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# The Future of Justice Scalia's Predictions of Family Law Doom

Robert E. Rains\*

*“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 . . .”*—Justice Scalia, dissenting, *Lawrence v. Texas*.<sup>1</sup>

*“I have seen also in the prophets of Jerusalem an horrible thing: they commit adultery and walk in lies: they strengthen also the bands of evildoers, that none doth return from his wickedness: they are all of them unto me as Sodom, and the inhabitants thereof as Gomorrah.”*—Jeremiah 23:14.<sup>2</sup>

## I. INTRODUCTION

Over the last two decades, the Supreme Court has handed down three groundbreaking decisions concerning the rights of homosexual persons:<sup>3</sup> *Romer v. Evans*,<sup>4</sup> *Lawrence v. Texas*,<sup>5</sup> and *United States v. Windsor*.<sup>6</sup> Each majority opinion was authored by Justice Kennedy, and each case featured a vehement dissent by Justice Scalia, with the overtones of an Old Testament prophet of doom.

In *Romer*, decided in 1996, the Court struck down a Colorado constitutional amendment barring the state and its political subdivisions from protecting homosexuals against discrimination. In dissent Justice Scalia argued that the majority’s rationale would mandate the legalization of polygamy. “The Court’s disposition today suggests

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1. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).
2. *Jeremiah* 23:14 (King James).
3. The Court has variously referred to “homosexual persons”, “gays and lesbians”, “homosexuals”, “homosexual adults”, and “homosexual couples.”
4. *Romer v. Evans*, 517 U.S. 620 (1996).
5. *Lawrence*, 539 U.S. at 558.
6. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

that these provisions (against polygamy) are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.”<sup>7</sup>

In *Lawrence* in 2003, the Court struck down on due process grounds a Texas law criminalizing private sexual acts between persons of the same sex.<sup>8</sup> The Court took the unusual step of explicitly overruling a fairly recent precedent, *Bowers v. Hardwick*,<sup>9</sup> decided seventeen years earlier, which had upheld a Georgia statute criminalizing “homosexual sodomy” and which also involved private consensual conduct between two adults.<sup>10</sup> The *Lawrence* majority was careful to try to limit the scope of the decision:

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.<sup>11</sup>

Dissenting, Justice Scalia bluntly said:

Do not believe it . . . . Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? . . . This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.<sup>12</sup>

Justice Scalia additionally argued that the majority’s rationale undermined “[s]tate laws against bigamy, . . . adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity . . . .”<sup>13</sup>

A decade later, in 2013, dissenting from the Court’s decision in

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7. Romer, 517 U.S. at 648.

8. Lawrence, 539 U.S. at 578.

9. *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986).

10. Lawrence, 539 U.S. at 578 (“*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.”).

11. *Id.*

12. *Id.* at 604–05 (Scalia, J., dissenting) (citations omitted).

13. *Id.* at 590.

*United States v. Windsor*, striking down Section 3 of the federal Defense of Marriage Act (DOMA) which prohibited the federal government from recognizing same-sex marriages valid under state law, Justice Scalia issued a similar warning:

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion . . . is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.<sup>14</sup>

He proceeded to quote several paragraphs from the majority opinion, striking through certain words and substituting others, to show precisely how the majority opinion could be used to strike down state laws prohibiting same-sex marriage.<sup>15</sup> He began:

~~[DOMA's]~~ *This state law's* principle effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.<sup>16</sup>

He continued:

~~[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, . . .<sup>17</sup>

Then he provided yet another example to prove his point:

And it humiliates ~~tens of~~ thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community

14. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (citations omitted).

15. *Id.* at 2709–10.

16. *Id.* at 2710.

17. *Id.*

and in their daily lives.<sup>18</sup>

This article will consider Justice Scalia's various prophecies of family law chaos (or progress, depending on one's point of view) and attempt to draw conclusions as to their validity. It will also raise the question of whether Justice Scalia may secretly support one or more of these outcomes he has gone so far to predict.

## II. SAME-SEX MARRIAGE

*"If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."*—Leviticus 20:13.<sup>19</sup>

For some fourteen months after the Supreme Court's decision in *Windsor*, an unbroken string of federal courts invalidated various state laws and constitutional provisions prohibiting same-sex marriage.<sup>20</sup> That string was broken on September 3, 2014, by the decision of District Court Judge Martin Feldman of the Eastern District of Louisiana, who applied the rational basis standard of review to uphold Louisiana's constitutional and statutory provisions barring same-sex marriage in *Robicheaux v. Caldwell*.<sup>21</sup> Subsequently, the district court for the District of Puerto Rico in *Conde-Vidal v. Garcia-Padilla*,<sup>22</sup> and the Sixth Circuit Court of Appeals, in *DeBoer v. Snyder*,<sup>23</sup> have also upheld bans on same-sex marriage, although such bans continue to fall in other jurisdictions, such as in the Ninth Circuit.<sup>24</sup>

In the flood of cases successfully challenging state bans on same-sex marriage decided in the year since *Windsor*, several district court judges have used Justice Scalia's words, with apparent relish, as supporting ammunition to invalidate such laws. Thus, for example, in *Kitchen v. Herbert*, striking down Utah's same-sex marriage ban, Judge Robert J. Shelby quoted from Justice Scalia's dissent in *Windsor* and then opined, "The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at

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18. *Id.*

19. *Leviticus* 20:13 (King James). Your author has not been able to find a similar biblical admonition against a woman lying down with another woman.

20. *See Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 916 n.6 (E.D. LA. 2014).

21. *See id.*

22. *Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. Lexis 150487 (D.P.R. 2014).

23. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

24. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”<sup>25</sup> Judge Shelby continued, “The court therefore agrees with the portion of Justice Scalia’s dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court’s reasoning logically extends to protect an individual’s right to marry a person of the same sex . . .” and proceeded to quote the language from Justice Scalia’s *Lawrence* dissent set forth above.<sup>26</sup>

In a similar vein, federal district court judges in Ohio,<sup>27</sup> Oklahoma,<sup>28</sup> Kentucky,<sup>29</sup> Virginia,<sup>30</sup> Texas,<sup>31</sup> Idaho,<sup>32</sup> Wisconsin,<sup>33</sup> and Florida,<sup>34</sup> have all cited Justice Scalia’s dissents in *Lawrence* and/or *Windsor* to buttress their opinions striking down same-sex marriage bans in those states.

Unsurprisingly, the only federal judges addressing these issues post-*Windsor* who have, or would have, upheld a ban on same-sex marriage, have found no occasion to cite the language in Justice Scalia’s dissents that the rationales of *Lawrence* and *Windsor* mandate the striking down of state law bans on same-sex marriage. Circuit Court Judge Kelly, dissenting in the Tenth Circuit’s affirmance in *Kitchen*, did not do so.<sup>35</sup> Circuit Court Judge Niemeyer, dissenting in the Fourth Circuit,<sup>36</sup> and District Court Judge Feldman, upholding Louisiana’s ban in *Robicheaux*, failed to do so.<sup>37</sup> Neither did Judge Pérez-Giménez in *Conde-Vidal*<sup>38</sup> nor Judges Sutton or Cook in *DeBoer*.<sup>39</sup>

25. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013), *aff’d* 755 F.3d 1193 (10th Cir. 2014), *cert. denied* sub nom. *Herbert v. Kitchen*, 135 S.Ct. 265 (2014).

26. *Id.* at 1204.

27. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 n.1 (S. D. Ohio 2013).

28. *Bishop v. United States*, 962 F. Supp. 2d 1252, 1277–78, 1295 (N. D. Okla. 2014), *aff’d* sub nom. *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied* sub nom. *Smith v. Bishop*, 135 S. Ct. 271 (2014).

29. *Bourke v. Beshear*, 996 F. Supp. 2d 542, 550 n.14 (W.D. Ky 2014), *rev’d* by *DeBoer v. Snyder*, 2014 U.S. App. Lexis 21191 (6th Cir. 2014).

30. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014), *aff’d* sub nom. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* sub nom. *Rainey v. Bostic*, 135 S. Ct. 286 (2014), *McQuigg v. Bostic*, 135 S. Ct. 314 (2014), *Schaefer v. Bostic*, 135 S. Ct. 308 (2014).

31. *De Leon v. Perry*, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014).

32. *Latta v. Otter*, 771 F.3d 456, 471 (9th Cir. 2014).

33. *Wolf v. Walker*, 986 F. Supp. 2d 982, 1017 (W.D. Wis. 2014), *aff’d* sub nom. *Baskin v. Bogan*, 766 F.3d 648, *cert. denied*, sub nom. *Bogan v. Baskin*, 135 S. Ct. 316 (2014), *Walker v. Wolf*, 135 S. Ct. 316 (2014).

34. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1290 (N.D. Fla. 2014).

35. *Kitchen v. Herbert*, 755 F.3d 1193, 1230–40 (10th Cir. 2014) (Kelly, J., dissenting).

36. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014).

37. *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

38. *Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. LEXIS 150487 (D.P.R. 2014).

