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# HOMOPHOBIA AND THE “MATHEW SHEPARD EFFECT” IN *LAWRENCE V. TEXAS*

KRIS FRANKLIN\*

*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.*<sup>1</sup>

## I. INTRODUCTION

To say that Supreme Court Justice Anthony Kennedy’s majority opinion in *Lawrence v. Texas* was unexpected would be a massive understatement. Readers on the political left and right, both supporters and opponents of the civil rights of sexual minorities were, frankly, gobsmacked by the Court’s decision and Kennedy’s language in explaining it.<sup>2</sup> Progressive commentators, legal scholars, advocates, even the lawyers for the case, were cautiously optimistic when the Supreme Court granted *certiorari*. But few, if any, raised the possibility that despite the promising pro-gay signs of *Romer v. Evans*,<sup>3</sup> the Court would so decisively overturn its decision in *Bowers v. Hardwick*<sup>4</sup> so soon, less than two decades after it was issued.<sup>5</sup> That the Court far exceeded even the most ambitious expectations

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1. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2484 (2003).
2. See, e.g., Linda Greenhouse, *The Supreme Court: Homosexual Rights*, N.Y. TIMES, June 27, 2003 at A1 (observing that “few people on either side of the case expected a decision of such scope. . .”); *Breakthrough*, WASH. POST, June 27, 2003, at A28 (deeming the Court’s “remarkable and majestic decision” an “enormous breakthrough”); Chris Bull, *Justice Served*, THE ADVOCATE, Aug. 19, 2003, at 35 (observing that “Court watchers were stunned by the sweep of the decision”).
3. 517 U.S. 620 (1996).
4. 478 U.S. 186 (1986).
5. See, e.g., Andy Humm, *Supreme Court Sodomy Ruling Next Week*, GAY CITY NEWS, June 20, 2003 (noting that “[w]hile virtually all observers expect the court to overturn the Texas gay-only sodomy law, there is no way to predict on what grounds the court will decide the case”); Ted Streuli, *Supreme Court to Hear Homosexual Case*, GALVESTON COUNTY DAILY NEWS, Mar. 26, 2003 (quoting law professor Laura Oren predicting “I don’t believe for a minute they’re going to say that homosexual conduct is protected. . . . That would be a big, big thing and I can’t see that.”).

of pro-gay observers in so doing,<sup>6</sup> fulfilling the deepest fears of our opponents,<sup>7</sup> was astounding.

It is hard to describe the burst of euphoria this decision produced. Like so many other lesbians and gay men in the United States, I was overwhelmed by the decision and moved by Kennedy's invocation of human rights and the innate dignity of consensual adult relationships in the context of homosexuality. Kennedy's opinion demonstrated not only generosity of spirit, but also a kind of intellectual cosmopolitanism usually absent from sodomy law decisions – citing lesbian and gay historians,<sup>8</sup> European parliamentarians,<sup>9</sup> and civil libertarians,<sup>10</sup> as well as the usual array of judicial precedents.

But my interest went beyond the historical import and legal significance of the decision. Several years ago, I decided to write a piece about legal authority and its rhetorics, and I chose to center my discussion on state sodomy law decisions. I considered discussing a number of cases that had recently been issued by state courts, including those in Louisiana, Montana, Kentucky, and Virginia,<sup>11</sup> but ultimately decided to analyze a case then percolating through

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6. See David J. Garrow, *Sodomy and the Supremes*, THE ADVOCATE, Mar. 4, 2003, at 52 (speculating that Lawrence and Garner's likelihood of success in the Supreme Court was "no small thing," but that "limited optimism [might] be in order"). See also, Allen Pusey, *New Day for Gay Americans*, DALLAS MORNING NEWS, July 21, 2003, at 1A; Richard Kim, *Queer Cheer: U.S. Supreme Court Overturns Texas Anti-Sodomy Laws*, 3 THE NATION, July 21, 2003, at 5.

7. See, e.g., John A. Corso, *Supreme Court's Sodomy Ruling Sets Dangerous Moral Precedent*, HOME NEWS TRIB., July 29, 2003, at A22 (finding "particularly objectionable" the conclusion that the majority's morality should not define the bounds of legal behavior); Doug Bandow, *Assault on Morality?*, THE CAPITOL EYE, July 23, 2003, at k230 (quoting Jay Sekulow of the American Center for Law and Justice arguing that in *Lawrence* the Court had struck a "damaging blow for the traditional family"); see also, Robert Robb, *Eroding the Constitution*, THE ARIZONA REPUBLIC, July 9, 2003, at 11B (arguing that Supreme Court's role is to defer to the actual words in the Constitution); Bruce Fein, *Ill-Reasoned Frolic*, WASH. TIMES, July 1, 2003, at A14.

8. *Lawrence*, 123 S. Ct. at 2479-80.

9. *Id.* at 2483.

10. *Id.* at 2479 (citing the *amicus* brief filed in the case by the American Civil Liberties Union).

11. *State v. Smith*, 766 So.2d 501 (La., 2000) (upholding constitutionality of Louisiana sodomy law); *Gryczan v. State*, 283 P.2d 112 (Mont. 1997) (striking down Montana sodomy law based on privacy protections in state constitution); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (overturning Kentucky sodomy law because it has no rational basis under the Kentucky constitution, and is discriminatory); *Santillo v. Com-*

the courts in Texas, *Lawrence v. State*.<sup>12</sup> My goal was primarily to devise a set of classifications of legal authorities,<sup>13</sup> examining how they are deployed in legal decisions in order to understand how they can shape, and are shaped by, judicial outcomes. Given this topic, to some extent I could have addressed almost any element of United States law. But my decision to focus on sodomy law was not entirely random. After all, in so many cases in which the state and federal constitutionality of laws forbidding the array of behaviors gathered under the rubric “sodomy”<sup>14</sup> was under consideration, the use of legal authority was decidedly eccentric.<sup>15</sup> And due to the intense and far-reaching ideological charge of sodomy cases, the choices of authority called upon to support or overturn these laws revealed a great deal about how authority itself functions within the judiciary.

At the time that I was working on my article, there was very little commentary on *Lawrence*, particularly outside Texas.<sup>16</sup> When I selected the case as an example for my analysis, the Texas Court of Appeals had just overturned the state’s sodomy law,<sup>17</sup> a decision

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monwealth, 517 S.E.2d 733 (Va. Ct. App. 1999) (upholding Virginia sodomy law as not impermissibly vague).

12. Kris Franklin, *The Rhetorics of Legal Authority: Constructing Authoritativeness, The “Ellen Effect,” and the Example of Sodomy Law*, 33 RUTGERS L.J. 49 (2001) (hereinafter, *Rhetorics of Legal Authority*).

13. In the earlier work I discussed the appropriately multiple connotations of the word “authority” in this context, signaling as it does not only an underlying source for a legal position, but a weighty determiner of a legal conclusion. *See id.* at 50.

14. Which might be all same-sex sexual activity, or specific set of sexual behaviors that generally include oral and/or anal sex, or simply, some codification forbidding “unnatural behavior.” For a more complete discussion of historically prohibited behavior, *see* Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 YALE L.J. 1073, 1082-89 (1988); *see also Lawrence*, 123 S. Ct. at 2479-80 (disputing the claim in *Bowers v. Hardwick* that same-sex sodomy provisions were soundly rooted historically, and offering a “more complex” description of the multiplicity of meanings in sodomy prohibitions); *but see Bowers v. Hardwick*, 478 U.S. at 192-93; *see also Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

15. *See* discussion in Franklin, *supra* note 12, at 56.

16. *But see* Mary Flood, *Appeals Court Upholds State Sodomy Ban*, THE HOUSTON CHRON., Mar. 16, 2001, at A1.

17. *Lawrence v. State*, 2000 WL729417 (Tex. App. 2000), *opinion withdrawn and superseded on reh’g by Lawrence v. State*, 41 S.W.3d 349 (2001) (the text of the withdrawn opinion remains unpublished, but may be viewed at [http://supct.law.cornell.edu/supct/background/02-102\\_ref.htm](http://supct.law.cornell.edu/supct/background/02-102_ref.htm)) (*last visited* Feb. 9, 2004).

that was later retracted and reversed *en banc*.<sup>18</sup> Because they not only took opposing positions, but also seemed to spring from entirely diverging notions of the cultural significance of gay sexual conduct, the appellate court's opinions and dissents offered textbook examples of ways in which courts have used legal authority to talk about sodomy, which made the case perfect for my purposes.

But on the national front, the case was fairly obscure. The strategy of gay rights activists since *Bowers* had been focused primarily, and often quite successfully, on attacking anti-sodomy statutes state-by-state (recently, the Georgia sodomy law, which had given birth to *Bowers* in the 1980s, had been overturned by the state's highest court,<sup>19</sup> garnering some publicity simply because of the situation's irony<sup>20</sup>), and since *Lawrence* explicitly addressed state constitutional issues, few observers expected that the case would go any further. *Bowers* was still comparatively recent, and it explicitly shut out any federal remedy to same-sex anti-sodomy laws.<sup>21</sup>

The core of my article analyzed not just the different ways in which each incarnation of the Texas Court of Appeals (the original panel and the Court sitting *en banc*) supported their opinions, but

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18. *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001) (*en banc*). When this happened, about halfway through my writing process, I panicked, fearing that my arguments about the case (and in fact the case itself) would disappear. In fact they did not, since the new majority's decision reinstating the sodomy law was in concord with my larger point. And, more importantly, the Texas Court's reactionary decision opened the door for the U.S. Supreme Court to hear the final appeal and overturn not only the Texas sodomy statute, but also all sodomy laws across the nation. The ironies of this are dizzying since what many gay rights advocates saw as a significant blow to the anti-sodomy law movement became the catalyst for the overturning of the touchstone of homophobic jurisprudence. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Additionally, one might imagine that had the majority of judges on the Texas Court of Appeals known the ultimate consequences of their actions, they might have let the original decision stand: now, not only was their sodomy law obviated, but so was the entire framework of anti-same sex discrimination that undergirded their decision.

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

20. *See, e.g.*, *Georgia Supreme Court Overturns Anti-Sodomy Law*, CNN.COM, Nov. 24, 1998 available at <http://www.cnn.com/US/9811/23/sodomy.law.03/> (last visited Feb. 9, 2004); Lisa Keen, *Georgia Repeals Sodomy Law*, WASHINGTON BLADE, Dec. 4, 1998, available at <http://www.sodomylaws.org/usa/georgia/ganews21.htm> (last visited Feb. 9, 2004).

21. This does not mean, of course, that advocates were not eager for further opportunities to push the boundaries of federal sodomy law jurisprudence. Many were. But *Bowers* was the controlling authority and was not especially likely to create room for federal remedies against state restrictions on sodomy.

also what the authorities they selected – from a wide variety of possibilities – revealed about their ideological positions.<sup>22</sup> Ultimately, I used my analysis of the different ways the two diverging opinions deployed legal authority to conclude that legal authorities do not simply document an argument; they also predigest and presuppose the decisions they reach.<sup>23</sup> Moreover, through the rubric of the differing authoritative bases for the varied opinions, I identified a cultural shift in discourse around homosexuality — a movement toward conceptualizing gay identity rather than homosexual conduct, and a consequent re-imagination of the meaning(s) of homosexuality. In honor of the enormous publicity given to comedian Ellen DeGeneres’s declaration that “yep [she was] gay,”<sup>24</sup> I dubbed that phenomenon the “Ellen effect.”

