724 (8th Cir. 2008), *after remand*, 686 F.3d 889 (8th Cir. 2012); Jeremy Blumenthal, Emotional Paternalism, 35 Fla. St. U. L. Rev. 1 (2007); Alex Stuckey, Judge Hears Case Over Abortion Restrictions, Religious Beliefs, St. Louis Post-Dispatch, Sept. 29, 2015, at A3. In the absence of such legislation, suppose that a patient sues a provider for malpractice as well as negligent infliction of emotional distress for failing to inform her before an abortion that the procedure will kill "an existing living human being." May the jury award damages? See Acuna v. Turkish, 930 A.2d 416 (N.J. 2007).

2. In an effort to encourage work and "personal responsibility" and to discourage out-of-wedlock births and welfare dependency, New Jersey has adopted a "family cap." Previously, a welfare recipient received an increased allotment of public assistance on the birth of each child. On enactment of the family cap, a welfare recipient gets no such increase regardless of how large her family thereafter becomes. For those newly joining the welfare rolls even after the family cap, however, the allotment is calculated on the basis of actual family size. Hence, for example, the assistance for a family of three children varies, depending on when the children are born (before or after enactment of the family cap) and whether the parent is receiving welfare at the time of the births.

What constitutional challenges might be brought on behalf of those adversely affected by the family cap? Does the law encourage abortion? Given the state's justifications, what result and why? See C.K. v. New Jersey Dept. of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996); Sojourner A. v. New Jersey Dept. of Human Servs., 828 A.2d 306 (N.J. 2003). See generally, e.g., Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 202-245 (1999); Susan Frelich Appleton, When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose, 85 Geo. L.J. 155 (1996).

4. The Liberation of Privacy

LAWRENCE v. TEXAS

539 U.S. 558 (2003)

Justice KENNEDY delivered the opinion of the Court.

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

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. In

Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. . . . The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace. . . .

. . . The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" as follows:

> "(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 person with an object." §21.01(1). . . .

[In a trial *de novo*, petitioners raised an unsuccessful equal protection challenge to the law, which criminalizes sexual intimacy by same-sex couples but not identical behavior by different-sex couples. Then, petitioners entered pleas of *nolo contendere*, were each fined $200, and were assessed court costs. On appeal, the court rejected petitioners' equal protection and due process arguments.]

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in [Bowers v. Hardwick, 478 U.S. 186 (1986)].

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases [citing *Pierce* and *Meyer*]; but the most pertinent beginning point is our decision in Griswold v. Connecticut, 381 U.S. 479 (1965). [The Court then reviews *Griswold, Eisenstadt, Roe,* and Carey v. Population Services International, 431 U.S. 678 (1977) (invalidating restrictions on minors' contraceptive choices).] [These subsequent cases] confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. . . .

The facts in *Bowers* had some similarities to the instant case [including police entry into Hardwick's bedroom while he was engaged in sexual conduct with another male]. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute [unconstitutional].

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." [478 U.S. at 190.] That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers*

was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." Id., at 192. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. . . . At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. . . .

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. . . .

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. In summary, the historical grounds relied upon in *Bowers* are more complex than [Justice White's] majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns, but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

[O]ur laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. . . . This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code §213.2, Comment 2, p 372 (1980). 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. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). [Illinois and other states changed their laws accordingly.]

The sweeping references by Chief Justice Burger [concurring in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1. Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), the

Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Id., at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

[505 U.S. at 851.] Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is Romer v. Evans, 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," id., at 624, and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Id., at 634.

[Although petitioners have a tenable equal protection argument under *Romer,* we must] address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons [by imposing the stigma of a misdemeanor, with resulting sex-offender registration requirements and disclosure requirements for job applications].

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer.* When our precedent has been thus weakened, criticism from other sources is of greater significance [citing commentators, state constitutional decisions, and authorities from other countries that rejected *Bowers*'s reasoning]. The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. . . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, supra, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

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. [Reversed.]

Justice O'CONNOR, concurring in the judgment. . . .

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e.g., Department of Agriculture v. Moreno, [413 U.S. 528, 534 (1973)]; Romer v. Evans, 517 U.S., at 634-635. . . . The Texas sodomy law "raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id., at 634.

. . . While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. [T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. . . .

. . . Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group. A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. . . .

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting. . . .