In effect, through his dissents, Justice Scalia has provided a road map for advocates advancing a position of which he apparently does not approve, i.e., that the Constitution requires states to allow same-sex couples to marry. Indeed, elsewhere in his *Windsor* dissent, he expressly disavowed that view: “It is enough to say that the Constitution neither requires nor prohibits our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve no-fault divorce, polygamy, or the consumption of alcohol.”<sup>40</sup>

Our great national debate over same-sex marriage is, of course, far from being resolved. In early October 2014, the Supreme Court surprised many observers<sup>41</sup> by denying *certiorari* in all seven petitions presented to it seeking review of circuit court decisions striking down same-sex marriage bans in Utah,<sup>42</sup> Oklahoma,<sup>43</sup> Virginia,<sup>44</sup> Indiana, and Illinois.<sup>45</sup> But, at that time, there was no circuit split of authority on the issue. With the subsequent *DeBoer* decision in the Sixth Circuit, that split now exists.<sup>46</sup> Accordingly, in January 2015, the Court granted *cert* in *Deboer* and its consolidated cases limited to the following questions:

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?<sup>47</sup>

Of course, even if the Court decides these most important issues on the merits and speaks with great clarity, that would not likely resolve our national debate on the subject, any more than the unani-

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39. *DeBoer v. Snyder*, 2014 U.S. App. Lexis 21191 (6th Cir. 2014).

40. *U.S. v. Windsor*, 133 S. Ct. 2675, 2707 (2013).

41. See Lyle Denniston, *Same-sex Marriage Cases Set for Early Look*, SCOTUSBLOG, (Sept. 10, 2014), <http://www.scotusblog.com/2014/09/same-sex-marriage-cases-set-for-early-look/>; (last visited Mar. 14, 2015); Adam Liptak, *Justices Embark on Road to a Ruling on Same-Sex Marriage*, THE NEW YORK TIMES, Sept. 29, 2014.

42. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

43. *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

44. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

45. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

46. It has been reported that Justice Ginsburg told an audience at the University of Minnesota Law School in September 2014 that there was “no need for us to rush” into the issue at that time because there was no circuit split on the subject. Greg Stohr, *Gay Marriage Cleared in New States After High Court Rebuff*, BNA FAMILY LAW REPORTER, Vol. 40, No. 46 at 1583, Oct. 17, 2014.

47. *DeBoer v. Snyder*, No. 14-571, 2015 WL 213650 (6th Cir. 2014); *Obergefell v. Hodges*, No. 14-556, 2015 WL 213646 (S.D. Ohio 2013); *Tanco v. Haslam*, No. 14-562, 2015 WL 213648; *Bourke v. Beshear*, No. 14-574, 2015 WL 213651 (W.D. Ky. 2014).

mous decision in *Brown v. Board of Education*,<sup>48</sup> made six decades ago, has lain to rest issues of segregation in public education,<sup>49</sup> or *Roe v. Wade*,<sup>50</sup> four decades ago, has quieted our national disputes over abortion.<sup>51</sup>

### III. POLYGAMY/BIGAMY

*“But King Solomon loved many strange women . . . and he had 700 wives, princesses, and three hundred concubines: and his wives turned away his heart.”*—I Kings 11:1–3<sup>52</sup>

In his dissent in *Romer*, Justice Scalia warned that the Court was undermining state prohibitions against polygamy when it struck down an amendment to the Colorado Constitution barring state or local actions prohibiting discrimination against persons with “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>53</sup> Similarly, in his *Lawrence* dissent, Justice Scalia argued that,

State laws against bigamy . . . 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; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.<sup>54</sup>

This raises many questions. Does the logic of the majority opinion in either *Romer* or *Lawrence* truly mandate state recognition of polygamy? Are prohibitions on polygamy based solely on “moral choices,” or do such prohibitions serve other functions? To what extent, if any, have Justice Scalia's predictions (now almost two decades old in the case of *Romer*) proven to be correct?

Has Justice Scalia created a false analogy? In *Romer*, the Court did not require Colorado or its local governments to have or enact statutes or ordinances protecting homosexuals from discrimination. Rather, the Court struck down a state constitutional amendment prohibiting the enactment of such protections. Indeed it is instructive

48. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

49. See *Thomas v. School Bd. St. Martin Parish*, 756 F.3d 380 (5th Cir. 2014); *Lewis v. Ascension Parish School Bd.*, 996 F. Supp. 2d 450 (M.D. La. 2014).

50. *Roe v. Wade*, 410 U.S. 113 (1973).

51. See *Planned Parenthood of Arizona v. Humble*, 753 F.3d 905 (9th Cir. 2014).

52. *1 Kings* 11:1–3 (King James). This may be one of the earliest recorded cases illustrating the doctrine of assumption of risk.

53. *Romer v. Evans*, 517 U.S. 620, 620 (1996) (see text accompanying n.7).

54. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).



that, to this day, the Human Relations Act in the author's state (Pennsylvania) still does not include homosexuals as a class protected from discrimination,<sup>55</sup> and all efforts to enact such protection have failed.<sup>56</sup> One would expect that if *Romer* truly mandated the enactment of state and local laws protecting homosexuals from discrimination, the omission of homosexuals from coverage under Pennsylvania's anti-discrimination statute would have long since been successfully challenged as unconstitutional. Similarly, sexual minorities are not protected under either Title VI<sup>57</sup> or Title VII<sup>58</sup> of the 1964 Civil Rights Act. Under the doctrine of *Bolling v. Sharpe*,<sup>59</sup> one would expect that if *Romer* mandated that states enact anti-discrimination legislation for homosexuals, that mandate would extend to the federal government as well. So, if *Romer* does not create a positive obligation on states to protect homosexuals (the actual subject of the decision) from discrimination, it is difficult to see how it can realistically be interpreted to require state and local authorities to enact laws prohibiting discrimination against polygamists (who were not the subject of the case).

It is to be expected that litigants seeking to enter into polygamous marriages and persons charged with violating state laws against polygamy would use any available legal ammunition in support of their position. If *Romer* actually provided strong support for those advocating a right to plural marriage, one would naturally expect such advocates to raise the *Romer* issue in litigation. Yet that has not proven to be the case, and, to date, these advocates have been uniformly unsuccessful.

The United States has a long history of the prohibition of plural marriage being upheld by the courts. Usually, the issue asserted by proponents is religious liberty rather than nondiscrimination. Well over a century ago, in 1878, the Supreme Court rejected such a claim in *Reynolds v. United States*, reasoning that religious belief cannot "be accepted as a justification of an overt act made criminal by the law of the land."<sup>60</sup> A hundred years later, the Tenth Circuit Court of Ap-

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55. Pennsylvania Human Relations Act, 43 P.S. 955.

56. See, e.g., Monica Disare, *In the Northeast, only Pa. Lacks Law on Discrimination by Sexual Orientation*, PITTSBURGH POST-GAZETTE, July 29, 2013, available at <http://www.post-gazette.com/news/state/2013/07/29/In-the-Northeast-only-Pa-lacks-law-on-discrimination-by-sexual-orientation/stories/201307290195> (last visited Mar. 14, 2015).

57. 42 U.S.C. § 2000d.

58. *Id.* § 2000e-2(a).

59. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

60. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

peals rejected multiple claims of a city police officer in Utah, Royston Potter, that his dismissal for the practice of polygamy violated his constitutional rights.<sup>61</sup> Potter asserted the “equal footing” doctrine (that all states are equal in power, dignity, and authority), the Free Exercise clause, the right to privacy, and “laws in desuetude,” none of which were given traction by the court.<sup>62</sup>

The Utah Supreme Court revisited the issue of polygamy in 2004 in a criminal case, *State v. Green*.<sup>63</sup> Thomas Green raised thirty-nine(!) issues on appeal to that court, but because he failed to adequately brief most of them, the court did not even bother to list them all.<sup>64</sup> In affirming his conviction for bigamy, the Court only addressed his constitutional claims of free exercise of religion and vagueness. There is no indication that Green relied on either *Romer* or *Lawrence* in any way. Significantly, the Court found many public policy reasons for prohibiting plural marriage other than moral disapproval.

Most importantly, Utah’s bigamy statute serves the State’s interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.<sup>65</sup>

The court noted that in addition to his bigamy conviction,

Green was also convicted of criminal nonsupport and rape of a child, Linda Kunz, who was thirteen years old at the time of her first sexual association with Green. The potential for conflicts of consanguinity in polygamous associations is illustrated by Green’s relationships. Among Green’s ‘wives’ are three sets of sisters and three of his own stepdaughters.<sup>66</sup>

The Utah Supreme Court had occasion to revisit these issues two years later, in 2006, in *State v. Holm*, yet another case of a polygamist who had entered into marital relationships with siblings, one of whom was a minor.<sup>67</sup> Although Holm did not apparently raise a defense under *Romer*, he did assert that *Lawrence* insulated his plural

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61. *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

62. *Id.* at 1067.

63. *State v. Green*, 99 P.3d 820 (2004).

64. *Id.* at 824.

65. *Id.* at 830.

66. *Id.* at n.14.