The stakes attached to the Texas case changed precipitously when the lead attorneys in *Lawrence* petitioned for *certiorari*, ambitiously asking the United States Supreme Court to reexamine its decision in *Bowers*.<sup>25</sup> Surprisingly enough, the Court agreed.<sup>26</sup> Given that Texas’s *Lawrence* was decided on state constitutional grounds,<sup>27</sup> the Supreme Court’s decision to hear the case strongly suggested that it was considering overturning the Texas sodomy law. When the Court finally issued its majority opinion, concurrence, and two dissents, what was remarkable was not just the wholesale rejection of anti-gay sodomy law, but the breadth and depth of difference between, and within, the sides, and the rhetorics they deployed to reach their conclusions. And significantly for my purposes, the themes I discussed in the original Texas state cases reappear in the federal constitutional analysis, but on a much

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22. See discussion in Franklin, *supra* note 12, at 71-92.

23. Franklin, *supra* note 12 at 102-3, (observing that “[c]onscious or not, legal writers invisibly construct interpretive frameworks through their choices in introduction and positioning of authorities.”)

24. Bruce Handy, *Roll Over Ward Cleaver, and Tell Ozzie Nelson the News*, TIME, Apr. 14, 1997, at 78.

25. See Brief of Petitioners, at i, 29-32, *Lawrence v. Texas*, 537 U.S. 1044 (2002) (No. 02-102).

26. *Lawrence v. Texas*, 537 U.S.1044 (2002).

27. Namely the Texas Constitution’s Equal Rights Amendment, TEXAS CONST., Article I, §§ 3, 3a. *Lawrence v. State*, 41 S.W.3d at 350 n.2.

broader and more self-consciously significant scale, perhaps because the stakes are so much higher.<sup>28</sup>

The decision reveals other cultural movements, on the left and the right, (in its use of authority), and suggests others that may still come. It seems that the roots of the change in the popular conception of gay people, for which I've reductively credited Ellen Degeneres, have really taken hold. As a result, in many ways Justices Kennedy and Scalia are ultimately speaking the same language about the role of sodomy law in American culture,<sup>29</sup> and in queer life – a massive shift from the rhetoric of *Bowers* and a subtle but crucial change from the majority and minority opinions in the Texas *Lawrence* case. And yet, the different conclusions that Kennedy and Scalia come to, and the authorities they invoke to reach them, demonstrate an ideological chasm between them. This divide separates not just Kennedy's famed libertarianism<sup>30</sup> and Scalia's retrogressive conservatism,<sup>31</sup> but two understandings of what it means to be gay in the world. Both Justices acknowledge the existence of gay people and even gay identity, but only Kennedy recognizes that identity to be fundamentally human, embodied, vulnerable to attack, and worthy of respect.

This Essay, then, is a follow up and companion to the earlier work, examining rhetorical strategy in the Supreme Court's decision in *Lawrence v. Texas* in the context of my previous analysis of the case in the Texas courts. I reflect and expand upon some of the ideas in the earlier article, briefly discuss the use of legal authority

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28. And unlike the opinions in state court, the tone of the federal opinions makes it abundantly clear that the justices acknowledge the mire of cultural debate they are wading into.

29. One reason for this, of course, is that the suggestion that Justices Kennedy and Scalia can easily align with the political "left" and "right" in the first place. While there is little doubt that Justice Scalia is more politically conservative than the average U.S. citizen, it is not conversely true that Justice Kennedy is more liberal. Moreover, Justice Kennedy's opinion is careful, where possible, to rely upon the work of scholars known for their conservative leanings. See, e.g., *Lawrence*, 123 S. Ct. at 2483 (citing Richard A. Posner & Charles Fried). Justice Scalia's dissent is equally strategic, where possible using the work of noted gay legal scholar William Eskridge to support his recounting of this history of sodomy prosecutions. *Id.* at 2494.

30. See, e.g., Randy E. Barnett, *Kennedy's Libertarian Revolution*, NATIONAL REVIEW, July 10, 2003.

31. Whole books have discussed this issue. See, e.g., RICHARD A. BRISBIN, JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL (Johns Hopkins Univ. Press 1997).

in the Supreme Court's opinions, and meditate upon some of the rhetorical and political shifts that occurred between the final decision of the Texas Court of Appeals and that of the United States Supreme Court. Finally, I consider where the Court has yet to venture – I discuss the importance of the Court's recognition of the significance of gay identities, but suggest that its insight will be far more realistic and valuable when it is complicated by an understanding of the systemic discrimination and bigotry that those identities engender.

## II. READING *LAWRENCE*

### A. *The Battle Over Gay Identity*<sup>32</sup>

*Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.*<sup>33</sup>

Few commentators doubt that the contest over sodomy laws had effects reaching far beyond the handful of criminal prosecutions the statutes engender. Part of the greater import of the issue are the far-reaching effects that statutes criminalizing behavior at the core of an entire set of social identities may have by virtue of their very existence, even if rarely enforced.<sup>34</sup> But even beyond that realm, the last several decades of consensual sodomy litigation has done something broader – it has acted as a signpost for an enormous shift in the ways that law and society imagine gay people and gay lives.

It is a cliché in analyzing *Bowers* to note that the majority opinion and the dissent are speaking two very different languages when

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32. For a more detailed discussion of the issues surrounding the development of judicial language about gay and lesbian identities in *Bowers v. Hardwick*, see Kris Franklin & Sarah E. Chinn, *I Am What I Am (Or Am I?): The Making and Unmaking of Lesbian and Gay Identity in High Tech Gays*, 15.1 DISCOURSE, 11 (1992).

33. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

34. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (exploring the disadvantages such codes may create).



it comes to sexual identity.<sup>35</sup> This distinction can be boiled down to what has long been defined as the status/conduct divide.<sup>36</sup> Whereas the dissent takes into account the existence of some quantifiable group of people organized around something called a gay identity,<sup>37</sup> the majority is steadfast in its insistence that it is dealing only with a set of behaviors: "homosexual sodomy." While "homosexual sodomy" might be engaged in by the people the Court calls "homosexuals," the majority opinion gives no indication that such a group of people have anything in common except the tendency to engage together in acts against nature. Justice Burger's concurrence goes further, associating homosexual sodomy not with people but with the "ancient roots" of opprobrium towards it.<sup>38</sup>

By the time the Court decided *Romer v. Evans*,<sup>39</sup> the terms in which it considered lesbians and gay men was beginning to shift. Since the case itself hinged on Colorado's Amendment 2, a referendum that forbade the state or municipalities within it from passing legislation protecting gay men, lesbians, and bisexuals from discrimination,<sup>40</sup> and was about identifiable groups of people rather

35. See generally, Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993).

36. See, e.g., E. Lauren Arnault, *Status, Conduct, and Forced Disclosure: What Does Bowers v. Hardwick Really Say?*, 36 U.C. DAVIS L. REV. 757, 771-772 (2003); Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241, 250-53 (1995); Nan D. Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695, 1717 (1993).

37. For example, Justice Blackmun characterizes the Court's decision that Michael Hardwick had standing to appeal to them, whereas a heterosexual married couple, equally affected legally by Georgia's anti-sodomy statute did not, as "rest[ing] in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals." *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting). More telling is his recognition that "individuals define themselves in a significant way through their intimate sexual relationships with others." *Id.* at 205.

38. *Id.* at 196 (Burger, C.J., concurring).

39. *Romer v. Evans*, 517 U.S. 620 (1996).

40. The amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority sta-

than sexual activities,<sup>41</sup> to a certain extent the language of gay identity was a prerequisite to any comprehensible discussion of the issues involved. Denying the social existence of lesbian, gay, and bisexual people would render Amendment 2 unintelligible: that is to say, the Amendment would arguably be discriminating against a group that did not exist as such.<sup>42</sup> Even Justice Scalia's dissent in *Romer*, which argued that *Bowers*, by criminalizing homosexual sodomy, made discriminating against homosexuals perfectly acceptable, acknowledged that there might be a collection of people whose sexual practices conferred upon them a social identity. As he argued, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."<sup>43</sup>

These were the struggles over the meaning of same-sex intimacy and queer identity that I was trying to tease out in analyzing the two disparate versions of the state of Texas' determinations in *Lawrence*. In so doing, I coined the term "Ellen effect" to capture the complex changes in public discourse – "a watershed in the way the straight mainstream media conceived of lesbians and gay men as simultaneously culturally meaningful and not intimidating."<sup>44</sup> Here "cultural meaning" signifies more than just visibility; rather it is the assumption that gay identity inheres in *actual people* who share a certain identity that makes it impossible for the mainstream to talk about homosexual *behavior* without generating an image of gay *people*. As a result, the status/conduct divide becomes farcical. Moreover, the Ellen effect assumes that gay people are not simply part of the social fabric, but can be integrated into society and its

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tus, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.  
 COLO. CONST., Art. II, § 30b.

41. The statute applied to identifiable groups at least insofar as it covered those with "homosexual, lesbian or bisexual orientation." *Id.* As the *Romer* majority itself reflected, the effect of Amendment 2 was to "put [homosexuals] in a solitary class with respect to transactions and relations in both the private and governmental sphere." *Romer*, 517 U.S. at 627.

42. Of course, from the perspective of the drafters, this is much more commonsensical than it sounds. The notion that there should be no "special rights" based on homosexual conduct or identity was *exactly* the basis for Amendment 2 in the first place: it is impossible to conceive of legal protection for a group whose existence you dispute.

43. *Romer*, 517 U.S. at 641.

44. Franklin, *supra* note 12, at 60.

institutions.<sup>45</sup> Thus it recognizes the combination of cultural significance and normalization of gay identity that has characterized the last decade or so of public discourse around homosexuality. This is a marked change from at least some earlier conceptions of the social significance of gayness. After all, Justices Burger (in *Bowers*)<sup>46</sup> and Scalia (in *Romer* and *Lawrence*)<sup>47</sup> implicitly argue for the cultural importance of sodomy and laws forbidding it, but their opinions nearly link same-sex activity and/or gay identities with the collapse of a functioning society – the furthest one can imagine from an unintimidating social class.

As I have argued, in the time since *Bowers*, the courts have generally become “Ellenized.”<sup>48</sup> Thus the majority and dissent in both the first Texas Court of Appeals decision (*Lawrence I*), and the substituted Texas *en banc* decision (*Lawrence II*) take for granted the existence of gay people and even gay communities. The Ellen ef-

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45. Of course this integration has been lubricated by lesbian and gay figures who are fairly non-threatening to non-gay people: beautifully “chic” lesbians, the gay characters on *Will & Grace* or the helpful “Fab Five” from *Queer Eye for the Straight Guy*. See, Melissa Fletcher Stoeltje, *A Gay Time in America*, *SAN ANTONIO EXPRESS-NEWS*, Aug. 24, 2003, at 1A. That is, gay people may be easier to take when they seem safe and do not threaten heterosexual primacy, or when their life’s purpose seems to be making the lives of straight people more pleasant and stylish. But this kind of media representation of gay people has not been embraced universally within queer communities. Indeed, some scholars and activists explicitly object to the defanged gayness that has found its way into the mainstream on the grounds that queer identity is (or at least should be) a counter to the values of heteronormativity. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM* (2d ed. 2000).