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in Bowers v. Hardwick. . . . Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if*: (1) its foundations have been "eroded" by subsequent decisions; (2) it has been subject to "substantial and continuing" criticism; and (3) it has not induced "individual or societal reliance" that counsels against overturning. The problem is that [Roe v. Wade] itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*. . . .

[To] distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers* [we need to examine] the third factor. . . . It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation [citing cases relying on *Bowers*]. State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision. . . .

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. . . .

[To establish that *Bowers* was wrongly decided, the majority relies on an] *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex* (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. [W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999).]

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and traditions," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. . . .

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers*, supra, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. . . . This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review. . . .

Finally, I turn to petitioners' equal-protection challenge. . . . To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex. . . .

[Justice O'Connor's] reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. . . . [Her] "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. . . .

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. . . . So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress; and that in some cases such "discrimination" is a constitutional right, see Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. . . . But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. . . .

Patty Reinert, Pair Proud They Could Get Sodomy Law Thrown Out

Hous. Chron., Apr. 25, 2004, at A1

Almost six years after police stormed his apartment and arrested him for having sex with another man, this is what John Lawrence remembers: Harris County Sheriff's Department officers shoving him to the couch, shattering the

Tyron Garner (left) and John Lawrence celebrate the Supreme Court victory.

porcelain birds that were a gift from his mother. The humiliating ride to the station, wearing only handcuffs and underwear. The fingerprinting and mugshot, the bologna sandwich he ate in jail, the jeans another inmate gave him for the ride home, the cabbie who took him, though he had no wallet to pay. And the call to his elderly father to tell him what had happened. . . .

. . . In [their first interview] since the case began, Lawrence and Garner said they are proud to have helped defeat an unjust law, overwhelmed by the support they've received and so glad it's over. "I got a sense of justice for being wronged by the state of Texas," Lawrence said as he sat with Garner in lawyer Mitchell Katine's office. "I feel I've been vindicated." . . . "Would I have done the same thing again? Yes," he said. "When somebody is wronged and they don't stand up for themselves, they're going to get wronged again. I wasn't going to stand for it."

Garner, 36, who sells barbecue from a street stand, agreed. "It was worth it," he said. On Sept. 17, 1998, Garner and his boyfriend, Robert Royce Eubanks, were drinking margaritas and eating dinner at a Mexican restaurant with their friend, Lawrence. . . . Back at [Lawrence's] apartment after dinner, though, Eubanks and Garner argued. Eubanks left angry, saying he was going to buy a soda. Instead, he went to a pay telephone and called the police, reporting that there was a man with a gun in Lawrence's apartment. "I think he was jealous," Garner said.

When two Harris County deputies arrived, the door to the apartment was unlocked. They walked in with Eubanks following and discovered Lawrence and Garner having sex. Lawrence and Garner said they had no idea why they were being arrested. They spent the night in jail.

The charges stemmed from the 1973 Texas Homosexual Conduct Law. . . . At the time, Kansas, Oklahoma and Missouri had similar laws, and nine other states—Louisiana, Mississippi, Alabama, Florida, South Carolina, North Carolina, Virginia, Idaho and Utah—made sodomy a crime for heterosexuals as well as homosexuals. . . . Eubanks was convicted and sentenced to 30 days in jail for filing a false report to a peace officer. Garner forgave him and continued their relationship; Lawrence couldn't. . . .

[After their arrest], Lawrence and Garner returned to their lives. But Lawrence was stewing. When Katine, a partner at Houston's Williams, Birnberg & Andersen, and the New York-based Lambda Legal Defense and Education Fund offered their services for free, Lawrence decided to fight. Garner was reluctant, but he agreed. "I didn't think we'd win," Garner said. And though his friends and family knew he was gay, he said, "I didn't enjoy being outed with my mugshot on TV. It was degrading to me." . . .

Lawrence, who works nights, set his alarm for 9 a.m. the day the court was expected to rule. He flipped on CNN and heard the announcement. "I bolted out of bed and shouted, 'Thank you, God!' " he said. . . . "I called my brother, and we celebrated with a couple of bottles of champagne," Garner said.

By nightfall, hundreds had gathered for a rally at City Hall. Katine, who had spent years shielding his clients from the media, introduced them to the crowd. People stood in line to meet them.

Today, Lawrence and Garner remain friends and date other people. Neither were activists before their case, and they still aren't. . . . Both support the right of gay people to marry but aren't interested themselves. "I'm single and love it," Lawrence said.