67. *State v. Holm*, 137 P.3d 726, 730 (2006).

marriage from state condemnation.<sup>68</sup> The Court readily distinguished *Lawrence* on its own terms. *Lawrence* was explicitly limited to private sexual conduct between adults.<sup>69</sup> In contrast, “this case implicates the public institution of marriage, an institution the law protects, and also involves a minor.”<sup>70</sup> The Court noted that there had already been over forty unsuccessful attempts by litigants to expand *Lawrence* beyond its scope.<sup>71</sup> Interestingly, the Utah Chief Justice dissented in part and asserted that *Lawrence* does protect the right to plural marriage.<sup>72</sup>

The Utah Supreme Court’s two recent, post-*Romer* and *Lawrence* decisions upholding Utah’s bigamy statute have not ended the legal battle in Utah. In light of the airing of a so-called “reality program” named “Sister Wives” on The Learning Channel, Utah state officials began an investigation of the Browns, the plural family featured on that show. In response, the Browns brought a lawsuit, *Brown v. Bubman*, in the U.S. district court for Utah,<sup>73</sup> challenging the constitutionality of Utah’s bigamy statute<sup>74</sup> on various grounds. In a lengthy opinion that frequently cites *Lawrence* (but not *Romer*), District Court Judge Clark Waddoups struck down that part of the Utah statute that criminalized “cohabitation,” including the situation where a married person “cohabits with another person.”<sup>75</sup> The court based this holding on the Free Exercise Clause of the First Amendment (which was not at issue in *Lawrence*),<sup>76</sup> a substantive due process right to consensual sexual privacy as interpreted by *Lawrence*,<sup>77</sup> and vagueness under the due process clause (also not at issue in *Lawrence*).<sup>78</sup>

Judge Waddoups also ruled that these constitutional restraints required that the court give a narrowing construction to that part of the bigamy statute that makes it a crime when a married person “purports to marry another person.”<sup>79</sup> As narrowed by Judge Waddoups,

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68. *Id.* at 742.

69. *Id.* at 743.

70. *Id.*

71. *Id.* at 742–43.

72. *Id.* at 776–79.

73. *Brown v. Bubman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

74. UTAH CODE ANN. § 76-7-101 (West 2014).

75. *Brown*, 947 F. Supp. 2d at 1234.

76. *Id.* at 1221.

77. *Id.* at 1222–23.

78. *Id.* at 1225–26.

79. *Id.* at 1226–34.

“the statute remains in force, submitting anyone residing in Utah, knowing he has a wife or she has a husband or knowing the other person has a wife or husband, to prosecution for the crime of bigamy for entering into a further purportedly legal union.”<sup>80</sup> The statute does not reach persons who enter into “religious cohabitation” which occurs when “those who choose to live together without getting married enter into a personal relationship that resembles a marriage in its intimacy but claims no legal sanction.”<sup>81</sup> Thus, the *Brown* plaintiffs and those similarly situated choose “‘to enter into a relationship that [they know] would not be legally recognized as marriage, [they use] religious terminology to describe this relationship,’ and this terminology—‘marriage’ and ‘husband and wife’—happens to coincide with the terminology used by the state to describe the legal status of married persons.”<sup>82</sup>

Judge Waddoups entered his judgment in *Brown*, now recaptioned *Brown v. Herbert*, on August 27, 2014,<sup>83</sup> and the state filed its notice of appeal on September 24, 2014.<sup>84</sup> It seems highly doubtful that Judge Waddoups’ application of *Lawrence* to these plaintiffs will be upheld. His *Lawrence* analysis appears much weaker than the free exercise and vagueness underpinnings of the judgment. As Judge Waddoups repeatedly noted, *Lawrence* protects private consensual sexual conduct. For example, he acknowledged, “*Lawrence*’s discussion about the Fourteenth Amendment’s commitment to a concept of liberty that ‘protects the person from unwarranted government intrusions into a dwelling or other private places.’”<sup>85</sup> It is difficult to perceive what privacy is involved with relationships which the *Brown* plaintiffs have seen fit to broadcast on a nationally syndicated television show or how they could possibly have standing to assert any privacy argument.

Even if Judge Waddoups’ decision striking down the cohabitation prong and narrowing the “purports to marry” prong of Utah’s polygamy statute should stand on appeal, that would still leave Utah’s *per se*

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80. *Id.* at 1233–34.

81. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

82. *Id.* (quoting *State v. Holm*, 137 P.3d 726, 773 (Utah 2006) (Durham, C. J. dissenting)).

83. *Brown v. Herbert*, 2014 U.S. Dist. LEXIS 120441 (D. Utah Aug. 27, 2014).

84. Ben Winslow, *Utah Will Appeal Polygamy Ruling*, FOX 13, Sept. 24, 2014, 11:30 pm <http://fox13now.com/2014/09/24/utah-will-appeal-polygamy-ruling/> (last visited March 14, 2015).

85. *Brown*, 947 F. Supp. 2d at 1201 (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)).

prohibition on bigamy/polygamy in place notwithstanding *Romer* and *Lawrence*, although, admittedly, harder to prosecute. But, *Lawrence* might well be read to prohibit the criminalization of private intimate cohabitation by a married person with someone other than his or her spouse, a topic better addressed below under adultery.

#### IV. ADULTERY

*“And David sent and enquired after the woman. And one said, Is not this Bathsheba, the daughter of Eliam, the wife of Uriah the Hittite? And David sent messengers and took her; and she came in unto him, and he lay with her; for she was purified from her uncleanness: and she returned unto her house. And the woman conceived, and sent and told David, and said, I am with child.”*—2 Samuel 11:3–5<sup>86</sup>

As noted, Justice Scalia argued in dissent that *Lawrence* called into question state laws against adultery.<sup>87</sup> While not explicit, it appears that he was referencing state criminal prohibitions rather than civil statutes addressing adultery in the context of domestic relations. Assuming that is correct, then Justice Scalia is also correct: state laws criminalizing adultery committed in privacy are surely doomed to be consigned to the scrap heap of history. Yet, rather astonishingly, more than a half century after the Kinsey Reports found that very large percentages of married men and women self-reported engaging in adultery,<sup>88</sup> almost half of all states continue to maintain on their books, although most do not actually prosecute, the crime of adultery.<sup>89</sup>

The crime of adultery is defined and categorized in different ways in different states. The Utah Criminal Code defines adultery thus: “A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse.”<sup>90</sup> Accordingly it appears that in Utah if a married person has sex with an unmarried per-

86. 2 *Samuel* 11:3–5 (King James).

87. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

88. ALFRED C. KINSEY, ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE*, 584–89 (W. B. Saunders Co., Phila. & London, 1948) (27% to 37% of married males in any given 5-year period); ALFRED C. KINSEY, ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE*, 416–18 (W. B. Saunders Co., Phila. & London, 1953) (26% of married females by age 40).

89. See Ethan Bronner, *Adultery, an Ancient Crime That Remains on Many Books*, N.Y. TIMES, Nov. 14, 2012, [http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html?\\_r=0](http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html?_r=0) (last visited Mar. 14, 2015) (reporting that adultery remained a crime in Virginia and 22 other states as of Nov. 2012).

90. Utah Code Ann. § 76-7-103 (2014).

son, only the married person has committed adultery, although the unmarried person will have committed the crime of fornication.<sup>91</sup> By contrast, Michigan law states that when adultery “is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment.”<sup>92</sup> Apparently in Michigan an unmarried woman who has sex with a married man does not share his culpability.<sup>93</sup> Perhaps the Michigan legislature simply did not contemplate that any unmarried Michigan woman would engage in such behavior. The Michigan statute also conflates cohabitation with adultery under one particular circumstance: “If any persons after being divorced from the bonds of matrimony for any cause whatever, shall cohabit together, they shall be liable to all the penalties provided by law against adultery.”<sup>94</sup> In South Carolina, adultery requires more than a single act of intercourse. Rather, “adultery is the living together and carnal knowledge with each other or habitual carnal intercourse with each other without living together of a man and a woman when either is lawfully married to some other person.”<sup>95</sup> The term “habitual” is not defined, but it would appear that a married person who has a series of “one night stands” with different partners cannot be prosecuted under this statute.

Punishments also vary widely. In Utah, adultery is a class B misdemeanor.<sup>96</sup> Since fornication is also a class B misdemeanor in Utah,<sup>97</sup> the unmarried sex partner of the married person potentially faces equal punishment. Class B misdemeanors are punishable by a fine of up to \$1,000 and/or imprisonment of up to six months.<sup>98</sup> In South Carolina, the guilty adulterer can be fined \$100 to \$500 or imprisoned for six months to one year, or both fined and imprisoned.<sup>99</sup> At the other end of the spectrum, in Michigan adultery is a felony.<sup>100</sup> Even more remarkably, in Michigan, in the 2006 case of *People v. Waltonen*, the appeals court ruled that adultery would also constitute “criminal sexual conduct in the first degree,” making it theoretically

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91. *Id.* § 76-7-104.

92. Mich. Comp. Laws § 750.30 (2014).

93. *See id.*

94. *Id.* § 750.32. This provision is in direct conflict with current public policy in most jurisdictions to encourage reconciliation. *See, e.g.*, 23 PA. CONS. STAT. § 3102(a)(2) (2014).

95. S.C. CODE ANN. § 16-15-70 (2013).

96. UTAH CODE ANN. § 76-7-103 (2014).

97. *Id.* § 76-7-104.

98. *Id.* §§ 76-3-301 and 76-3-204.