46. *Bowers*, 478 U.S. at 196-97 (Burger, J., concurring) (noting that sodomy prohibitions’ “ancient roots” are “firmly rooted in Judeo-Christian moral and ethical standards.”). It should be noted that the Court’s majority neatly sidesteps the issue, but its vague observation that sodomy laws easily meet the standard of rational moral choices by the majority, suggests that it is not unsympathetic with that position, either. *Id.* at 196.

47. See *Romer*, 517 U.S. at 640-43 (Scalia, J. dissenting); *Lawrence*, 123 S. Ct. at 2490-91.

48. An obvious example of this shift is found in Justice O’Connor’s concurring opinion in *Lawrence*. Despite having joined the majority’s insistence that *Bowers* dealt solely with sexual conduct that happened to take place between persons of the same gender, Justice O’Connor now asserts that “[t]hose harmed by this [same-sex sodomy prohibition] are people who have a same-sex sexual orientation and thus, are more likely to engage in the behavior prohibited. . . .” *Lawrence*, 123 S. Ct. at 2485 (O’Connor, J., concurring).

fect changes the rhetoric around sodomy laws, and makes it much harder for the *Lawrence II* majority to do what the *Hardwick* majority did with ease: ignore the potential civil rights issues that sodomy laws may entail. The combination of the Ellen effect and the vigorous dissent makes it more politically complicated for the court to appear to align itself with bigotry.<sup>49</sup> Hence we find in *Lawrence*, the tragicomic vision of Justice Scalia asserting that he has nothing against homosexuals as long as we know our place: despite himself, he has to admit that we might have a place in contemporary United States culture and there is nothing he can do about it.

But once the roots for the effect have taken hold, the questions raised by a consensual sodomy law shift. Consequently, the authority upon which the questions may be resolved must move as well, or risk being seen as outdated and irrelevant.

### B. Core Authorities in *Lawrence*

. . . the most pertinent beginning point is our decision in *Griswold v. Connecticut*.<sup>50</sup>

It is clear from even a cursory examination of the three major opinions<sup>51</sup> in *Lawrence*, that each justice approaches the case with very different narratives of authority. This makes perfect sense, since each opinion is telling quite a different story not only about sodomy law, but also about the nature of constitutional jurisprudence. Much can, and doubtless should, be made of the important distinctions between, for example, older conceptions of rational ba-

49. Franklin, *supra* note 12, at 86.

50. *Lawrence*, 123 S. Ct. at 2476.

51. I am not addressing Justice Thomas's dissent as a "major opinion." Not only is this dissent unusually brief (two paragraphs) but it does not significantly add to the debate. Thomas simply states that Texas's sodomy law is "uncommonly silly" and should be repealed, and concludes first that this is an issue for the states rather than the Supreme Court, and second that the Constitution does not provide for the right to privacy at all. *Id.* at 2498. It is striking that the only authority he cites is Justice Stewart's dissent to *Griswold* (from which he directly quotes), the majority opinion of which serves as a cornerstone for Justice Kennedy's opinion.

Clearly Thomas is modeling himself on Stewart as an old-style strict-constructionist conservative, which is itself, an interesting move. But while Thomas aligns himself with Justice Scalia by joining in his dissent, he distances himself from Scalia's enraged rhetoric, taking up the mantle of Stewart's genteel conservatism rather than identifying with Scalia's more contemporary reactionary language of the "culture wars."

sis review and Justice O'Connor's newer construction of the concept.<sup>52</sup> But for the purpose of this brief Essay, it is sufficient simply to note how radically the foundational precedent in each opinion differs.

For Justice Kennedy, the road to overturning *Bowers* begins with *Griswold v. Connecticut*, and continues with the development of the doctrine of the constitutional right to privacy that runs through *Eisenstadt v. Baird*<sup>53</sup> and culminates in *Planned Parenthood of Southeastern Pa. v. Casey*.<sup>54</sup> In her concurrence, Justice O'Connor tells a very different story, which focuses on *Cleburne v. Cleburne Living Center, Inc.*<sup>55</sup> and the reconsideration of the meaning of "rational basis" in the absence of suspect classification status for lesbians and gay men. Finally, and not surprisingly, Justice Scalia leans most heavily on *Bowers v. Hardwick* itself, arguing, "most of today's opinion has no relevance to its actual holding."<sup>56</sup>

Quite obviously, these differences in foundational precedent reflect (and construct) the varying legal analyses that the justices bring to their opinions.<sup>57</sup> For the majority, the central issue is the preservation and furthering of human dignity that the Court has already identified and protected in its line of privacy decisions. So even though, oddly enough, the Court does not hinge its opinion directly on the right to privacy, it makes sense that the underpinnings of the privacy decisions, which is to say the initial movement from *Griswold* to *Eisenstadt*,<sup>58</sup> as well as the most recent decisions

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52. For a thorough analysis of the Court's emerging "new scrutiny," see Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002) (contending that the Rehnquist Court was often seeking "measured reasonableness" in state action, rather than merely formalist declarations of "rationality").

53. 405 U.S. 438 (1972).

54. 505 U.S. 833, 844 (1992).

55. 473 U.S. 432 (1985).

56. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

57. My analysis here necessarily compresses and probably oversimplifies the significance of each opinion's reasoning and use of authority. No doubt other scholars will weigh in heavily on what is at stake in each of these opinions, given how rich they are. But since this essay is simply an attempt to read *Lawrence v. Texas* through the lens of my previous analysis of the Texas court's reasoning, such an inquiry is well beyond the scope of this work.

58. The expansion of privacy protections for birth control measures from the marital context in *Griswold* to unmarried couples in *Eisenstadt* is perhaps even more important in a gay rights context than the initial construction of Fourteenth Amendment due process-based privacy rights in the first place. Had the right to privacy been narrowly

encapsulating the current state of privacy doctrine, that is, *Casey*, would also undergird the Court's analysis.<sup>59</sup>

Justice O'Connor's opinion is equally clearly signaled by her foundational reliance on *Cleburne*. She finds herself unable to agree with the majority's overturning of *Bowers* based on broad notions of personal liberty,<sup>60</sup> but does not want her judgment that anti-gay sodomy laws do not infringe upon a fundamental right to lead to a standard of rational basis review that would allow the government unfettered ability to constrain personal behavior.<sup>61</sup> Consequently, she takes the middle ground and relies on the *Cleburne* decision, which offers a third way between what she sees as the Scylla and Charybdis of right to privacy on the one hand and presumptive rational basis on the other. *Cleburne* constitutes the roots of a different genealogy that Justice O'Connor plainly intends to reshape the meanings of rational basis and challenge the free hand the Court has given legislatures in defending the reasoning behind their laws.<sup>62</sup> By positioning the concurrence in this way, then Justice O'Connor can correct what many see as the error of *Bowers* without having to deem it wrongly decided, and can furthermore move toward the heightened rational-basis jurisprudence that many scholars believe she is urging.

Justice Scalia's choice of authority is hardly unexpected. His entire argument centers on the notion that *Bowers* is recent, bind-

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construed as restricted to the "intimate relation of husband and wife," it could much more easily be interpreted to have nothing to say about gay sex (unless gay marriage were to become a legal reality). For a discussion of the ways in which *Eisenstadt's* conception of the zone of privacy for families is "much more radical than *Griswold's*," see Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 357-60 (1997).

59. *Lawrence*, 123 S. Ct. at 2481. Thus *Casey's* reaffirmation that individual autonomy over "the most intimate and personal choices a person may make in a lifetime . . . are central to the liberty protected by the Fourteenth Amendment" is particularly crucial to the Court's reasoning. *Casey*, 505 U.S. at 851 (cited in *Lawrence*).

60. Particularly since she signed onto the original *Bowers* decision. *Bowers*, 478 U.S. 186.

61. *Lawrence*, 123 S. Ct. at 2485.

62. *Id.* Scholars have observed a general turn in this direction by the entire court, and have generally describe Justices O'Connor and Kennedy, politically to the center of the current Court, taking a central role in that movement. See generally, Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1391-92 (discussing the Court's handling of "semisubstantive" questions, and analyzing the approaches of Justice O'Connor and Kennedy).

ing authority, and consequently (pre-)determines the outcome of this case.<sup>63</sup> Given this position, Scalia does not feel obliged to defend the logic of *Bowers* itself – he does not have to if it is the outstanding precedent. His opinion, therefore, centers solely to attempting to demolish the reasoning of the majority.

This identification of central legal authority is helpful, but fairly transparent. But my initial work with the *Lawrence* case was an effort to go beyond an analysis of legal authority for its pure precedential value and to inquire more broadly how authority operates and what the judicial use of legal authority reveals.

To do that, I began to construct a system of classification of authorities that initially divided into several categories, the most important of which were “looming” and “lurking” authorities.<sup>64</sup> In my analysis, looming authorities are more than just precedent; rather, they are those authorities, controlling or not, which “appear immense and inescapable” within the context of a legal decision.<sup>65</sup> While looming authorities might be binding in a strictly legal way, they are organized more around *sensation* of the central issues rather than mechanistic use of precedent; as I argued, “binding or not, they might shape the theoretical orientation of the court’s analysis, and thus must be addressed to maintain consensus about a decision’s legitimacy.”<sup>66</sup> In the Texas *Lawrence* decisions, *Bowers v. Hardwick* plays this role – not only as precedent, it looms over the question of sodomy law more generally, in part constructing what it means to be lesbian or gay in the eyes of the court and in the United States more generally. The case looms not only over the Texas court but over every state court addressing the issue of sodomy, even when those state courts are, as Texas is here, focusing only on their state constitutions. Beyond its status as binding precedent, *Bowers* is “a symbol of the contested landscape of American sexual life.”<sup>67</sup>

Lurking authority is, as its name suggests, a little more amorphous. Lurking authorities may or may not be precedential; what is

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63. *Id.* at 2488-89.

64. Franklin, *supra* note 12, at 92-100. The discussion here compresses the arguments made in the earlier article.

65. Franklin, *supra* note 12, at 93.

66. Franklin, *supra* note 12, at 93.

67. Franklin, *supra* note 12, at 94.

significant about them is their very lack of “loomingness,” which makes the judicial decision to invoke them all the more compelling and revealing of how they operate. While looming authorities, whether binding or not, hang heavy over a decision, lurking authorities are discovered on the sidelines and deployed as deliberate interpretive strategies. Thus non-legal authorities are always lurking, be they the doll studies in *Brown v. Board of Education*<sup>68</sup> or the historical research of John D’Emilio, Estelle Freedman, and Jonathan Ned Katz in *Lawrence*, but legal authorities can lurk just as well. To that extent, then, lurking authorities are crucial clues to the interpretive work a court is doing – invoking certain authorities brings with them a specific ideological and legal orientation.<sup>69</sup> An examination of those legal authorities provides a new framework for understanding the work of the court itself.