Garner is touched by people who recognize him at the grocery store or on the street, and Lawrence loves to tell the story of two burly cops, working security outside a gay nightclub, approaching to give them a hug. Both laugh at the idea of cashing in with a book or a TV movie deal, and they shun comparisons some have made to Jane Roe of abortion rights fame or Rosa Parks, a civil rights icon. "I don't really want to be a hero," Garner said. "But I want to tell other gay people, 'Be who you are, and don't be afraid.' " . . .[31]

Tony Mauro, A "Cultural Milestone" at the High Court: Lawrence Gay Attorneys Turned Out in Force to Witness Lawrence Arguments

Tex. Law., Mar. 31, 2004, at 11

Paul Smith brought energy, agility and a full command of the case to the podium when he argued on behalf of the Lambda Legal Defense and Education Fund . . . in the landmark gay rights case Lawrence v. Texas. He also brought personal experience. Smith, managing partner in Jenner & Block's Washington, D.C., office, is gay, a fact that was not widely talked about. . . .

"I think it gave me a greater comfort level answering questions . . . ," says Smith, 48, a veteran of eight [previous] U.S. Supreme Court arguments . . . . "And I think there is a symbolic importance to the community that I was up there. . . ." The symbolism was palpable in the courtroom. Dozens of prominent gay lawyers filled the lawyers' section of the gallery. "The most remarkable thing about the argument was the audience," said Walter Dellinger of O'Melveny & Myers, who wrote an amicus curiae brief for several gay and civil rights groups. The presence of so many [gay] prominent lawyers . . . was a "cultural milestone," Dellinger said. . . .

Smith's advocacy also marked a milestone for Jenner & Block, which has become well-known as a firm that welcomes gay and lesbian lawyers. . . . He joined the firm 10 years ago "when I was not very 'out' in general, but it has been a very supportive place." . . .

Smith's sexual orientation is notable for another reason: He clerked for the late Justice Lewis Powell in 1981. Five years later, historians have noted that as

[31]. Both challengers died just a few years later. Adam Liptak, John Lawrence, 68, Plaintiff in Gay Rights Case, Dies, N.Y. Times, Dec. 24, 2011, at D8; Douglas Martin, Tyron Garner, 39, Plaintiff in Sodomy Case, N.Y. Times, Sept. 14, 2006, at D8.

> Powell deliberated in Bowers v. Hardwick, he mused to a law clerk that "I don't believe I've ever met a homosexual." Powell was apparently unaware not only that the clerk he was speaking to was gay, but also that several of his previous clerks were gay.
>
> . . . Smith holds no animosity toward Powell, who was the deciding vote in favor of upholding Georgia's anti-sodomy law. Smith notes that after Powell left the court in 1987, he said he regretted his vote in *Bowers*. "Obviously it was very troubling to him, and he came to believe he had made a mistake," Smith says, "Justice Powell was very much on my mind as I argued."

Notes and Questions

1. Constitutional basis. What is the constitutional right protected by *Lawrence*? The majority's opinion begins with the word "liberty" and ends with the word "freedom." Does the Court's opinion reflect a broad libertarian approach under which substantive due process presumptively protects all personal interests? See, e.g., Randy E. Barnett, Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2002-2003 Cato Sup. Ct. Rev. 21. What does *Lawrence*'s liberty mean for the right to privacy? See Jamal Greene, The So-Called Right to Privacy, 43 U.C. Davis L. Rev. 715 (2010).

2. Equality. What role do equality principles play in the majority opinion? How does the majority respond to Justice O'Connor's reliance on the Equal Protection Clause? Why do you suppose the majority did not use the Equal Protection Clause to decide *Lawrence,* as it did Romer v. Evans, 517 U.S. 620 (1996), a precedent cited in *Lawrence*? What difference would it have made? What role does the type of "animosity" found in *Romer* play in *Lawrence*?

Despite the *Lawrence* majority's use of due process, not equal protection, commentators say the opinion synthesizes autonomy and equality principles by rejecting criminal statutes that subordinate a particular group of citizens. See, e.g., Pamela S. Karlan, Foreword: Loving *Lawrence*, 102 Mich. L. Rev. 1447, 1449 (2004) ("*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality."); Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 749 (2011) (naming "such hybrid equality/liberty claims as 'dignity' claims"). This synergy between liberty and equality as a foundation for gay rights culminated 12 years later in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), guaranteeing for same-sex couples access to marriage and marriage recognition (reprinted in Chapter II).