99. S.C. CODE ANN. § 16-15-60.

100. MICH. COMP. LAWS § 750.30 (2014).

punishable by life in prison.<sup>101</sup> Michigan law, however, contains a significant limitation on prosecution: “No prosecution for adultery . . . shall be commenced, but on the complaint of the husband or wife.”<sup>102</sup> At the time of the *Waltonen* decision, the Prosecuting Attorneys Association of Michigan noted that no one had been convicted of adultery in Michigan since 1971, more than a third of a century earlier.<sup>103</sup>

What could possibly be the purpose of statutes, which are virtually never enforced, which criminalize behavior that at one time or another is engaged in by possibly a majority of the married, adult population (and those who engage in it with them)? To give just two prominent examples of the efficacy of such statutes, consider former South Carolina Governor Mark Sanford and former Michigan Attorney General Mike Cox. The then married Sanford, whose famous “hike on the Appalachian Trail” turned out to be a tryst with his Argentinian mistress, Maria Belen Chapur, left the governorship in disgrace in 2011, only to be elected to the U.S. House of Representatives in 2013, with Ms. Chapur standing proudly by his side.<sup>104</sup> Michigan Attorney General Mike Cox, whose office took the *Waltonen* case to the court of appeals, had himself confessed to an adulterous relationship, thus theoretically making him eligible for a sentence of life imprisonment.<sup>105</sup>

There is no real evidence that criminal adultery statutes actually deter adultery. A married person who is not afraid of the consequences at home of his or her infidelity is hardly likely to be seriously afraid of prosecution under a statute that he likely does not know still

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101. See *People v. Waltonen*, 728 N.W.2d 881, 890 n.8 (Mich. App. 2006); MICH. COMP. LAWS § 750.520b. See also Brian Dickerson, *Adultery Could Mean Life*, *Court Finds*, DETROIT FREE PRESS (Jan. 14, 2007, 10:00 PM), <http://archive.freep.com/article/20070115/COL04/701150333/Adultery-could-mean-life-court-finds>; <http://webarchive.org/web/20070206173058/http://freep.com/apps/pbcs.dll/article?AID=/20070115/COL04/701150333> (last visited Mar. 14, 2015).

102. MICH. COMP. LAWS § 750.31.

103. Dickerson *supra*, note 101.

104. Kim Severson, *Looking Past Sex Scandal*, *South Carolina Returns Ex-Governor to Congress*, N.Y. TIMES (May 7, 2013), [http://www.nytimes.com/2013/05/08/us/south-carolina-election-a-referendum-on-sanford.html?\\_r=0](http://www.nytimes.com/2013/05/08/us/south-carolina-election-a-referendum-on-sanford.html?_r=0) (last visited Mar. 14, 2015); Adam Edelman, *South Carolina Rep. Sanford's Argentinian Fiancée Opens Up About their Affair*, N.Y. DAILY NEWS (Oct. 20, 2013 1:52 PM), <http://www.nydailynews.com/news/politics/south-carolina-rep-mark-sanford-argentinian-fiancee-opens-affair-article-1.1490958>. (last visited Mar. 14, 2015). Not too surprisingly, Rep. Sanford later announced, on Facebook no less, that he had broken up with his Argentinian “true love.” See Alan Rappeport, *Mark Sanford Announces a Breakup on Facebook*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/us/sanford-calls-off-engagement-on-facebook.html>. (last visited Mar. 14, 2015).

105. Dickerson *supra*, note 101.

exists as it is never, or hardly ever, prosecuted. If such statutes are intended to express mere moral condemnation, do the (highly theoretical) punishments fit the “crime” and societal attitudes? If such criminal statutes were to be actually prosecuted today, would they not be subject to challenge as having fallen into desuetude and being subject to the worst possible prosecutorial discretion? It may be politically difficult for a politician to stand up and publically announce that she wants to repeal the crime of adultery and thereby risk the charge of being in favor of such behavior.<sup>106</sup> Where this is politically infeasible, has the Court not done the sensible thing in *Lawrence* by ruling that the state cannot constitutionally criminalize private, non-commercial, consensual sexual behavior between adults?

## V. FORNICATION

*“But if this thing be true, and the tokens of virginity be not found for the damsel: Then they shall bring out the damsel to the door of the father’s house, and the men of her city shall stone her with stones that she die: because she hath wrought folly in Israel, to play the whore in her father’s house: so shalt thou put evil away from among you.”—Deuteronomy 22:20-21<sup>107</sup>*

Justice Scalia’s expressed fear in his *Lawrence* dissent that the majority’s opinion would spell the death knell of state laws criminalizing the act of fornication was sound. But it does not tell the whole story. Such laws were already under well-deserved attack before the *Lawrence* decision. Nevertheless, a number of states still maintain them on the books although they are seldom prosecuted.

The laws themselves, a strange admixture, are mostly—but not entirely—in southern states. The usual rule, as in Utah,<sup>108</sup> Idaho,<sup>109</sup> and Virginia,<sup>110</sup> is that fornication is sexual intercourse between two unmarried persons. But in South Carolina, “Fornication’ is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and a

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106. See Bronner, *supra*, note 88. (“A number of law professors, including Joanna L. Grossman of Hofstra University, said one reason that adultery laws remain on the books is that getting rid of them would require politicians to declare their opposition to them, something few would do.”)

107. *Deuteronomy* 22:20–21 (King James).

108. Utah Code Ann. § 76-7-104 (2014).

109. Idaho Code Ann. § 18-6603 (2014).

110. VA. Code Ann. § 18.2-344 (2006).



woman, both being unmarried.”<sup>111</sup> While the term, “habitual,” is not defined, this section would appear to permit individual, or infrequent, non-commercial, private sex acts between consenting adults. North Carolina’s statute, which combines fornication and adultery, states, “If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other.”<sup>112</sup> The use of the conjunctive “and” suggests that the crime requires the couple to associate, bed, and cohabit together, thus permitting non-cohabiting private, consensual sexual conduct.

Mississippi’s statute, a masterpiece of internal inconsistency, provides, “If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary to constitute the offense, that the parties dwell together as husband and wife, but it may be proved by circumstances that show habitual sexual intercourse.”<sup>113</sup> Thus sexual cohabitation is criminal, whether or not it involves cohabitation. However, non-habitual intercourse between non-cohabiting consenting adults does not run afoul of the law.

As noted, state statutes criminalizing fornication were under attack before *Lawrence*. Most interesting is the example of Georgia. It was Georgia’s anti-sodomy law that was upheld in the U.S. Supreme Court against federal constitutional attack in 1986 in *Bowers v. Hardwick*,<sup>114</sup> the case that *Lawrence* overturned in 2003.<sup>115</sup> In the interim between those two decisions, the Georgia Supreme Court struck down that same anti-sodomy law in 1998 in the case of *Powell v. State*, as violating the Georgia constitution’s right to privacy.<sup>116</sup> Then in January 2003, five months before the *Lawrence* decision, the Georgia Supreme Court, relying on *Powell*, struck down the state’s criminal fornication statute in *In re J.M.*<sup>117</sup> Again the Georgia Court ruled that the Georgia Constitution “protects from criminal sanction private, unforced non-commercial acts of sexual intimacy between persons

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111. S.C. Code Ann. § 16-15-80 (1976).

112. N.C. Gen. Stat. Ann. § 14-184 (1994).

113. Miss. Code Ann. § 97-29-1 (2014).

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

115. *Lawrence v. Texas*, 539 U.S. 558, 600 (2003).

116. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

117. *In re J.M.*, 575 S.E.2d 441, 444 (Ga. 2003).

legally able to consent.”<sup>118</sup>

Of course, the *Lawrence* decision also has had an impact on state fornication laws. In 2005, in direct reliance on *Lawrence*, the Virginia Supreme Court in the case of *Martin v. Ziberl* struck down that state’s statute criminalizing fornication.<sup>119</sup> The *Martin* Court was at pains to limit the scope of its decision:

It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults . . . . Our holding does not affect the Commonwealth’s police power regarding regulation of public fornication, prostitution, or other such crimes.<sup>120</sup>

The asserted facts in *Martin* demonstrate the kind of cynicism that such a statute can encourage. According to the pleadings, an adult man and woman carried on an intimate sexual relationship for two years, during which the man infected the woman with herpes.<sup>121</sup> She brought a tort action alleging that he knew he had herpes, knew it was contagious, and failed to inform her of his condition.<sup>122</sup> The man filed a demurrer in which he argued that because the woman had engaged in the criminal act of fornication, she could not recover damages caused by her own illegal action.<sup>123</sup> The trial court granted the demurrer.<sup>124</sup> The man’s own criminal acts (for which, of course, he was not prosecuted) did not matter; her crime of having had sex with him was dispositive.<sup>125</sup> Reasonably enough, the Virginia Supreme Court reversed by striking down the criminal fornication statute, thereby allowing the lawsuit to proceed.<sup>126</sup>

Whatever the state definition of fornication, such an act—not uncommon in our society—conducted in private, between consenting adults, on a non-commercial basis, is quite properly not the subject of state criminal laws. This is not to argue against marriage, or

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118. *Id.* at 442.

119. *Martin v. Ziberl*, 607 S.E.2d 367 (Va. 2005).

120. *Id.* at 371.

121. *Id.* at 368.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 368.

126. *Martin v. Ziberl*, 607 S.E.2d 367 (Va. 2005).

against raising children in marriage, or for single parent households; rather it is an acceptance of reality and the proper limits of the law.

## VI. ADULT INCEST

*“If there is a man who lies with his father’s wife, he has uncovered his father’s nakedness; both of them shall surely be put to death, their bloodguiltiness is upon them. . . . If there is a man who marries a woman and her mother, it is immorality; both he and they shall be burned with fire, so that there is no immorality in your midst.”*—Leviticus 20:11, 14.<sup>127</sup>

Justice Scalia likewise argued in his *Lawrence* dissent that the decision would undermine state laws against adult incest. This author can find no documented case in which this fear has materialized.

Incest, like fornication, has no one universal definition. The states are not in agreement as to what constitutes incest, and the different statutes reveal distinct underlying purposes.