### C. Repositioning Bowers

*I begin with the Court’s surprising readiness to reconsider a decision rendered a mere 17 years ago in Bowers v. Hardwick.*<sup>70</sup>

The Supreme Court’s decision in *Lawrence* was surprising not simply because of its outcome, although that was remarkable enough. It was conceivable, after all, that the Court could overturn the Texas sodomy statute and still leave *Bowers v. Hardwick* intact.<sup>71</sup> That was what numerous state courts had done<sup>72</sup> including, in its

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68. 347 U.S. 483, 494, n.11 (1954).

69. A good example of this is the use of Biblical sources in sodomy law cases. See, e.g., *Wasson*, 842 S.W.2d at 503 (Lambert., J., dissenting); see also, *Bowers*, 478 U.S. at 196 (Burger., C.J., concurring) (referring more vaguely to “Judeo-Christian moral and ethical standards”). It would be rare indeed to find opinion simultaneously quoting the Bible and opposing sodomy laws.

70. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

71. This is certainly what most commentators expected the Court to do, and had Justice O’Connor’s reasoning been adopted this would have been the result. Given the Court’s equal protection reasoning in *Romer*, as well as the court’s general reluctance to reverse themselves, this position seemed like a reasonably secure one before the decision was issued. See Vincent J. Samar, *The Supremes Gay Rights*, IN THESE TIMES, Aug. 11, 2003, at 17 (recounting the “surprise of legal commentators and many in the lesbian and gay community” at the expansive basis for the majority opinion).

72. *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell*, 510 S.E.2d 18; *Cryczan*, 283 P.2d 112; *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. 1996); *Wasson*, 842 S.W.2d 487.



initial decision, the Texas Court of Appeals.<sup>73</sup> *Bowers* seemed so looming that it was hard to imagine how the Supreme Court could overturn it at all, not just because it was such recent precedent but, more importantly, because its influence was so far-reaching in United States culture over the fifteen years after it was issued.<sup>74</sup> This perception was borne out by both the majority and dissent in the *en banc* Texas *Lawrence* decision and by the United States Supreme Court's avoidance of *Bowers* in its prior decision in *Romer v. Evans*. In these three opinions, *Bowers* looms heavily.

The looming character of *Bowers* is particularly interesting in the Texas decision on *Lawrence*, because theoretically, the court was solely interpreting the Texas constitution and its Equal Rights Amendment, rather than considering the precedential nature of federal law. Hence there was no reason for the court to discuss *Bowers* at all. The fact that so many states overturned their sodomy statutes even after *Bowers* was decided in 1986<sup>75</sup> makes it clear that state appeals courts were drawing lines between local and federal law, and relegating *Bowers* to the realm of the federal.<sup>76</sup> To that

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73. *Lawrence*, 41 S.W.3d 349.

74. Justice Scalia himself notes this in footnote 2 of his dissent, citing reliance on *Bowers* for determining that no "fundamental right" was implicated in a broad range of issues, including sexual conduct by military personnel, adoption of grandchildren, naming of children at birth, and employment practices of the defense industry and police and firefighting organizations. See *Lawrence*, 123 S. Ct. at 2490, n. 2. As one scholar puts it, *Hardwick* could serve as valuable authority against legal protections for gay people on a variety of fronts under the theory that "If a State can criminalize sodomy, . . . why cannot it keep lesbians and gays out of the military; deny gay and lesbian parents custody, or visitation, etc.?" Samuel A. Marcossan, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 232 (1998).

On the other hand, it can be argued that *Bowers* had a profoundly favorable effect on gay organizing (or no effect at all) given the enormous strides of queer movements even after the case was handed down. The backlash against the decision, and its roundly criticized reasoning, were perhaps a galvanizing force in lesbian and gay political work throughout the late 1980s, 1990s, and even beyond.

75. By June, 1986, twelve states had done so through judicial or legislative means. For a complete state-by-state breakdown of extant sodomy laws pre-*Lawrence*, see <http://www.nglrf.org/downloads/sodomymap0603.pdf>. (last visited Feb. 11, 2004).

76. And perhaps, implicitly criticizing the Supreme Court's reasoning. Though, as Justice Scalia notes, there were also certainly a large number of cases using *Bowers* as precedent. *Lawrence*, 123 S. Ct. at 2490. In an interesting maneuver (and an indirect swipe at the similar move by the *Casey* majority), Justice Scalia constructs this very fact,

extent then, *Bowers* was moot for Texas, particularly given the recent example of Georgia's overturning of its sodomy statute.

But, legally relevant or not, *Bowers* could not be banished. As I have argued, in any case concerning lesbian and gay issues, whether specific to sexual conduct or not, *Bowers* casts a heavy shadow.<sup>77</sup> In the days after the Supreme Court's *Lawrence* decision and the emerging national debate on legalized marriage between gay partners, it is hard to remember quite how stifling an influence *Bowers* had on the legal imagination regarding possible protection of lesbian and gay people. But at the time the case was decided, the debate between the majority opinion and dissent in the Texas *Lawrence* case about *Bowers* was not rooted in its precedential value but in its cultural weight. Because it was not binding upon interpretations of state law, the case could be thrust aside by courts choosing to go in different directions, but because it loomed so heavily, its method could easily be adopted by courts inclined to concur with its outcome. In its dissent to the Texas Court of Appeals' reinstatement of its sodomy law, the minority seems to be looking over its shoulder at *Bowers*, defensively shooing it away by symbolically waving the Texas state constitution at it.

Strikingly, the other case that looms over the Texas *Lawrence* decision itself had to wrestle with the specter of *Bowers*: *Romer v. Evans*. As I argued in my initial analysis of the Texas court's *Lawrence* decision, once one acknowledges, as *Romer* does, that lesbian and gay people are a group whose civil rights must be protected, specifically anti-gay sodomy laws take on a very different political color.<sup>78</sup> At the time that the Texas court was struggling with this issue, both *Bowers* and *Romer* were good law. The irony of *Romer*, however, is its studied avoidance of *Bowers*, which it manages not to mention at all.<sup>79</sup> *Romer's* commitment to the "status" side of the

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that *Bowers* has regularly been used as precedent, *authoritative*. That is, he suggests that the fact forms a basis for concluding that the ruling should not be overturned. *Id.*

77. As I have argued, "[t]he use of the phrase 'as the Supreme Court held in *Bowers v. Hardwick*,' in a sodomy case immediately signals to the reader that the opinion will support not only the constitutionality of sodomy statutes but an entire worldview about the relevance (or, rather, irrelevance) of sexual orientation." Franklin, *supra* note 12, at 81.

78. Franklin, *supra* note 12, at 94-5.

79. In fact, *Romer's* avoidance of *Bowers* gives the Texas *Lawrence* majority its most powerful ammunition in disposing of *Romer* as a binding precedent. Arguing that

conduct/status divide does not erase the fact that *Bowers* looms over its decision; rather the strategy of the majority in *Romer* is to pretend that the looming discourse over anti-sodomy statutes has no bearing on the civil standing of lesbians and gay men.<sup>80</sup>

However, the *Romer* opinion could not directly oppose homophobia (as, for example, *Loving* explicitly opposed white supremacy<sup>81</sup>). Doing so would have forced the *Romer* court to confront *Bowers* head on, something it was unwilling to do, and since the case was not directly on point, it was something that it could evade. For state courts, where *Bowers* has less precedential weight, *Romer* can then take on immense meaning because it offers a counterpoint. Using *Romer* in a sodomy law context becomes a way to argue against sodomy laws because of the effect they have on gay people as a group, without directly taking on the legitimacy of *Bowers*. *Romer* differs in flavor from *Bowers* because, and since it was one of the earliest times that the Supreme Court used the language and the concept of gay people, its invocation conjures up the spirit of lesbian and gay identity. Ironically, because of the Ellen effect, in and after *Romer*, the invocation of *Bowers* becomes not simply a sign of homosexual-sodomy-as-conduct, but a mark of opprobrium towards gay people, as linked to, but not only defined by sexual conduct.<sup>82</sup>

Given the legal and cultural changes that produced and were brought about by *Romer*, one might expect to see the decision figuring heavily in Justice Kennedy's *Lawrence* opinion. But it is *Romer's* position as a compromise between *Bowers* and a pro-gay stance that superannuates it in *Lawrence*.<sup>83</sup> Simply put, *Romer* does not loom for *Lawrence*, because the decision has the air of having bigger fish to fry, namely *Bowers*. After almost two decades of primacy in the

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*Romer* did not address the issue of "homosexual conduct" and hence was irrelevant to a consideration of anti-sodomy statutes, the Texas court attempted (and succeeded) to duck away from the looming status of the case. *Lawrence*, 41 S.W.3d at 355.

80. As many commentators, including Justice Scalia in his dissent, have pointed out.

81. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

82. And characterized by the phrase later adopted by Justice Scalia, "the homosexual agenda," which clearly implicates broader questions of social policy.

83. Consequently, the Court raises *Romer* only to suggest that an equal protection argument based on it might be "tenable," but is not the subject of the Court's decision. *Lawrence*, 123 S. Ct. at 2482.

realm of law relating to homosexuality, *Bowers* is unseated, replaced by a different narrative with a very different set of values: privacy, dignity, and self-determination.

#### D. *The Narrative of Gay Identity*

*Today's opinion is the product of a Court . . . that has largely signed on to the so-called homosexual agenda.*<sup>84</sup>

But if *Bowers* no longer looms, what is left? The answer to that question depends upon whether the respondent is Justice Kennedy, Justice O'Connor, or Justice Scalia.

Let's return to Kennedy's opening gambit in his demolition of *Bowers*. According to the logic of the majority opinion, the inevitable starting place to "reconsider the Court's holding in *Bowers*" is the thirty-year progression of privacy rights that stretches from *Griswold* to *Casey*. By moving directly from *Bowers* to *Griswold*, Kennedy is effectively repudiating the *Bowers* majority's disarticulation of gay identity and the right to privacy, the cornerstone of that decision. Moreover, Kennedy imagines the story of privacy law as a narrative of endlessly increasing liberty (something that the Court's decisions in its recent past might very well put into doubt),<sup>85</sup> concluding, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>86</sup>

What hovers over the case for Kennedy, and lurks as authority, then, is not any one case, but a larger concept: progress. The historical focus of *Bowers*, particularly in Justice Burger's concurrence, becomes for Kennedy, its greatest weakness. Kennedy's belief that "our laws and traditions in the past half century are of the most relevance here" is deeply revealing, as is his reliance on contempo-

84. *Id.* at 2496 (Scalia, J., dissenting).

85. For some examples of recent Supreme Court cases limiting potential privacy rights, see *United States v. Am. Library Assoc.*, 539 U.S. 194, 123 S. Ct. 2297 (2003) (finding that libraries' use of internet filtering devices pursuant to federal statute were not violating individuals' right to private speech); *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646 (1995) (holding that mandatory drug testing did not impermissibly violate high school athletes' privacy); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding Missouri statute placing limitations on access to abortion).