3. Bowers. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Supreme Court held that enforcement of a state sodomy statute did not violate the Constitution. Citing the "ancient roots" of sodomy proscriptions, the majority opinion in *Bowers* found no fundamental right to privacy at stake and saw no connection between "family, marriage, or procreation on the one hand and homosexual activity on the other." Id. at 191. Why did the Supreme Court overturn *Bowers*? How does *Lawrence* explain its overruling of *Bowers*, consistent with the doctrine of *stare decisis*?

4. Liberty's scope. *Bowers* had invoked history and tradition to determine whether an asserted interest merits constitutional protection. What methodology does *Lawrence* use to determine what's "in" and what's "out" of substantive due process? See David A. Strauss, The Modernizing Mission of Judicial Review, 76 U. Chi. L. Rev. 859 (2009) (discerning new approach that looks forward instead of back to history and tradition).

What is the scope of the liberty protected in *Lawrence*? Does the majority hew to *Griswold*'s focus on the spatial privacy of the bedroom and the home? What do the "more transcendent dimensions" of "liberty of the person" encompass?

Lawrence quotes language from Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992), that critics, including Justice Scalia (in an omitted portion of his dissent), call the "sweet-mystery-of-life passage." See 539 U.S. at 588 (Scalia, J., dissenting). Does this language help define the interest at stake? Cf. Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997) (requiring interests protected by substantive due process to be deeply rooted in history and tradition and susceptible to "careful description").

5. Standard of review. *Bowers*, which saw no fundamental right at stake, used the rational basis test. What standard of review does *Lawrence* use? Why?

Professor Mary Anne Case identifies the following as the critical sentence, asserting that the Court's use of the nonrestrictive "which" instead of the restrictive "that" reveals the application of rationality review: "The Texas statute furthers no legitimate state interest which can justify its intrusions into the personal and private life of the individual."[32] But see Matthew Coles, Lawrence v. Texas and the Refinement of Substantive Due Process, 16 Stan. L. & Pol'y Rev. 23, 30-31, 37 (2005) (finding the Court used a balancing test); Laurence H. Tribe, Essay, Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1917 (2004) (finding the Court used strict review).

6. Morality. In *Bowers*, the Supreme Court concluded that Georgia satisfied the rational basis test because its electorate regarded sodomy as immoral and unacceptable. In *Lawrence*, why do majoritarian moral values fail to justify the Texas statute? Evaluate Justice Scalia's prediction that the *Lawrence* majority's approach dooms "all morals legislation."

Consider philosopher John Stuart Mill's tenet that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." John Stuart Mill, On Liberty 13 (Gateway ed. 1955) (originally published in 1859). To what extent does Mill satisfactorily resolve the issue in *Lawrence*? Does Mill's "harm principle" preclude legislation based on morality alone? Even under Mill's harm test, don't moral judgments remain relevant? As Justice Scalia intimates, why can't a legislature regard its disapproval of gay sex as a means of protecting children from the "harm" of exposure "to a lifestyle [believed] to be immoral and destructive"? Cf. Chai R. Feldblum, Gay Is Good: The Moral Case for Marriage Equality and More, 17 Yale J.L. & Feminism 139, 139 (2005) (contending that *Lawrence* provides an

[32]. Mary Anne Case, Of "This" and "That" in Lawrence v. Texas, 2003 Sup. Ct. Rev. 75, 83-84.

opportunity "to make a moral case for supporting the range of . . . creative ways in which we currently construct our intimate relations outside of marriage").

Justice Scalia's use of the term "culture war" evokes a discourse about a number of contested family law (and family values) issues, including reproductive rights, gender equality, gay rights, end-of-life decisions, and the legislatures' and courts' roles in such matters. Why has family law, in particular, become the site of such controversy? What role should religion and religious beliefs play in official resolutions of such disputes?

7. Foreign law. What is the appropriate role for foreign legal authorities, such as those cited by the *Lawrence* majority, when battles in the culture wars reach American courts? Note that the Supreme Court has relied on foreign and international law to invalidate certain punishments, such as juvenile life sentences. See Graham v. Florida, 560 U.S. 48 (2010); Stephen C. McCaffrey, There's a Whole World Out There: Justice Kennedy's Use of International Sources, 44 McGeorge L. Rev. 201 (2013).