For example, in Pennsylvania one commits the crime of adult incest “if that person knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood.”<sup>128</sup> Moreover, “[t]he relationships. . . include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.”<sup>129</sup> Thus it appears that sexual intercourse between adopted brother and sister who have no blood relationship is not a crime in Pennsylvania, which suggests that preservation of harmony within the nuclear family unit is not the primary concern of the statute. There are no exceptions in either the marriage law or the criminal incest statute for those who are sterile, which suggests that fear of genetic aberrations also is not a sole motivator. Further complicating the picture, the criminal prohibition is not coextensive with the degrees of consanguinity set forth in the Domestic Relations Code, which constitute a bar to issuance of a marriage license. Thus, no marriage license may be issued to first cousins in Pennsylvania,<sup>130</sup> but neither marriage nor cohabitation nor sexual intercourse between first cousins constitutes a crime. Moreover, a marriage entered into in

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127. *Leviticus* 20:11, 14 (New American Standard Bible).

128. 18 P.A. CONS. STAT. § 4302(a) (2012).

129. *Id.* § 4302(c).

130. 23 P.A. CONS. STAT. § 1304(e) (2014).

violation of the consanguinity rules is either voidable<sup>131</sup> or void,<sup>132</sup> depending on which section of the Domestic Relations Code one reads. Finally, Pennsylvania law is silent on the extraterritorial effect of its consanguinity prohibitions. In 2005, two first cousins residing in Pennsylvania, and unable to get married in that state, travelled to Maryland where first cousin marriage is legal, were married there, and immediately returned to continue residing in Pennsylvania.<sup>133</sup> Whether their marriage is valid in Pennsylvania is an open question.

In Wisconsin, by contrast, the crime of incest is directly linked to marriage prohibitions based on consanguinity. Thus, the crime of incest is defined as follows: "Whoever marries or has nonmarital sexual intercourse . . . with a person he or she knows is a blood relative and such relative is related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class F felony."<sup>134</sup> In turn, the relevant Wisconsin marriage law prohibition provides:

No marriage shall be contracted . . . between parties who are nearer in kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile. Relationship under this section shall be computed by the rule of the civil law, whether the parties to the marriage are of the half or of the whole blood.<sup>135</sup>

The Wisconsin consanguinity prohibition applies even if the Wisconsin resident contracts the marriage out of state, intending to return to Wisconsin.<sup>136</sup>

It appears that, as far as it applies to first cousins, the Wisconsin marriage prohibition and hence the crime of incest, is based on a fear of genetic defects in the offspring, inasmuch as first cousins are permitted to marry if the woman is over 55 or either party is medically certified to be permanently sterile. Thus, as far as the first cousin prohibition, the rationale is not a societal incest taboo or fear of a de-

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131. *Id.* § 1703.

132. *Id.* § 3304(a)(2).

133. See Fredrick Kunkle, *Pa. Cousins Try to Overcome Taboo of 'I Do'*, WASHINGTON POST, Apr. 25, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/24/AR2005042401406.html> (last visited Mar. 14, 2015).

134. WIS. STAT. § 944.06 (2009).

135. *Id.* § 765.03.

136. *Id.* § 765.04.

structive relationship within the extended family.

As predicted by Justice Scalia, this statute has indeed been attacked on a *Lawrence* theory, but as one would expect from the majority opinion in *Lawrence*, that attack failed. In *Muth v. Frank*,<sup>137</sup> a case with a complicated procedural history, two siblings managed to get married and produced three children, at least one of whom was removed from them.<sup>138</sup> Their parental rights to that child were subsequently terminated, and they were both prosecuted for and convicted of incest.<sup>139</sup> Subsequently, the man brought a federal *habeus corpus* petition challenging the constitutionality of Wisconsin's incest statute based on an expanded reading of *Lawrence*.<sup>140</sup> The district court denied that petition, and the Seventh Circuit affirmed.<sup>141</sup> The appellate court reasoned that Muth was not a beneficiary of the rule *Lawrence* announced: "*Lawrence* . . . did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest."<sup>142</sup>

It is highly doubtful that *Lawrence* will affect state criminal incest statutes or consanguinity restrictions on marriage, but it is an open question whether the remaining state prohibitions on first cousin marriage or intercourse are warranted. While that matter is beyond the scope of this article, it is interesting to note that quite a fair number of prominent and highly intelligent people, including Charles Darwin<sup>143</sup> and Albert Einstein,<sup>144</sup> have married their first cousins. Fortunately for Darwin and Einstein, neither resided in Wisconsin.

## VII. PROSTITUTION

*"If a priest's daughter defiles herself by becoming a prostitute, she disgraces her father; she must be burned in the fire."*—Leviticus 21:9<sup>145</sup>

Justice Scalia's argument that *Lawrence* undercuts criminal prosti-

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137. *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005).

138. *Id.* at 810.

139. *Id.*

140. *Id.*

141. *Id.* at 818.

142. *Id.* at 817.

143. PAUL JOHNSON, CHARLES DARWIN: PORTRAIT OF A GENIUS 49–50 (2012). The couple produced 10 children.

144. WALTER ISAACSON, EINSTEIN: HIS LIFE AND UNIVERSE, 172 (2007).

145. *Leviticus* 21:9 (New International Version).

tution laws has been raised several times by criminal defendants charged with prostitution or related offenses, but, thus far at least, has failed.

In 2004, less than a year after *Lawrence*, Donna L. Williams appealed her second prostitution conviction, asserting that her actions were protected under *Lawrence*.<sup>146</sup> In a brief decision, the Appellate Court of Illinois, Third District, readily distinguished the rationale of *Lawrence*:

“Williams’ reliance on the *Lawrence* decision is misplaced. Williams characterizes her conduct as private sexual activity between two consenting adults. As the State argues, however, Williams’ activity is more aptly described as the commercial sale of sex. The *Lawrence* Court specifically excluded prostitution from its analysis.”<sup>147</sup>

In 2005, the Louisiana Supreme Court, in *State v. Thomas*, rejected a similar claim involving a motion to quash a bill of information for soliciting an undercover officer to engage in “unnatural oral copulation for compensation.”<sup>148</sup> The trial court had agreed with the defendant that her commercial activity was protected by *Lawrence*, but the state supreme court unanimously reversed, citing the *Lawrence* majority’s specific disclaimer that the decision addressed prostitution.<sup>149</sup>

In 2006, an Arizona appeals court summarily rejected a similar challenge raised by a man charged with soliciting an act of prostitution in *State v. Freitag*.<sup>150</sup> That same year, a federal district court in Indiana likewise rejected a similar defense to federal charges of inducing or enticing women to travel in interstate commerce to engage in prostitution.<sup>151</sup>

The closest that Justice Scalia’s stated fear has come to fruition was in the Hawai’i Supreme Court decision in *State v. Romano* in 2007.<sup>152</sup> Pame Romano was convicted of prostitution after the trial court found that she had agreed to perform a “handjob” on an undercover policeman for \$20.<sup>153</sup> The officer had responded to a massage

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146. *People v. Williams*, 811 N.E.2d 1197 (Ill. App. Ct. 2004).

147. *Id.* at 1199.

148. *State v. Thomas*, 891 So. 2d 1233, 1234 (La. 2005).

149. *Id.* at 1236.

150. *State v. Freitag*, 130 P.3d 544, 547 (Ariz. Ct. App. 2006).

151. *United States v. Thompson*, 458 F. Supp. 2d 730, 733 (N.D. Ind. 2006).

152. *State v. Romano*, 155 P.3d 1102 (Haw. 2007).

153. *Id.* at 1104.

advertisement in a “Pennysaver” newspaper.<sup>154</sup> He called the telephone number, and Ms. Romano answered and agreed to meet him in front of his hotel.<sup>155</sup> From there, they then went up to his hotel room.<sup>156</sup> The officer brought up the subject of a sex act, and, when she agreed to perform a “handjob” for \$20, she was arrested for prostitution.<sup>157</sup> Under the Hawai‘i statute, prostitution includes the situation in which a person “engages in, or agrees or offers to engage in, sexual conduct for a fee.”<sup>158</sup> “Sexual conduct” includes “sexual contact,” which at the time was defined as, “[A]ny touching of the sexual or intimate parts of a person not married to the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or intimate parts.”<sup>159</sup> Although the Hawai‘i Supreme Court affirmed Ms. Romano’s conviction, Chief Justice Levinson dissented, based on *Lawrence* as applied to the specific facts in the case. Citing Justice Scalia’s dissent, Chief Justice Levinson concluded that *Lawrence* protects prostitution between consenting adults where the entire transaction takes place in a private setting:

My analysis draws a clear line between purely private behavior between consenting adults—requiring demonstration of a compelling state interest before *criminal* penalties may be imposed—and the public realm, where the state retains broad power to impose time/place/manner regulations. . . . [T]his case does not implicate public solicitation, streetwalking, or salacious advertising, which are not private activities. Rather, the present record reflects that the charged transaction could not conceivably have hurt anyone other than Romano, which renders her conviction under [the statute]—absent a showing of a compelling interest from the prosecution—a violation of her federal and state constitutional rights to privacy as articulated by *Lawrence* and by the drafters of article I, section 6.<sup>160</sup>

No other justice joined Chief Justice Levinson’s dissent. Nor have subsequent cases followed his rationale. In 2011, a court of appeals in Texas rejected the notion that *Lawrence* protects adult “consensual commercial sex” from criminal prosecution in *Jackson v.*

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154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1104–05.