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

rary (and, one might add, queer) historians rather than Blackstone and Montesquieu.

For Kennedy, progress in a gay rights context means acknowledging the contemporary cultural compact that gay people exist as a class and as such must benefit from the expansion of civil freedoms over time. Hence, it is not surprising that his opinion is suffused with the fallout of the *Ellen* effect, a quintessentially contemporary phenomenon. Kennedy's opinion takes for granted that John Lawrence and Tyron Garner were not simply bodies participating in various illegal acts, but gay men engaging in a "personal relationship."<sup>87</sup> The *Ellen* effect's twin outcomes of cultural significance and acceptability of homosexuality are nowhere so clear as in Kennedy's direct refutation of the equation of gay identity with sexual acts: "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."

This is not the place to speculate about the analogy that Kennedy draws here (particularly given his veiled references to gay marriage and his mild assurances that this ruling does not open the door to the possibility),<sup>88</sup> but his language does indicate a larger link. On the one hand, *Lawrence* is all about sex, just as *Griswold* was about the right to have non-procreative sex within marriage. But the argument of *Griswold* (and later *Eisenstadt*) linked the concept that marriage was about more than sex to the idea that sex was about more than reproduction. Moreover, since *Griswold*, marriage has been increasingly off-limits to the law; it has been constructed as a relationship so private and so sacred, that despite its myriad interpolations with the public world of contracts, taxes, property rights and so on, that the law has, or ideally should have, little regulatory power.<sup>89</sup> In regards to marriage, then, *Griswold* arguably ren-

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87. *Id.*

88. *Id.* at 2484.

89. That is, since the *Griswold* decision, the Court has consistently reaffirmed the sanctity of (heterosexual) marriage, and the inappropriateness of state control over this form of consensual intimacy. Marriage stands as a protected, intimate relationship, which should not be interfered with. See E. Clifton Knowles, *Consensual Sexual Activity Between Married Persons*, 44 TENN. L. REV., 179, 187 (1976) (contending that the Supreme

dered itself redundant: a law that seeks, where possible, to define marriage as outside the realm of law. It is exactly that move that Kennedy is shadowing in *Lawrence*. Once *Bowers* is out of the way, there is no looming authority: sexual relationships between consenting adults might be viewed as beyond the reach of the law, subject only to the rights and responsibilities we share as human beings.

As soon as the yoke of *Bowers* has been thrown off, the entire Court is free to develop its analysis of *Lawrence* based on any authority that seems to lurk in the field. It is striking, in this context, that Justice Kennedy chooses to revisit the history of sexuality first laid out in the *Bowers* decision. Justice Kennedy offers an extensive, almost point-by-point refutation of the *Bowers* court's conclusion that "[p]roscriptions against [same-sex sexual acts] have ancient roots,"<sup>90</sup> citing as authoritative: scholars of gay and lesbian history who have suggested that historically, homosexual conduct was not uniquely sanctioned in sodomy restrictions,<sup>91</sup> England's *Wolfenden Report*,<sup>92</sup> which concluded that homosexual acts should be decriminalized in Great Britain, and the very recent construction of sodomy as a same-sex, or "homosexual" offense.<sup>93</sup> Justice Kennedy thus attacks the historical assumptions underlying *Bowers*, and then moves on to build his own history – telling a story of relatively recent criminalization of gay conduct, coupled with an even more recent trend toward liberalization of the law due to a growing consensus that gay people deserved respect and basic protection under the law.<sup>94</sup>

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Court generally shies away from regulating the "protected intimate relationship" of marriage).

90. *Bowers*, 478 U.S. at 192.

91. *Lawrence*, 123 S. Ct. at 2479. Credit for bringing these authorities to bear on the issue does not rest with the court, of course, since these sources were relied on in petitioner's brief, and in the briefs of numerous *amici*. But regardless of who makes the introduction into judicial discourse, when such scholarship is cited as authoritative by the courts themselves, it gains a unique value that other sources, no matter how indisputable, may not possess.

92. *Id.* at 2481.

93. *Id.* at 2479.

94. *See id.* at 2481 (observing the movement of European human rights law toward invalidation of sodomy prohibitions, and suggesting that U.S. states have been following a similar trajectory).

And since the slate of binding authority has been wiped clean, Justice O'Connor is similarly able to move in a very different direction. Her response is to act as though overturning *Bowers* is no big deal (she dedicates two sentences to it), that her focus is elsewhere, on the issue of Equal Protection as laid out in *Cleburne v. Cleburne Living Center*.<sup>95</sup> But this reasoning, too, only has meaning in an Ellen-affected world. The *Bowers* majority would find the idea that there could be equal protection for sodomites unintelligible, and essentially deems that argument "facetious."<sup>96</sup>

Although O'Connor joined the *Bowers* majority, she has clearly changed with the times, opposing the Texas sodomy statute because it is "targeted at more than conduct. It is instead directed towards gay persons as a class."<sup>97</sup>

O'Connor's concurrence makes clear that the fight that was going on in some of the earlier sodomy cases and gay rights cases generally is over. In 2003, the Ellen effect is so powerful that one must acknowledge the social reality of gay identity or look like a bigot. Of course, this puts Justice Scalia in a very difficult situation, in light of his attachment to the methodology of *Bowers*.<sup>98</sup> He can no longer depend upon the world view that he had imagined incontrovertible. The *fait accompli* represented by these narratives of

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95. 473 U.S. 432 (1985). In fact, in my earlier piece analyzing the Texas court's writing in this case, I noted with interest the fact that *Cleburne* was used by the majority, but "just as a side point." Franklin, *supra* note 12, at 87; *Lawrence*, 41 S.W.3d at 380. Since unlike Justice O'Connor the Texas Court of Appeals had neither the authority nor the inclination to expand upon the case's analysis of rational basis review, this makes perfect sense.

96. *Bowers*, 478 U.S. at 194. To be fair, the Court's specific reference here was actually to the due process argument raised in the case. For the reasons discussed here and elsewhere, the Court did not see an equal protection issue in the case at all.

97. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring). In a poetic irony, O'Connor quotes Scalia's dissent in *Romer* to prove her point, reversing the intention of his argument that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* Where Scalia used this point to argue that sodomy laws made the majority opinion in *Romer* untenable, O'Connor deploys it to demonstrate the innate unfairness of gay-only anti-sodomy statutes.

98. In fact, Scalia's dissent in *Lawrence* does not seek to offer its own reasoning for upholding the constitutionality of the Texas statute. Rather it relies solely on *stare decisis*, appealing to the power of *Bowers* as a (now non-existent) precedent, and warning that the majority's decision represents a "massive disruption of the current social order." *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting).

*Griswold* to *Casey* to *Romer* on the one hand, and *Cleburne* to *Lawrence* on the other, leaves behind the story that Justice Scalia wants to tell: a story in which sexual conduct is classifiable and our humanity and our sexual desires are wholly divorced from each other.<sup>99</sup> Scalia has no recourse to *Bowers*, but it is his only recourse. Set adrift in this inhuman universe, he grips onto *Bowers* like Ishmael clinging onto Queequeg's coffin, an empty box whose designated occupant has sunk out of sight elsewhere and long ago.

Perhaps this explains Justice Scalia's intemperate tone. His dissent is peppered with phrases italicized for emphasis<sup>100</sup> and characterized by acerbic potshots at the majority.<sup>101</sup> As is often true, Scalia is in fact right: the Court, and the culture that surrounds it, *has* signed onto the "homosexual agenda" as he describes it, a campaign to reduce the often murderous contempt and hatred towards queers and same-sex eroticism that characterized much of the twentieth century.<sup>102</sup> But so has Justice Scalia. As soon as he begins to talk about "homosexuals" as an identifiable subsection of the citi-

99. Hence Scalia's conflation of a whole host of sexual behaviors including "adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage." *Id.*

100. For but one example, see Scalia's italicization in his discussion of *Casey*, in order to emphasize his contention that a Court treating *stare decisis* loosely could result in criticism of precedential opinions being used as a reason to "overrule" them in one instance, but "affirm" them in another, and to point out that the majority's suggestion that *Casey's* reasoning undercuts *Bowers'* cannot stand in light of the fact that *Roe* "which was already on the books when *Bowers* was decided," offers "less" protection for abortion rights than did *Roe*. *Id.* at 2488-89.

101. There are numerous examples of unusually inflamed rhetoric in Justice Scalia's opinion. To recite just a few, see his assertion that "the Court does not have the boldness to reverse" the conclusion he sees as central to *Bowers'* holding, his contention that the majority's conclusion that the Texas sodomy law is not rational "is so out of accord with our jurisprudence – indeed, with the jurisprudence of *any* society we know – that it requires little discussion" (italics again), or his use of simple but strikingly descriptive characterizations of the majority's "grim warnings" about the consequences of criminalizing gay sexual expression or its "coo[ing]" over the importance of gay relationships. *Id.* at 2492, 2495, 2496-98.

102. In fact the historian's amicus brief submitted to the *Lawrence* court posits that "discrimination on the basis of homosexual status was an unprecedented development of the twentieth century," and traces increasing restrictions on gay life from the Great Depression through World War II and the McCarthy era, and sees a lessening, but not eradication, of anti-gay bias beginning in the 1970s. Brief of Professors of History at George Chauncey, et. al, at 10-29, *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003) available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/183.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/183.pdf) (last visited Feb. 11, 2004).



zenry,<sup>103</sup> the logic of the *Bowers* opinion, such as it was, dissolves. Scalia has been Ellen-ized, and *Bowers* cannot stand in the face of that substantive a change.

### III. THE LOOMING (AND LURKING) RACE ANALOGY

*[The framers] 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.*<sup>104</sup>

Another narrative looms over the *Lawrence* decision, one that is barely referred to by any of the opinions but that silently informs both Justice Kennedy's writing for the majority and Justice O'Connor's concurrence: the trajectory of racial civil rights decisions from *Plessy v. Ferguson*<sup>105</sup> to *Korematsu v. United States*<sup>106</sup> to *Brown v. Board of Education*.<sup>107</sup> While the parallels between *Lawrence* and *Brown* were much commented upon in the media,<sup>108</sup> the Court only tangentially references this analogy. Structurally, the analogy holds fairly well:<sup>109</sup> both *Brown* and *Lawrence* make claims beyond the importance of precedent, and perhaps implicitly what some identify as the doctrine of "higher law" – the set of principles that issue from the larger ethical issues presented by the Constitution

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103. *E.g.*, *Lawrence*, 123 S. Ct. at 2497.

104. *Id.* at 2484 (emphasis added).

105. 163 U.S. 537 (1896).

106. 323 U.S. 214 (1944).

107. 347 U.S. 483 (1954).

108. *See, e.g.*, Frank Rich, *And Now, the Queer Eye for Straight Marriage*, N.Y. TIMES, Aug. 10, 2003, at Sec. 2, p. 1 (quoting legal scholar David J. Garrow as deeming *Lawrence* "as significant as the 1954 *Brown v. Board of Education* decision"); Rick Perlstein, *What Gay Studies Taught the Court*, WASH. POST, July 13, 2003, at B03 (noting that "[s]ome court watchers have called *Lawrence* the most momentous civil rights decision since *Brown* outlawed school segregation in 1954").