8. Legislative vs. judicial reform. Justice Scalia's dissent advocates leaving the issue of gay rights to the legislature. In an omitted portion, he asserts that "the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly." 539 U.S. at 604. Must courts take matters to their logical conclusions? Do they? What does Justice Scalia's distinction mean in family law, with its religious and cultural roots? Note that this "Who decides?" issue also divided the majority and dissents in the marriage-equality case, *Obergefell*, supra.

9. The anti-subordination theme. In an omitted sentence, Justice O'Connor states that the Texas statute violates equal protection because it "threatens the creation of an underclass." The majority, rejecting Texas's argument that the statute simply punishes conduct, condemns the statute for targeting "gay persons as a class." Such language suggests an anti-subordination approach (which requires invalidation of laws and legal structures that perpetuate the subordination of disadvantaged groups, such as women or African-Americans). See generally Kenneth L. Karst, The Liberties of Equal Citizens: Groups and the Due Process Clause, 55 UCLA L. Rev. 99 (2007). What groups count for purposes of this anti-subordination analysis? Is Justice Scalia correct that the most salient classification in the Texas law is sex-based, the same classification that long restricted access to traditional marriage to one man and one woman? Should sexual orientation trigger suspect-class status (and hence strict scrutiny)?

10. Conduct and identity. The majority opinion refers to "homosexual conduct," "homosexual persons," and "a homosexual lifestyle." What connection does the majority see among these? Justice O'Connor discerns a close correlation between the prohibited conduct and "being homosexual." Is Justice Scalia correct that one might invoke the same analysis for any criminal law? In an omitted portion of his dissent, he analogizes: "A law against public nudity targets 'the conduct

that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.' " 539 U.S. at 600. Is the analogy apt? Does "conduct" suggest choice and "identity" suggest immutability? What are the legal implications? Cf. Jessica A. Clarke, Against Immutability, 125 Yale L.J. 2 (2015).

11. A relationship test? The majority envisions sexual intimacy as one part of a more encompassing relationship, criticizing *Bowers* for its assumption that the case concerned "simply the right to engage in certain sexual conduct . . . , just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Lawrence and Garner had no ongoing relationship, as noted in the interview, supra. Does that matter? Does *Lawrence* assume that, for constitutional protection, sex must be part of an intimate relationship like marriage in *Griswold*, supra? See Laura A. Rosenbury & Jennifer E. Rothman, Sex In and Out of Intimacy, 59 Emory L.J. 809 (2010). For more details on the facts of the case, see Dale Carpenter, Flagrant Conduct: The Story of Lawrence v. Texas (2012).

Alternatively, do all consensual sexual encounters, however fleeting, evoke the protection that *Lawrence* requires? How "discreet" must one keep the relationship? What is the boundary that separates "private" from "public" sex? Privacy from "the closet"? See Carlos A. Ball, Privacy, Property, and Public Sex, 18 Colum. J. Gender & L. 1 (2008).

12. A right to sex? Is *Lawrence* simply a "sex positive" case, embracing a jurisprudence of sexual pleasure, regardless of the nature of the underlying relationships? What are the implications for family law? Soon after *Bowers*, Professor Sylvia Law linked Georgia's sodomy law with the statutes overturned in *Griswold*, *Eisenstadt*, and *Roe* by explaining how all these measures burden the capacity to enjoy sexual activity:

> People have a strong affirmative interest in sexual expression and relationships. Through sexual relationships, we experience deep connection with another, vulnerability, playfulness, surcease, connection with birth and with death, and *transcendence*. The power of sexual experience is such that, in every culture, the basic units of human community, nurturing, acculturation, economic sharing, companionship and daily life are built around relationships of sexual expression and taboo.[33]

Is this what *Lawrence* had in mind in protecting liberty in its "more transcendent dimensions"? What does this liberty include? See Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 54 (2012) ("*Lawrence* interposed a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state."). But see Mary Ziegler, The (Non-)Right to Sex, 69 U. Miami L. Rev. 631 (2015).

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[33]. Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 225 (emphasis added).