158. HAW. REV. STAT. § 712-1200(1) (2014).

159. *Id.* §§ 712-1200(2) & 707-700 (2014).

160. *State v. Romano*, 155 P.3d 1102, 1124 n. 149 (Haw. 2007) (Levinson, C.J. dissenting).

*State*.<sup>161</sup> The factual basis of Sylvia Jackson's conviction is not set forth in the decision, so it is impossible to tell whether the underlying commercial transaction took place in private as it did in *Romano*. It probably did not help Jackson's cause that she had previously been convicted multiple times of prostitution and that she testified that "she is not mentally ill, does not have a drug or alcohol problem, and is a prostitute because she 'likes to shop and the idea of having money in [her] pocket.'"<sup>162</sup>

Courts have continued to unanimously reject the notion that *Lawrence* protects prostitution from criminal prosecution. The most recent case in this line, *Commonwealth v. Tamen*, decided by the Supreme Court of the Commonwealth of the Northern Mariana Islands in August 2014, cited not only some of the preceding authorities, but also similar decisions of the federal district courts for the eastern district of Louisiana, the northern district of Ohio, and the District of Columbia.<sup>163</sup>

In an ironic twist, American University Law Professor Jamie Rankin testified before the Senate Judiciary Committee in June 2014 that the Supreme Court's decisions in *Citizens United v. FEC*<sup>164</sup> and *McCutcheon v. FEC*,<sup>165</sup> striking down limitations on campaign contributions on free speech grounds, mean that paying money for sex is a form of free speech that cannot be criminalized.<sup>166</sup> Justice Scalia joined the majority opinion in both cases.<sup>167</sup>

## VIII. MASTURBATION

*"Then Judah said to Onan, 'Sleep with your brother's wife and fulfill your duty to her as a brother-in-law to raise up offspring of your brother.' But Onan knew that the child would not be his; so whenever he slept with his brother's wife, he spilled his semen on the ground to keep from providing offspring for his brother. What he did was wicked in the Lord's sight; so the*

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161. *Jackson v. State*, 2011 Tex. App. Lexis 4467 (Tex. App. Dallas 2011).

162. *Id.* at n.2.

163. *Commonwealth v. Tamen*, 2014 MP 8 (N. Mar. I. 2014).

164. *Citizens United v. FEC*, 558 U.S. 310 (2010).

165. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

166. Eric W. Dolan, *Law Professor Tells Senators: If Money is Speech, Outlawing Prostitution is Unconstitutional*, RAW STORY (June 4, 2014), <http://www.rawstory.com/rs/2014/06/law-professor-tells-senators-if-money-is-speech-outlawing-prostitution-is-unconstitutional/> (last visited Mar. 14, 2015).

167. *See Citizens United*, 558 U.S. 310; *McCutcheon*, 134 S. Ct. 1434 (2014).



*Lord put him to death also.*”—Genesis 38:8-10.<sup>168</sup>

In his *Lawrence* dissent, Justice Scalia is opaque as to which state laws prohibiting masturbation he thought were undermined by the majority's decision. Public or commercial masturbation may well be subject to prosecution under any of a number of related statutes. As noted above, in the *Romano*<sup>169</sup> case, an offer to perform, or actual performance of, an act of masturbation on another person for money may constitute prostitution, for which *Lawrence* does not constitute a defense. In Georgia, such an act may constitute the separate offense of “masturbation for hire.”<sup>170</sup> An individual who masturbates in public may be prosecuted for such offenses as “indecent exposure” in Michigan,<sup>171</sup> or “exposure of a person” in New York,<sup>172</sup> or “public indecency” in Ohio.<sup>173</sup>

An individual who creates visual depictions of a minor masturbating, possesses such visual depictions, or transmits such depictions is subject to criminal prosecution under related provisions of the federal child pornography laws. In *United States v. Bach*, the criminal defendant who had been convicted of these crimes appealed, *inter alia*, alleging that his actions were “protected by the liberty and privacy components of the due process clause of the Fifth Amendment under *Lawrence v. Texas*.”<sup>174</sup> Relying on the Supreme Court's admonition in *Lawrence* that that case “did not involve minors or others ‘who might be injured or coerced,’” the Court of Appeals readily distinguished Bach's actions involving a minor who had been coerced from the consensual private conduct between two adults at issue in *Lawrence*.<sup>175</sup>

Masturbation in the privacy of one's home does not appear to have been the subject of state criminal laws in modern times, and there is understandably a dearth of case law on the subject. It is, of course, possible that a sex act committed in the privacy of the home may end up being observed by public authorities. In this regard, it is

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168. *Genesis* 38:8–10 (New International Version) (One might argue that the Lord was compelling Onan to engage in incest. In any event, it is less than clear whether Onan's mortal sin was the act of masturbation or the purposeful failure to impregnate his sister-in-law).

169. *Act v. Romano*, 155 P.3d 1102, 1124 n. 149 (Haw. 2007).

170. GA. CODE ANN. § 16-6-16 (2014).

171. *People v. Vronko*, 579 N.W.2d 138, 141 (Mich. App. 1998).

172. N.Y. PENAL LAW § 245.01 (McKinney 2014).

173. *State v. Edmiston*, 2010 Ohio 3413 (Ct. App. 2010).

174. *United States v. Bach*, 400 F.3d 622, 628 (8th Cir. 2005).

175. *Id.* at 628–29.

noteworthy that in *Lawrence*,<sup>176</sup> as in *Bowers*,<sup>177</sup> two men were engaged in a private, non-commercial, consensual sex act when the police entered the residence and arrested them. One supposes that if there were a state criminal statute outlawing masturbation *per se*, and in the unlikely event that a zealous prosecutor ever actually attempted to prosecute someone for committing such a crime in the privacy of his home where he could not be observed by either a minor or a member of the public, *Lawrence* would indeed stand as a defense. Given the apparent dearth of such laws and the understandable lack of state attempts to enforce any such criminal prohibition, it is doubtful that *Lawrence* would have any real practical impact on what Justice Scalia evidently believes to be a proper subject of state criminal sanctions.

### IX. BESTIALITY

*“Anyone who has sexual relations with an animal is to be put to death.”—Exodus 22:19<sup>178</sup>*

In his *Lawrence* dissent, Justice Scalia opined that the case would undercut, *inter alia*, state laws against bestiality.<sup>179</sup> He apparently equated consensual, non-commercial, private sex between two sentient adults with sex between an adult and an animal. This logical leap leads ineluctably to such metaphysical questions as: the age at which a particular animal reaches adulthood, the mental capacity of even an adult animal to give consent to a sex act with a human, whether in the case of a pet or farm animal who is reliant on the human for food and shelter consent may ever have been said to have been given truly voluntarily, and how exactly the adult is to ascertain that the animal is of age and gives voluntary informed consent?

An individual who engages in a sexual encounter with an animal may be subject to prosecution under state laws with a variety of names. In Minnesota, such an act constitutes “bestiality.”<sup>180</sup> In Virginia, it is a “crime against nature.”<sup>181</sup> In South Carolina, it is “buggery.”<sup>182</sup> In Kansas, it is a form of “sodomy.”<sup>183</sup>

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176. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

177. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

178. *Exodus 22:19* (New International Version).

179. *Lawrence*, 539 U.S. at 590.

180. MINN. STAT. § 609.294 (2014). See *State v. Bonyng*, 450 N.W.2d 331 (Minn. App. 1990).

181. VA. CODE ANN. § 18-2-361 (2006).

182. S.C. CODE ANN. § 16-15-120 (1976).

For a variety of reasons, such crimes are rather infrequently reported, and, when they are, the perpetrator may become the object of public derision. In September 2012, a Florida farm worker, Carlos Romero, was arrested for performing a sex act with a miniature donkey named Doodle.<sup>184</sup> Bravely, if rather unwisely, his public defenders actually accepted Justice Scalia's invitation to challenge Florida's bestiality statute on the grounds that it deprived Romero of his "personal liberty and autonomy when it comes to private intimate activities."<sup>185</sup> Shortly thereafter, however, Romero, presumably on the advice of counsel, accepted a plea deal for a year's probation and a \$200 fine.<sup>186</sup>

There appears to be only one reported case in which a defendant actually took Justice Scalia's suggestion and tried to use the *Lawrence* analogy as a basis to challenge his conviction for having had sex with an animal up through the state's court system. Joshua Coman pled guilty to misdemeanor criminal sodomy in violation of Kansas statute after his former roommate found him with her pet Rottweiler dog "in a compromising position."<sup>187</sup> At sentencing, the district court determined that Coman had to register under the Kansas Offender Registration Act (KORA). Coman appealed the sentence imposed to the Court of Appeals, but also challenged the constitutionality of the statute under both the United States and Kansas Constitutions. For a variety of procedural reasons, the Court of Appeals declined to hear his constitutional challenge and affirmed his sentence. Coman took his challenge to the Kansas Supreme Court.

Coman had pled guilty to "criminal sodomy," which as set forth in the pertinent section of the Kansas statute is, "Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal."<sup>188</sup> The Kansas Supreme Court acknowledged that part of the statute "may be unconstitutional under the narrow holding in *Lawrence* because it makes private homosexual conduct by two consenting adults a crime."<sup>189</sup>

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183. KAN. STAT. ANN. § 21-3505(a)(1) (2014).