109. I want to acknowledge that the comparison between these two marginalized groups can be valuable, but that there are also pitfalls to the suggestion that the first set of circumstances maps neatly onto the second. The analogy between race and sexuality often feels compelling to queer litigators and legal scholars, particular since arguments from race have had, in the post-Civil Rights era, a certain public moral legitimacy that arguments from sexuality have not often had. However, the analogy can only be strategic, if that (and the strategy doesn't necessarily work anyway), since the cultural understandings and lived experiences of race and sexuality, although relatable, are certainly not identical.

rather than a conservative accordance with majoritarianism.<sup>110</sup> Moreover, the eventual embarrassment that *Korematsu* engendered – upholding the internment of Japanese nationals and Japanese Americans during WWII – proved to the judiciary<sup>111</sup> is implicitly echoed in Kennedy's determined rejection of *Bowers*.

At the same time there are significant differences between the *Plessy-Brown* trajectory and the journey from *Bowers* to *Lawrence*. Among other considerations, as Justice Scalia points out, the time between sodomy law decisions was, by the Court's standards, remarkably short. While it took almost sixty years for the Court to reconsider *Plessy*, *Bowers* was overturned after only seventeen years.<sup>112</sup> However, methodologically the two are comparable. Just as *Lawrence* does not counter *Bowers* with another opposing legal authority, the Court in *Brown* argues against *Plessy* primarily with

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110. GREGG D. CRANE, *RACE, CITIZENSHIP, AND LAW IN AMERICAN LITERATURE*, (2002). In fact, Crane's book, which discusses representations of the legal struggles over slavery, abolition, segregation, and black civil rights in the nineteenth century, maps astoundingly well onto the issues raised by *Lawrence*. Crane associates a commitment to higher law with a belief in the expansion of human and civil rights, a political cosmopolitanism and international consciousness, and a faith that while the framers of the Constitution could not predict the directions the nation would take, they could support the liberalization of the American polity: all hallmarks of Justice Kennedy's *Lawrence* decision. Kennedy's cosmopolitanism and internationalism are particularly striking here. Just as antislavery activists pointed to Europe, and specifically to Great Britain, to prove that slavery was anathema to post-Enlightenment Western values, Kennedy observes that throughout Europe "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many countries." See *Lawrence*, 123 S. Ct. at 2483.

111. The work of Eugene V. Rostow and Peter Irons in exposing the falsehoods on which *Korematsu* was based, in terms of inaccurate intelligence about Japanese-American involvement in espionage and the virulent anti-Japanese racism of West Coast commander John DeWitt, have been crucial in reshaping legal understandings of the meanings and ramifications of *Korematsu*. Eugene V. Rostow, *The Japanese-American Cases— a Disaster*, 54 YALE L.J. 489 (1945); Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONSTIT. COMMENT. 35 (1986); see also, *THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS* (Charles McClain, ed. 1994).

112. Though, as Justice Kennedy points out, *stare decisis* "is not an inexorable command." *Lawrence*, 123 S. Ct. at 2483 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); cited in *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

the evidence of the doll studies and other social scientific research to show that separate can never be equal.<sup>113</sup>

While the majority in *Lawrence* gestures towards alternative historical and legal interpretations of the meaning of sodomy laws, ultimately, as *Brown* does with the practice of educational segregation, the decision is arguing from a moral and ethical position that sodomy laws are in theory and in practice undemocratic, and that by unfairly targeting one segment of the population they threaten the liberty<sup>114</sup> of all citizens.<sup>115</sup> *Lawrence's* deployment of pro-gay historians and legal scholars is analogous to the *Brown* court's reliance upon anti-racist sociologists such as Gunnar Myrdal and his magisterial study of American racism, *An American Dilemma*, as well as the famous doll studies undertaken by Kenneth B.

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113. But of course, this oversimplifies the reasoning of *Brown*, and elides the Court's examination of, among other points, the growing centrality of formal education in American culture in the time between *Plessy* and *Brown*. *Plessy*, 163 U.S. 537; *Brown*, 347 U.S. at 492-94.

114. For example, Justice Kennedy's opening salvo: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 123 S. Ct. at 2475. Here Kennedy is not talking only about queer people, but about values that he believes apply to all Americans equally – in some ways, he is implicitly citing Martin Luther King, Jr.'s famous declaration that injustice anywhere is a threat to justice everywhere. MARTIN LUTHER KING, JR., & JESSE JACKSON, JR., *WHY WE CAN'T WAIT* (1967).

115. This is in large part due to the work of gay and lesbian historian activists such as those cited in the decision: John D'Emilio, Estelle Freedman, Jonathan Ned Katz, whose contribution to the history and historiography of sexuality was long considered marginal both in form and content. But the history here is deployed specifically to contest the historical constructions in *Bowers*. This alternative narrative renders the history of sodomy laws and their meaning debatable rather than incontrovertible, and therefore frees the Court to pursue other kinds of reasoning, such as its arguments for dignity and expanding freedom. *Lawrence*, 123 S. Ct. at 2478-79.

The Court's maneuver here is comparable in some ways to the strategy of the *Brown* Court, and the comparison is compelling. In order to neutralize the *Plessy* Court's definitive interpretation of the Fourteenth Amendment as having nothing to say about racial segregation, *Plessy*, 163 U.S. at 548, Chief Justice Warren recounts the history of interpretations of the Amendment, *Brown*, 347 U.S. at 490-91. He determines that there are so many conflicting readings that the Court must turn to other bases for its logic. *Id.* In so doing, the Court releases itself from the straitjacket of the prior Court's interpretation and thus creates space for its reasoning to hinge on social science data, leading it to a "new" understanding of the Equal Protection clause in the context of racial segregation in schools. *Id.* at 495.

Clark.<sup>116</sup> *Brown's* use of social science, like *Lawrence's* invocation of recent national and international history, is provided as much to reassure an anxious audience about the massive social changes taking place as it is to support its position.<sup>117</sup>

But *Brown* looms most significantly in the *Lawrence* majority's adoption of a righteous moral tone. Justice Warren's declaration that "in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal"<sup>118</sup> finds its parallel in Justice Kennedy's statement that *Lawrence* and *Garner* "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."<sup>119</sup>

The majority's focus not just on the constitutional right to privacy but the human right to a dignified life borrows directly from the rhetoric of *Brown*. Kennedy's avowal that *Lawrence* "involves liberty of the person both in its spatial and more transcendent dimensions"<sup>120</sup> in many ways echoes Justice Warren's declaration in *Brown* that education is "the very foundation of good citizenship. . . a principal instrument in awakening the child to cultural values. . . and in helping him to adjust normally to his environment."<sup>121</sup> Similarly, the argument that "[t]o say that the issue in *Bowers* was simply the

116. See Richard Goldstein, *The Matthew Shepard Icon: Sometimes the Image of a Martyr Fits the Victim of a Crime*, VILLAGE VOICE, Mar. 13-19, 2002; James Brooke, *After Beating of Gay Man, Town Looks at Its Attitudes*, N.Y. TIMES, Oct. 12, 1998.

117. This raises another commonality between the rhetoric of the two cases. In *Brown*, the Court, even after hearing reargument regarding the intent of the 14th Amendment, concludes that the issue is murky, and essentially declares the debate a draw, rendering it unhelpful in its ultimate determination of the segregation question. *Brown*, 349 U.S. at 489-90. The *Lawrence* majority appears to deploy its examination of the history of sodomy prohibition for a similarly neutralizing effect, to render inert the history relied upon by the *Bowers* majority, and the Burger concurrence.

118. *Brown*, 349 U.S. at 495.

119. *Lawrence*, 123 S. Ct. at 2484. One crucial difference between the two decisions is the willingness of each to explicitly critique the precedent they were overturning. While Kennedy is unsparing in his dismissal of *Bowers*, the *Brown* court spends very little time discussing *Plessy* while overturning it. It is likely, of course, that *Brown's* closedmouthedness about *Plessy* was a result of the Court's desire for a unanimous decision in the case, given the intense political importance of the issue of desegregation. But since it was clear from the beginning that the *Lawrence* court could never come to a unanimous decision, each side might have felt freer to attack the opposing position (the exception being Justice O'Connor, who takes a much more centrist stance).

120. *Lawrence*, 123 S. Ct. at 2475.

121. *Brown*, 347 U.S. at 493.

right to engage in certain sexual conduct demeans the claim the individuals put forward," maps almost directly onto Warren's observation that segregation is more than a mechanical separation of black children and that it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>122</sup> The Supreme Court's decision in both cases to reverse itself is more than a reconsideration of the legal issues: it is a deliberate policy change and an acknowledgment of prior mistakes. In many ways, *Brown* and *Lawrence* are variations on the old American genre of the conversion narrative, in which transformation cannot be explained except through the embrace of a new vision.<sup>123</sup>

If *Plessy* and *Brown* loom for the majority in *Lawrence*, then *Korematsu* lurks in the background, subtly but decisively affecting the decision's rhetoric and approach. *Korematsu*'s status in the history of civil rights cases is ambiguous to say the least: while it was the first place in which the Supreme Court outlined a set of standards by which differential treatment according to race must be considered, its conclusion – that Japanese and Japanese Americans pose such a threat to American national security that the government can at least temporarily strip them of their liberty – was monumentally wrongheaded. In addition, while *Korematsu*'s legacy of the doctrine of heightened scrutiny has been immensely useful for the furthering of civil rights of people of color, the case itself has increasingly been viewed as a low point in American jurisprudence, on a level with *Dred Scott* and *Plessy*.

*Korematsu*'s relevance to *Lawrence* extends beyond the injustice of its determination. For if *Bowers* is gay peoples' *Plessy*, and *Lawrence* is our *Brown*, then the Texas court's decision in *Lawrence* can be viewed as our *Korematsu*. In *Korematsu* the Court declared that "[p]ressing public necessity may sometimes justify the existence of

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122. *Id.* at 494.

123. As scholars of early American culture such as Perry Miller and Patricia Caldwell have argued, the conversion narrative was fundamental to the development of a cultural sense of self in New England. The narrative served two seemingly opposed purposes: to fit within a recognizable script of experience by which the larger community could judge the legitimacy of a conversion experience, and to give voice to the unvoiceable, the presence of God. PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* (1953); PATRICIA CALDWELL, *THE PURITAN CONVERSION NARRATIVE: THE BEGINNINGS OF AMERICAN EXPRESSION* (1983).

such restrictions [as internment]; racial antagonism never can" and then went on to argue that internment *was* a public necessity.<sup>124</sup> Thus, while raising the bar considerably on the limits of white supremacy, a standard that opened the possibility for the *Brown* decision, the *Korematsu* court chooses to ignore the fact that anti-Japanese sentiment and legislation had a long and ignoble history on the West Coast, and that the imposition of martial law and subsequent curfew and internment there were simply the latest in a series of discriminatory acts.<sup>125</sup>

The Texas *Lawrence* court makes strikingly similar moves in its decision to uphold its sodomy law in its invocation of *Loving v. Virginia*. As I have argued,<sup>126</sup> the use of *Loving* as an authority in sodomy law cases most often indicates sympathy towards greater sexual freedom, and an (either implicit or explicit) analogy between race and sexuality as marginalized identities. Like the majority in *Korematsu*, however, the Texas court deploys *Loving* to show the incommensurability of race and sexuality. The court frames its discussion of *Loving* in the context of the African American struggle for civil rights; in fact it represents *Loving* as the culmination of heroic battles against the evil power of white supremacy.<sup>127</sup> But it subverts the customary use of *Loving* by asserting that "while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct."<sup>128</sup> This is almost identical to the rhetorical move made by the *Korematsu* majority: a condemnation of one kind of prejudice followed by an assertion that a different kind of discrimination is

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124. *Korematsu*, 323 U.S. at 216.