Does the Court, along with family law more generally, show solicitude for men's sexual pleasure, but not women's? See Susan Frelich Appleton, Toward a "Culturally Cliterate" Family Law?, 23 Berkeley J. Gender L. & Just. 267 (2008); Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women's Sexuality, 56 Emory L.J. 1235 (2007). What does family law's focus on sex mean for self-identified asexuals? See Elizabeth F. Emens, Compulsory Sexuality, 66 Stanford L. Rev. 303 (2014).

13. *Lawrence* and other family laws. What implications does *Lawrence* have for other family law issues? Consider, for example, the Court's abortion jurisprudence. Evaluate Justice Scalia's assertion in his dissent in *Lawrence* that *Roe* stands out as a more compelling case for overruling than *Bowers*. Can you reconcile the treatment of morality and criminal law in Justice Kennedy's majority opinions in *Lawrence* and *Gonzales*, supra?

As Justice Scalia, predicted, *Lawrence* paved the way for constitutional protection of same-sex marriage. See Chapter II. What does *Lawrence* mean for nonmarital relationships and families? See Ariela R. Dubler, From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage, 106 Colum. L. Rev. 1165 (2006); Courtney G. Joslin, Marital Status Discrimination 2.0, 95 B.U. L. Rev. 805, 815 (2015); Murray, supra. Identify other aspects of family law that *Lawrence* might unsettle.

14. Race, class, and power. Given its emphasis on *consensual* sex, to what extent should the Court's analysis have paid more attention to race, class, and age—and power disparities? Consider the following facts, not all apparent from the case or the interview: Lawrence, age 59 and white, was a medical technician; Garner, some 20 years younger, an unemployed African-American, had a white roommate-boyfriend (Eubanks), who summoned police to Lawrence's residence with a false report of "a black male going crazy with a gun." Professor Carpenter explores such background facts, including conflicting reports of the arresting officers, whose own racial backgrounds might have shaped their understandings of what they saw at Lawrence's residence.[34] What should be the legal relevance of such details?

15. Critiques. Predictably, *Lawrence* has many critics. Some condemn the "judicial activism" exemplified by the majority opinion. E.g., Nelson Lund & John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 Mich. L. Rev. 1555 (2004). Some supporters of gay rights also find fault with *Lawrence*. According to Professor Catharine MacKinnon, *Lawrence* reinforces the pervasive problem of gender inequality, "securing for homosexuals heterosexuality's substantive privileges, including its male gendered dominance, by extending rather than dismantling them."[35] Professor Marc Spindelman agrees, identifying as the source of the problem *Lawrence*'s "'like-straight' logic," which protects gays and lesbians on the theory that their lives and relationships mirror those of heterosexuals.[36]

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[34]. Dale Carpenter, Flagrant Conduct: The Story of Lawrence v. Texas 96-104 (2012).

[35]. Catharine A. MacKinnon, The Road Not Taken: Sex Equality in Lawrence v. Texas, 65 Ohio St. L.J. 1081, 1094 (2004).

[36]. Marc Spindelman, Surviving Lawrence v. Texas, 102 Mich. L. Rev. 1615, 1619-1632 (2004).

This assimilationist approach also has a confining, rather than a liberating effect, according to Professor Katherine Franke, who writes:

> I fear that *Lawrence* and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality.[37]

Problem

On several occasions, R.L.C., age 14, had vaginal intercourse with his girlfriend, O.P.M., age 12. Despite their youth and a state statutory rape law that places the age of consent at 16, this conduct was not illegal because of a "Romeo and Juliet exception" applicable to minors no more than three years apart in age. The state's prohibition against the "crime against nature," which includes oral sex, does not contain a similar exception, however. After the couple engaged in oral sex, R.L.C. was convicted and adjudicated a felony delinquent, entailing punishment and required registration as a sex offender. R.L.C. now challenges this outcome as unconstitutional, based on *Lawrence*. What result and why? See In re R.L.C., 643 S.E.2d 920 (N.C. 2007); Michael Kent Curtis & Shannon Gilreath, Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas, 43 Wake Forest L. Rev. 155 (2008); Daniel Allender, Applying *Lawrence*: Teenagers and the Crime Against Nature, 58 Duke L.J. 1825 (2009). See also State v. Limon, 122 P.3d 22 (Kan. 2005).

B. When Privacy Rights Conflict

1. Wives and Husbands

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY

505 U.S. 833 (1992)

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court and delivered the opinion of the Court [for Part V-C]:

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of

[37]. Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 Colum. L. Rev. 1399, 1414 (2004).