184. Vishal Persaud, *Lawyers for Donkey-Sex Suspect Challenge Law's Constitutionality*, Ocala Star-Banner (Dec. 11, 2012), <http://www.gainesville.com/article/20121211/ARTICLES/121219923> (last visited Mar. 14, 2015).

185. *Id.*

186. *Fla. Man Who Pleaded Guilty to Sex with Donkey Is Back in Jail*, KCCI, (Jan. 18, 2013), <http://www.kcci.com/Fla-man-who-pleaded-guilty-is-back-in-jail/18186364>.

187. *State v. Coman*, 273 P.3d 701, 703 (Kan. 2012).

188. KAN. STAT. ANN. § 21-3505(a)(1) (2014).

189. *Coman*, 273 P.3d at 705.

But that was not the part of the section of statute under which Coman had been charged, i.e. the bestiality provision. He lacked standing to challenge the homosexual acts prohibition under the statute, and *Lawrence* simply did not apply to bestiality laws.<sup>190</sup> Given the complete lack of equivalence between private adult consensual sex and sex between a human and a non-human, this result is hardly surprising.

## X. OBSCENITY

*“Nor should there be obscenity, foolish talk or coarse joking, which are out of place, but rather thanksgiving.”*—Ephesians 5:4.<sup>191</sup>

Finally, Justice Scalia argued that *Lawrence* would undermine state obscenity laws.<sup>192</sup> The law on obscenity is of course complex, sometimes to the point of inexplicability, and ever-changing in light of new forms of media and communication. Normally, obscenity challenges are focused on First Amendment issues rather than due process, the prevailing argument in *Lawrence*. Thus, although the Court has generally found that obscenity is not protected by the First Amendment,<sup>193</sup> in *Stanley v. Georgia* in 1969, it ruled that an individual has a First Amendment right to possess obscene materials “in the privacy of a person’s own home.”<sup>194</sup> As was the case with both *Bowers* and *Lawrence*, the authorities had entered the defendant’s residence for other purposes and then discovered the activity deemed criminal under state law.<sup>195</sup> In words which presaged the *Lawrence* rationale, the *Stanley* majority emphasized, “[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>196</sup>

190. *Id.* at 705–06. The Court nevertheless found that Coman did not have to register under KORA, given the crime to which he had pled guilty. *Id.* at 709.

191. *Ephesians* 5:4 (New International Version).

192. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

193. *Roth v. United States*, 354 U.S. 476, 481 (1957). Non-obscene pornography is generally protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 26 (1973). But non-obscene child pornography is not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764 (1982). Therefore, despite *Stanley v. Georgia*, possession of child pornography in one’s home is not protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 108 (1990). On the other hand, computer generated child pornography that is not obscene and is created without using real children is protected. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002).

194. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

195. *Id.* at 558.

196. *Id.* at 564.

As noted above, there was a failed effort to mount a *Lawrence* defense to creation, dissemination and transmission of child pornography in the *Bach* case.<sup>197</sup> Another ultimately unsuccessful effort to use *Lawrence* (coupled with *Stanley*) to challenge the law in this area has been reported in the federal court system. In *United States v. Extreme Associates*, the government charged the defendants with nine counts of violating federal obscenity statutes and one count of conspiracy to do so.<sup>198</sup> The defendants moved to dismiss, challenging the federal statutes as violating the rights of liberty and privacy. As in some of the cases striking down same-sex marriage prohibitions, the district court judge cited Justice Scalia's dissent in *Lawrence* as a basis to strike down the challenged statutes:

In a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia opined that the holding in *Lawrence* calls into question the constitutionality of the nation's obscenity laws, among many other laws based on the state's desire to establish a 'moral code' of conduct.<sup>199</sup> It is reasonable to assume that these three members of the Court came to this conclusion only after reflection and that the opinion was not merely the result of over-reactive hyperbole by those on the losing side of the argument.<sup>200</sup>

But the defendants' victory was short-lived; a unanimous panel of the Third Circuit reversed the district court.<sup>201</sup> The panel reasoned that "the Supreme Court has decided that federal statutes regulating the distribution of obscenity do not violate any constitutional right to privacy," and *Lawrence* does not definitively overrule that line of cases.<sup>202</sup> Similarly, *Lawrence*-based attacks on obscenity laws have also failed in the Fifth Circuit<sup>203</sup> and the Eastern District of Missouri.<sup>204</sup>

Understandably, litigation in this area of law continues to focus on the First Amendment. In 2008, Justice Scalia penned the majority opinion in *United States v. Williams*, upholding a provision of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act against a First Amendment chal-

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197. See *supra* text accompanying notes 174–75.

198. *United States v. Extreme Associates*, 352 F. Supp. 2d 578, 579 (W.D. PA 2005).

199. *Lawrence*, 539 U.S. at 590, 123 S. Ct. 2472 (Scalia, J., dissenting).

200. *Id.* at 590.

201. *United States v. Extreme Associates*, 431 F.3d 150, 151 (3rd Cir. 2005).

202. *Id.* at 161.

203. *United States v. Coil*, 442 F.3d 912 (5th Cir. 2006).

204. *United States v. Gendron*, 2009 U.S. Dist. Lexis 125889 (E.D. Mo. 2009).

lenge.<sup>205</sup> In *Williams* there was a secondary due process issue as to whether the statute was void for vagueness, which was obviously not based on *Lawrence*. The Court rejected that claim as well.<sup>206</sup>

In 2009, Justice Scalia wrote the majority opinion in *Federal Communications Commission v. Fox Television*, overruling a decision of the Second Circuit that the FCC had failed to comply with procedural requirements under the Administrative Procedure Act when it announced that a broadcast of a single “F-word” could violate the indecency standard.<sup>207</sup> Because the Second Circuit had not reached the underlying First Amendment issue, the Supreme Court declined to do so on appeal.<sup>208</sup> When the case returned to the Court in 2012, Justice Scalia joined the Court’s unanimous opinion that the FCC had failed to give fair notice that it had changed its interpretation of indecency to include fleeting expletives and brief non-frontal nudity, and thus its new standards as applied, were void for vagueness.<sup>209</sup>

In 2010, Justice Scalia joined the majority opinion in *United States v. Stevens*, striking down under the First Amendment a federal statute that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty.<sup>210</sup> Again, there was no *Lawrence* issue in the case.

It is fair to say that, to date, *Lawrence* has not affected the law of obscenity (or child pornography or indecency) in any meaningful way.

## XI. A SCORE CARD AND THE FUTURE

It is impossible to make a final judgment on open-ended predictions, as opposed to time-limited predictions (such as, “in the next ten years”) or date specific predictions (such as “the world will end on (insert date here)”). The latter two types of predictions will be proven or disproven with the passage of time. For example, radio preacher Harold Camping predicted that the end of the world would take place on May 21, 2011, and sadly many of his followers took dire actions in preparation for the imminent rapture. When that failed to transpire on the date set, Camping recalculated and changed his pre-

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205. *United States v. Williams*, 553 U.S. 285 (2008).

206. *Id.* at 305–06.

207. *F.C.C. v. Fox Television*, 556 U.S. 502, 509–22 (2009).

208. *Id.* at 529.

209. *F.C.C. v. Fox*, 132 S. Ct. 2307 (2012).

210. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

diction to October 21, 2011. When that didn't happen, he gave up predicting the end of the world.<sup>211</sup>

Justice Scalia's dissents in *Romer*, *Lawrence*, and *Windsor* are open-ended; they have no date certain or time frame for fruition. It is now almost two decades since *Romer* was decided, more than a decade since *Lawrence*, and a little more than a year since *Windsor*. Just because an open-ended prophecy has not been fulfilled in one, ten or twenty years' time does not disprove its prescience. In 1896, Justice Harlan, the sole dissenter in *Plessy v. Ferguson*, upholding racial segregation in railway cars, wrote, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case."<sup>212</sup> It took almost six decades before Justice Harlan was vindicated and the Court abandoned *Plessy's* pernicious doctrine of separate-but-equal as it applied to public education in *Brown v. Board of Education*.<sup>213</sup>

With these caveats in mind, one may sum up how Justice Scalia's "parade of horrors" have fared to date. Same-sex marriage is an issue currently riveting the nation. An almost unanimous federal bench has struck down state prohibitions on same-sex marriage based largely on *Windsor*, and it is highly likely that the Court will address this issue in the foreseeable future. Polygamy, insofar as legal recognition of plural marriage, is not the law in any state, and even if the "Sister Wives" decision is upheld on appeal, it will not mean legal recognition of plural marriage. Adultery remains a crime in many jurisdictions, but sensibly is seldom prosecuted. Fornication laws, likewise seldom prosecuted for obvious reasons, still exist in some states, but admittedly are highly suspect post-*Lawrence*. Adult incest prohibitions remain in place and have thus far been upheld. Prostitution is a crime in all states, although Nevada permits local options (except in Clark County where Las Vegas is situated) for licensed brothels.<sup>214</sup>

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211. Robert D. McFadden, *Harold Camping, Dogged Forecaster of the End of the World*, *Dies at 92*, N. Y. TIMES, Dec. 17, 2013, available at <http://www.nytimes.com/2013/12/18/us/harold-camping-radio-entrepreneur-who-predicted-worlds-end-dies-at-92.html?pagewanted=all> (last visited Mar. 14, 2015).

212. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

213. *Brown v. Board of Education*, 347 U.S. 483 (1954).