125. For example, the Alien Land Act of 1913, which prevented aliens not eligible for U.S. citizenship from owning land, which effectively excluded all Asian-born immigrants, given the 1790 act of Congress that limited naturalization to white people (a restriction the Supreme Court affirmed in 1922 in *Ozawa v. United States*, 260 U.S. 178 (1922)). The passage of the Japanese Exclusion Act in 1924 severely limited immigration until the 1960s. FRANK F. CHUMAN THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS (1976). Moreover, the internment order had been immediately preceded by a curfew on all Japanese Americans, which was challenged and upheld in *Hirabayashi v. United States*, 320 U.S. 81 (1943).

126. Franklin, *supra* note 12, at 82-86.

127. *Lawrence*, 41 S.W.3d at 351-52, 357.

128. *Id.* at 357.

wholly rational.<sup>129</sup> Clearly, for the *Korematsu* majority, hatred for Japanese Americans is not the same as “racial antagonism” but is instead a healthy respect for national security; similarly, while racism is “sinister,” homophobia is something quite different (harmless? salutary?).

The understanding that *Korematsu* and its resonance in the Texas *Lawrence* decision lurk beneath Justice Kennedy’s opinion in *Lawrence*, helps explain why the decision combines a kind of historical relativism with moral absolutism. At a time of political and social crisis, the *Korematsu* court may have felt that their decision was “necessary and proper” but we now recognize that the ruling “serve[d] only to oppress.”<sup>130</sup> While *Brown* could not completely erase the blot on the nation’s escutcheon that *Korematsu* represents, it could instead act as a corrective, a movement towards a greater moral standard of liberty and democracy. Similarly, although Justice Kennedy’s opinion in *Lawrence* cannot convince the Texas court that homophobia is as “sinister” as racism, it can argue for a different way of looking at the power of the dominant culture in subordinating the rights of the marginalized.

Finally, but not insignificantly, the example of *Korematsu* casts a shadow of shame over American jurisprudence that clearly sharpens Justice Kennedy’s antipathy towards *Bowers*. *Bowers* is not simply bad law – it is an embarrassment.<sup>131</sup> Its antediluvian arguments are based in animus, just as *Korematsu*’s efforts to portray Americans of Japanese descent as disloyal threats to the war effort were, at bottom, racist. While *Korematsu* might still be, almost sixty years later, too much of a hot potato to invoke directly, it clearly lurks behind

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129. *Korematsu*, 323 U.S. at 216-19.

130. For a succinct discussion of the consensus that *Korematsu* was both wrongly based on racial animus and simultaneously valuable in establishing a grounding for important subsequent civil rights determinations, see Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 166-74 (2003).

131. Hence Justice Kennedy’s several references to what a disaster *Bowers* has been jurisprudentially. For example, he characterizes the *Bowers* Court’s description of what was at stake in the case as an indication of “the Court’s own failure to appreciate the extent of the liberty at stake,” *Lawrence*, 123 S. Ct. at 2478, and bemoans the fact that “[i]n our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement.” *Id.* at 2481.

Justice Kennedy's spirited opposition to the bigotry represented by anti-gay sodomy laws and the pretense that there is no "sinister motive" there, only the needs of the state to protect itself.

#### IV. HOMOPHOBIA AND THE "MATTHEW SHEPARD EFFECT"

*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.*<sup>132</sup>

The greatest insight, one might argue, of the stream of constitutional civil rights victories beginning with *Brown v. Board of Education* was not that segregation was in and of itself discriminatory, but that the system of racial segregation was built upon a foundation of white supremacy, and the separation of blacks and whites was always and only ever on terms set by the white majority. Segregation was destructive because it was created by white racism as a mechanism of subordination, control, and humiliation – something the doll studies and Myrdal's travels through the American South proved beyond a doubt.<sup>133</sup> The argument that segregation was destructive towards black self-esteem and self-determination, and that the suppression of African Americans was a national scandal, was what separated *Brown* from its predecessors. After all, previous cases had allowed African Americans to attend and participate fully in the life of all-white educational institutions, including the University of Texas Law School<sup>134</sup> and graduate school in Oklahoma,<sup>135</sup> but none had questioned the very basis of separate but equal and its historic links to the Taney Court's infamous observation in *Dred Scott* that the Constitution's framers might have considered black

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132. *Id.* at 2482.

133. For an historical account of the process by which Myrdal's work and Kenneth B. Clark's studies shaped the *Brown* plaintiffs' litigation strategy, see RICHARD KLUGER, *SIMPLE JUSTICE*, 313-45 (1975).

134. *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering the University of Texas to admit an African-American applicant to its law school where no law school in the state admitted black students).

135. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (striking Oklahoma statute permitting black doctoral students but provide separated classrooms, library usage and cafeteria facilities).



people to have “no rights that the white man was bound to respect.”<sup>136</sup>

Just as *Brown*, for the first time in American jurisprudential history, acknowledged the corrosive effect racism and white supremacy have had on Americans of African descent, and the blight that racism has brought to the nation as a whole, *Lawrence* is the first place in which homophobia is revealed as a destructive social force that dehumanizes not just queer people but the culture that supports it. While *Romer v. Evans* (whose majority opinion was also written by Justice Kennedy) affirms that the protections lesbians and gay men seek under non-discrimination statutes are simply “protections taken for granted by most people either because they already have them or do not need them,”<sup>137</sup> the decision fails to speculate on *why* the entire state of Colorado might want to deprive gay people of those protections.

Not surprisingly, the *Romer* minority is less puzzled. Justice Scalia (again, not coincidentally), the author of the dissent, recognizes *Romer* for what it is: a result of Kulturkampf<sup>138</sup> (or, as he calls it in *Lawrence*, the “culture war”<sup>139</sup>). For the *Romer* dissent, Colorado’s Amendment 2 is wholly reasonable, since it chooses to discriminate against a group of people whose sexuality is repugnant to both the people and the laws.<sup>140</sup> While this might seem ironic, that those opposing gay freedom are the only ones who are able (or at least feel free) to identify homophobia, the seeming naiveté of the *Romer* majority points to one of the weaknesses of the Ellen effect.

The Ellen effect makes queer people visible and non-threatening; it does not, however, explain why people hate us and want to do violence to us, nor does it even acknowledge that they do so. In fact, by representing lesbians, gay men, and bisexuals as unthreatening, it implicitly denies the power that homophobia has, particularly over the most vulnerable members of our communities as well as the most powerful among us.<sup>141</sup> Hence the *Romer* majority

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136. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

137. *Romer*, 517 U.S. at 631

138. *Id.* at 636.

139. *Lawrence*, 123 S. Ct. at 2497.

140. *See Romer*, 517 U.S. at 647.

141. For example, even after Ellen DeGeneres came out, there was not a lot of discussion about what had kept her closeted for so long. The pattern is frequently

opinion is typical of the cultural changes that surrounded the *Ellen* effect as a phenomenon: willing to identify homosexuals but blind to the pervasive power of homophobia.

Only a few years later, in *Lawrence*, Justice Kennedy seems to be writing out of a very different consciousness. Homophobia (although never named as such) has become a central concern to the *Lawrence* decision's logic, and eradicating homophobia is linked to the larger constitutional project of the nation's "search for greater freedom."<sup>142</sup>

How can we account for this massive change in less than a decade, a shift from the basic libertarianism that Kennedy's jurisprudence has been known for to an impassioned argument for liberty as a transcendent virtue? After all, it is not as though homophobia suddenly appeared on the scene for the Supreme Court to identify. In fact, quite the opposite has occurred. As many scholars and activists have noted, homophobia has been an integral part of modernity itself, an era characterized, as Eve Kosofsky Sedgwick has argued, by "the homo/hetero division."<sup>143</sup> More importantly, the moment at which the Supreme Court chose to acknowledge that the cultural opprobrium towards homosexuality was one in which hatred of, and violence towards, queer people has finally begun to wane.<sup>144</sup>

What happened between 1995 and 2003 that might have caused this shift in the Court's discursive approach to homosexuality?

Of course, one can only speculate. However, within the larger social and historical context of attitudes towards gay people, perhaps the most significant consciousness-raising event was the brutal

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repeated with the (still comparatively short) list of now openly gay celebrities – indeed, their closetedness is sometimes interpreted as an individual weakness of their psychological make-up rather than a symptom of the pervasive homophobia of American society.

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

143. EVE KOSOFSKY SEDGEWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

144. ALAN S. YANG, *THE 2000 NATIONAL ELECTIONS STUDY AND GAY AND LESBIAN RIGHTS: SUPPORT FOR EQUALITY GROWS NATIONAL GAY AND LESBIAN TASK FORCE FOUNDATION*, 2000 available at <http://www.ngltf.org/library/index.cfm#2> (last visited Feb. 11, 2004).

murder (one might even say lynching<sup>145</sup>) of Matthew Shepard in October, 1998. A 21-year-old student at the University of Wyoming, Shepard was abducted from a Laramie bar, tied to a fence, robbed, beaten, and left for dead on the remote plains.<sup>146</sup> The intense publicity and public outrage over Shepard's murder was a watershed event for both gay and straight people, pushing homophobia and the violence it engenders onto the front pages of newspapers around the country.<sup>147</sup> For many gay people, it felt like the first time that the mainstream recognized the levels of fear and anxiety that accompany much of queer life around the country, and the often tragic results of the homophobic rhetoric of religious and political leaders.<sup>148</sup> To many Americans, the language of "special

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145. The term "lynching" has deep and bloody roots in U.S. culture, and using it to apply to the murder of Matthew Shepard evokes the similarities (brutality, a murder fueled by hatred) and the crucial differences. For example, most pseudo-penological lynchings were public events, attended by a cross-section of a community's white, and sometimes black, population, occasionally even advertised in advance and/or memorialized after the fact in photographs and postcards. Rarely were perpetrators of lynchings brought to justice: indeed, in many instances members of law enforcement and the legal profession were active and passive participants in lynchings. On lynching, see generally UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage, ed. 1997); RALPH GINZBURG, 100 YEARS OF LYNCHING (2d ed., 1972). For disturbing photographs of actual lynchings, see WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen, ed., 2000.).

