members of the GLBT community into this warm embrace of constitutional protection, stating that: “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”\textsuperscript{82} For the majority of the Supreme Judicial Court of Massachusetts, then, the United States Supreme Court’s disclaimers about Lawrence’s application to marriage were overborne by its more comprehensive discussion

\textsuperscript{76} 381 U.S. 479 (1965). Both cases involved laws that prohibited contraceptive sales; the Court found that both impermissibly infringed freedom to make the most intimate decisions relating to procreation, and therefore violated plaintiffs’ privacy rights.

\textsuperscript{77} Goodridge, 798 N.E.2d at 984-88 (Cordy, J., dissenting).

\textsuperscript{78} Id. at 948.

\textsuperscript{79} Id.

\textsuperscript{80} David B. Cruz, Just Don’t Call It a Marriage: The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925, 937-38 (2001) (citations omitted).

\textsuperscript{81} Lawrence, 539 U.S. at 574.

\textsuperscript{82} Id.
of the interconnectedness of the privacy, family, and autonomy decisions.

Of course, a court can choose to follow the more disaggregated approach taken by the dissenting justices in *Goodridge*, and decline to discover any support for same-sex marriage in *Lawrence*. In fact, at least one court has already done so.83 For same-sex marriage, as for other issues connected to GLBT rights, *Lawrence*'s kaleidoscope will yield different patterns depending on which way it is turned, and how much light it reflects.

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