214. NEV. REV. STAT. § 269.175 (2014) authorizes boards of county commissioners to license "disorderly houses and houses of ill fame" in any unincorporated town. But § 244.345(8) prohibits a license board from issuing a license for the purpose of operating "a house of ill fame or repute or any other business employing any person for the purpose of prostitution" in a county whose population is 700,000 or more, thereby prohibiting legal prostitution in Las Vegas (a/k/a "Sin City") and the surrounding Clark County.

Thus far, constitutional attacks on prostitution statutes have proven unavailing. Masturbation conducted in private, without a commercial component or coercion or the involvement of minors, is beyond the scope of civil or criminal law, as well it should be. Bestiality is a seldom prosecuted crime, which has been upheld against rare unconstitutional attack. Obscenity laws are frequently evolving and have sometimes fallen to constitutional challenges, but not under any theory based on *Romer*, *Lawrence*, or *Windsor*.

Now that the Court is poised to rule directly on state prohibitions on entry into and recognition of same-sex marriage, will Justice Scalia prove to have been prescient in predicting the outcome? While it is admittedly hard, and probably foolish, to try to “read the tea leaves,” certainly the trilogy of *Romer*, *Lawrence*, and *Windsor* must give great hope to advocates of same-sex marriage. In each case, the proponents of gay rights won a clear victory for their position. And, *Hollingsworth v. Perry* (the companion case to *Windsor*), while not decided on the merits of the challenge to California’s Proposition 8, must be counted as a victory for gay rights advocates, as the Court’s finding of the lack of a case or controversy had the effect of reinstating same-sex marriage in that State.<sup>215</sup> All this constitutes a marked about-face from the Court’s 1972 summary dismissal of the appeal in *Baker v. Nelson*, where two men had alleged a federal constitutional right to be married, the Court unanimously finding the “want of a substantial federal question.”<sup>216</sup>

Surely there is language in the various opinions of the Justices in *Windsor* that can be read to support or undermine the notion of a federal constitutional right to same-sex marriage. The majority opinion repeatedly emphasized that regulation of civil marriage is a traditional function of the States. “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens . . . . Consistent with this allocation of authority, the Federal Government through our history, has deferred to state-law decisions with respect to domestic relations.”<sup>217</sup> Yet, the majority did not explicitly decide the case on federalism grounds, but rather on due process and equal protection.<sup>218</sup>

While the *Windsor* majority opined that “discriminations of an

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215. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

216. *Baker v. Nelson*, 409 U.S. 810 (1972).

217. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

218. *Id.* at 2693.



unusual kind' especially require careful consideration,"<sup>219</sup> nevertheless the majority opinion was ultimately silent on the standard of review applicable to a statute which discriminates against homosexuals.<sup>220</sup> Furthermore, as noted, the majority opinion, by its own terms, was limited to marriages recognized as lawful under state law.<sup>221</sup>

One might posit that Justice Scalia could feel bound by the doctrine of stare decisis to follow the rationale of *Lawrence* and *Windsor* and his own analysis of those decisions to vote that the United States Constitution guarantees same-sex couples the right to marry. But given his dissent in *Windsor*, in which he surely did not feel bound by the majority's rationale in *Lawrence*, this is a consummation hardly to be expected. On the other hand, since Justice Scalia actually provided the fifth vote in *Hollingsworth* to reinstate same-sex marriage in our most populous state, might he surprise the legal world again? And, why did he provide such an explicit roadmap for applying the *Lawrence* rationale to state same-sex marriage bans if not to assist the opponents of those bans?

If the Court finds a constitutional right for same-sex couples to marry, that would, temporarily at least, end the legal dispute, although no doubt there would be calls for a constitutional amendment to overturn the result.<sup>222</sup>

If the Court upholds state same-sex marriage bans, then the law on same-sex marriage will remain similar to the law on first cousin marriage, with the states being divided on the issue.<sup>223</sup> Should that happen, some same-sex couples—perhaps those who are younger and more mobile—may be expected to “vote with their feet” and move from jurisdictions where they cannot marry to jurisdictions where they can.

But other couples, like Windsor and her longtime partner Thea Spyer, may opt to get married in a jurisdiction that permits such marriages, without intending to reside there.<sup>224</sup> This will implicate the second question on which the Court has granted cert: whether states are required by the Fourteenth Amendment to recognize same-sex

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219. *Id.*

220. *Id.* at 2716-19 (Alito, J., dissenting).

221. *Id.* at 2696.

222. *See, e.g.*, the proposed “Marriage Protection Amendment,” H.J. RES. 51, 113th Cong. (2013–2014).

223. *See* National Conference of State Legislatures, *State Laws Regarding Marriages Between First Cousins*, <http://www.ncsl.org/research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx> (last visited Mar. 14, 2015).

224. Windsor, 133 S. Ct. at 2682.

marriages validly licensed and performed out-of-state. If the Court answers that question in the affirmative, then there will be no conflict of laws or choice of laws problem. But, should the Court answer that question in the negative, such couples may well find themselves in the anomalous position of being considered married in a state where they don't reside, but not married where they do reside. This could lead to myriad complexities involving such matters as ownership of property, health and life insurance coverage, Social Security benefits, and state and federal taxation.<sup>225</sup>

What does the future of family law in the United States hold for the various other "horribles" raised by Justice Scalia? There appears to be no credible legal movement for the legalization of state-recognized polygamy, and the polygamy laws will continue to be enforced periodically in egregious or notorious circumstances. We may expect adultery to remain a proper subject of domestic relations law, but at most to be on the outer fringes of criminal law even where such a crime remains on the books. Anti-fornication criminal statutes will remain for some time on the books in a dwindling number of states, but not really enforced except perhaps in a deal where someone charged with a more serious sexual offense is offered a plea. Adult incest will remain a crime, although the states will continue to be at odds as to the degree of consanguinity necessary to constitute the offense, and although it will be seldom prosecuted. Indeed, even the European Court of Human Rights, which is generally viewed as being more "liberal" than the U.S. Supreme Court, has fairly recently upheld the right of Germany to criminalize adult incest.<sup>226</sup> What about legalization of prostitution, as some have called for,<sup>227</sup> and as is already the case in many countries around the world?<sup>228</sup> It seems highly unlikely that our courts would initiate such a change, but some states may eventually take baby steps and follow Nevada's lead of al-

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225. See Robert E. Rains, *The Legal Status of Same-Sex Married Couples in Pennsylvania after the U.S. Supreme Court Decision in the DOMA Case*, 85 PBA Quarterly 1 (2014).

226. Case of Stübing v. Germany, E.C.H.R. Application no. 43547/08, decided 24/09/2012.

227. See Amanda Swysgood, *U.N. Commission Calls for Legalizing Prostitution Worldwide*, CNSNEWS.COM (July 23, 2012), <http://cnsnews.com/news/article/un-commission-calls-legalizing-prostitution-worldwide>. (last visited Mar. 14, 2015); *Legalize Prostitution Now*, THE DAILY CALIFORNIAN, (July 28, 2014), [www.dailycal.org/2014/07/28/legalize-prostitution-now](http://www.dailycal.org/2014/07/28/legalize-prostitution-now). (last visited Mar. 14, 2015).

228. See *100 Countries and Their Prostitution Policies*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000772> (last visited March 14, 2015).

lowing local options. Masturbation in private, not for money, not involving coercion or children, will properly remain outside the scope of state regulation. Bestiality will remain a crime, although seldom prosecuted and although some may deem its perpetrators to be more in need of psychiatric help than incarceration.<sup>229</sup> Obscenity laws and related statutes will continue to evolve in a world where texting quickly brought forth “sexting” and where anyone with a smart phone or access to the internet can readily become a pornographer. Challenges to obscenity and related statutes will likewise continue, but are unlikely to be premised on a theory arising out of *Romer*, *Lawrence*, or *Windsor*.

But, ultimately, this author’s crystal ball may be no clearer than Justice Scalia’s. The law evolves. What is unimaginable today may become imaginable or even acceptable and constitutionally protected with the passage of time.

To the Supreme Court in 1972, the concept of a constitutional right to same-sex marriage was so unthinkable that it summarily dismissed the appeal in the first same-sex marriage case to reach it, *Baker v. Nelson*.<sup>230</sup> In the ensuing years, the Court has issued three decisions on the merits that are protective of gay rights, *Romer*, *Lawrence*, and *Windsor*, to the point of striking down in *Windsor* the provision in the federal Defense of Marriage Act barring federal recognition of state recognized same-sex marriages. And, in a fourth case, *Hollingsworth*, decided on standing grounds, the Court effectively reinstated same-sex marriage in California. Whatever one’s position on gay rights issues, it is undeniable that the Court has revolutionized this area of law in a remarkably brief period of time.

The author grew up in the segregated South in a state where interracial marriages were outlawed, the crime of miscegenation was actually prosecuted, and a state court judge could defend that legal situation as having been divinely ordained.<sup>231</sup> Today, the President of the United States, who has been elected twice, is the product of an interracial marriage, which, had it taken place in the author’s home state, would have been void and criminal.

What does all this hold for the future of family law in the United

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229. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), list zoophilia as an “Other Specified Paraphilic Disorder,” 302.89 (F65.89). But, just because a disorder is listed in the DSM does not mean that acting out that disorder cannot be the basis of criminal prosecution.

230. *United States v. Extreme Associates*, 352 F. Supp. 2d 578, 579 (W.D. PA 2005).

231. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967).

States? Changes are bound to come. Only time will tell what exactly they will be. And, whether they will ultimately be good or bad for families will, as always, remain in the eye of the beholder.