While it can be argued that Matthew Shepard's murder was, like typical lynchings, a "message" crime intended to terrorize lesbian and gay people more generally, it was not committed in the public eye, but rather took place in an isolated, desolate location. Moreover, whatever mixed feelings the people of Laramie, WY and the United States more generally might have had about homosexuality and gay people, the public response to the murder was almost universally one of condemnation rather than the studied neutrality or even approval that was voiced by the American mainstream regarding anti-black lynching. For responses to the murder of Matthew Shepard, see *The Laramie Project Archives*, available at [www.nytimes.com/ads/marketing/laramie](http://www.nytimes.com/ads/marketing/laramie) (last visited Feb. 11, 2004).

146. James Brooke, *Gay Man Beaten and Left for Dead: 2 Are Charged*, N.Y. TIMES, Oct. 12, 1998, at A9; James Brooke, *Gay Man Dies from Attacks, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A30.

147. Lexis/Nexis records 403 "major stories" discussing the attack on Matthew Shepard in "major newspapers" between October 9, 1998 and October 31, 1998, including repeated A section stories in USA Today, the New York Times, the Washington Post, the Chicago Tribune, the Rocky Mountain News, the Denver Post, the Seattle Times, and the Miami Herald-Tribune.

148. See Sid Smith, *Matt Shepard Bios Use His Death to Skewer Hate Crime*, CHICAGO TRIBUNE, Mar. 8, 2002, at 1C ("Clearly his homicide endures as an emblem of the horrors of homophobia, just as lynching embodied similar hatred in another era.").

rights” that the supporters of Colorado’s Amendment 2 used in their arguments in *Romer* began to ring more hollow in the wake of Shepard’s death. We might, then, dub this emerging consensus over the pervasive and pernicious effects of homophobia in the lives of queer people the “Matthew Shepard effect” – if a well-educated, clean-cut, All-American gay man like Shepard could be the victim of such a violent crime, what might that mean for the rest of us?

While the Ellen effect seems now to have suffused contemporary understandings of gay identity, whether supportive of gay rights or opposed to them, the Matthew Shepard effect has become the contemporary locus of controversy. As we have seen in the Texas *Lawrence* decision, the Texas Court of Appeals explicitly denied the influence of homophobia on anti-gay sodomy laws. It had to, because *Bowers*, its primary looming authority, essentially constitutes an official United States policy of homophobia. Just as *Brown* had to make visible the racism that undergirds segregation before it could overturn it, the Texas *Lawrence* decision must obscure the homophobia that infuses *Bowers* in order to put it to rest. Acknowledging the animosity behind contemporary anti-gay sodomy laws would force the Texas court to recognize queer people as citizens with civil rights that were potentially being abrogated, rather than a group of people who participated in acts that were socially abhorred.

Justice Kennedy’s language of human dignity, and his focus on the narrative of privacy rights are, at the very least, an indirect result of the Matthew Shepard effect: the recognition that lesbians and gay men are not simply a group, but a vulnerable population whose rights must be protected if we are to live in a just society. While Justice Scalia openly asserts the existence of the culture wars, Justice Kennedy seems to understand that in those wars both queer people and our freedoms of self-expression, association, and self-determination have been significant casualties. Kennedy does not just reverse the Texas *Lawrence* court’s decision, he reverses its representation of laws against lesbians and gay men as ethically neutral. Once the concept of homophobia is introduced, those laws cannot be seen in the same light.

## V. CONCLUSION

*Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scout masters for their children, as teachers in their children's schools, or as boarders in their home.*<sup>149</sup>

The Supreme Court's *Lawrence* decision has enormous ramifications, not least of which is the overturning of all sodomy laws nationwide.<sup>150</sup> More importantly, perhaps, it has acted as a watershed in public discourse around gay people and issues of sexual orientation. From almost the moment of the decision's being made public, voices from the left and right were weighing in on the meaning, implications, and possible results of the decision. In a post-*Lawrence* world, the significance of sexual orientation and the terms in which it can be publicly discussed seem to have shifted permanently.

When *Bowers* was decided, no one was sure precisely what it would be used for (although we could speculate) but it was clear that this kind of official sanctioning of anti-gay policy had to have broader applications and would be used as precedent for more issues than simply sodomy. The same has to be true in the inverse here. Some of the most obvious possible changes are those already raised by the Court's decision.<sup>151</sup> But we cannot imagine to what other legal uses this decision could be put as precedent,<sup>152</sup> or how willing this Court (or other incarnations of the Supreme Court in

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149. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

150. At the very least, it overturns everything that sodomy laws have been used for, for example the deployment of the existence of sodomy laws as justification for denying queer people other civil rights or protection from discrimination. But also, the opinion garnered widespread speculation about its potential ramifications for gay marriage. See, e.g., *Shutting the Bedroom Door a Victory for Privacy Nevertheless Brings up the Issue of Gay Marriage*, PITTS. POST-GAZETTE, July 1, 2003, at a-15; George Edmonson, *Lawsuit Challenges Military's Gay Policy*, ATLANTA JOURNAL-CONST., July 20, 2003, at 5A.

151. See, e.g., Justice Scalia's musings on the case's ramifications for same-sex marriage. *Lawrence*, 123 S. Ct. at 2497-98.

152. Though early indications show courts unwilling to read it expansively, see, for example, *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004) (holding *Lawrence* does not preclude state law punishing sexual acts between adults and children of the same gender far more severely than adults and children of opposite genders); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (finding *Lawrence* inapplicable to Florida ban on adoptions by homosexuals).

future years) would be to use it as an authority more generally.<sup>153</sup> What we do know is that when as revered a body as the United States Supreme Court comprehends not just the rhetoric but the texture of queer lives, it becomes harder and harder to articulate a reasoned anti-gay argument. This is not to say that there will not be opposition to gay rights positions, in fact backlash to this decision has already begun.<sup>154</sup> It simply means that the grounding upon which anti-gay rhetoric was based is shifting, leaving less room for anything but explicit ideology.<sup>155</sup>

However, the future is not necessarily as rosy as this analysis might lead one to conclude. The analogy to *Brown v. Board of Education* is instructive here. Shortly after the Supreme Court decided *Brown* it had to issue another decision instructing school systems on implementation of desegregation.<sup>156</sup> Moreover, the power of the law was not enough to integrate African American children into many schools: the National Guard was needed for that.<sup>157</sup> By the 1960s desegregation was hardly less controversial or violently opposed. The lynching of Emmett Till only a year after the *Brown*

153. Courts do have a way of ignoring or, more precisely, defining out of relevance, Supreme Court decisions on gay issues that interfere with their own local agendas. For example, after *Bowers* was decided, thirteen courts overturned their own sodomy statutes by making a distinction between federal and state constitutions. Similarly the U.S. Supreme Court managed to ignore *Bowers* in its own decision in *Romer v. Evans*.

154. For a discussion of the politics of backlash in relation to *Lawrence*, see Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at 48.

155. Of course, what can strike a reader as ideological may seem to the speaker to be common sense. For example, George W. Bush's assurance that "I am mindful that we're all sinners" and that "it's very important for our society to respect each individual, to welcome those with good hearts, to be a welcoming country" probably seemed to him an evenhanded way in which to address the recent *Lawrence* decision and questions about the future likelihood of gay marriage, rather than an explicitly religious and ideological statement that invoked the anti-gay rhetoric of the Christian right. Andy Humm, *Bush Says "Codify" Man-Woman Marriage*, GAY CITY NEWS, Aug. 1-13, 2003, at 1.

156. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). Of course, further implementation decisions litter the 1960s and 1970s. See, e.g., *Cooper v. Aaron*, 358, U.S. 1 (1958) (unanimously holding that the state of Arkansas could not declare itself unbound by the U.S. Supreme Court's desegregation rulings); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (finding unconstitutional the closing of public schools to avoid desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ordering desegregation of schools in Charlotte, North Carolina); *Keyes v. Sch. Dist.*, 413 U.S. 189 (1973) (ordering desegregation across school districts in Denver, Colorado).

157. For a thorough discussion of the Little Rock school integration struggle, see EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965 (Juan Williams, ed., 1998).

decision, riots by white Mississippians at the attempts by black students to enroll at the University of Mississippi,<sup>158</sup> the brutal and sometimes murderous attacks on black and white civil rights leaders,<sup>159</sup> and the vocal opposition to integration by Southern leaders such as George Wallace and Strom Thurmond<sup>160</sup> demonstrate that social change is hardly a peaceful process, even with the law on the side of that change. And of course, despite the enormous successes of the anti-segregation movement, much of American society remains separated by race.<sup>161</sup>

In fact, despite the acknowledgment of a history of institutionalized United States racism in *Brown*, the public discourse ever since has still tried to distance itself from that reality. From the *Bakke*<sup>162</sup> decision in the mid-1970s to the Court's current decision in Michigan affirmative action cases *Gratz*<sup>163</sup> and *Grutter*,<sup>164</sup> civil rights redress for the pernicious and ongoing effects of systemic racism (and even whether that racism still exists) remains a site of controversy.<sup>165</sup>

A similar pattern with respect to homophobia and issues of sexual orientation is predictable. Already, only a few years after the murder of Matthew Shepard, anti-gay violence has receded far from the headlines. The fatal stabbing of Sakia Gunn, a teenage lesbian in Newark, NJ, in early 2003, while obviously a homophobic attack, received only local mainstream coverage and was national news in

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158. PAUL HENDRICKSON, *SONS OF MISSISSIPPI: A STORY OF RACE AND ITS LEGACY* (2003).

159. For example the murders of Michael Schwerner, James Chaney, and Andrew Goodman in 1964, the assassination of Medgar Evers in 1963, and the violence against nonviolent protestors throughout the South. For a more detailed discussion of violence against both white and black civil rights workers, see TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65* (Simon & Schuster eds., 1999).

160. See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1996); KARI FREDRICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968* (2001).

161. For but one discussion of contemporary racial segregation, see Anders Gyllenhaal, *Segregation Returns to State Schools*, *THE NEWS OBSERVER*, Feb. 18, 2001 at A21.

162. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

163. *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003).

164. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003).

165. Indeed the most effective defense for affirmative action now seems to be that a diverse educational environment is good for white students, erasing the positive value higher education might have for students of color.

only the lesbian and gay press.<sup>166</sup> While racism and class bias clearly plays a role in the minimal attention Gunn, a black working class girl, received, the role of homophobia in local and national governments and media is much greater.<sup>167</sup>

The path for gay rights advocates and attorneys, then, seems clear. The more consensus there is regarding the power of homophobia to limit and even destroy our lives, the more successful advocacy on behalf of lesbian, gay, bisexual and transgender clients or rights can be. When the courts address homophobia head-on, they are more likely to understand the world from a queer perspective, and not coincidentally, rule in favor of queer litigants.<sup>168</sup> One goal, then, should be to capture and expand upon not only the influence of *Lawrence* as an astonishingly favorable precedent, but also on the assumptions underlying it. In order not to lose the value of the Ellen and Matthew Shepard effects the courts and the general public must focus on more than just the existence of gay people; they must be reminded of the historical violence both actual and metaphorical that has been perpetrated against us. It is only with both of these phenomena in mind that advocates might truly get the courts to see the experiences of lesbians, gay men, bisexuals and transgender people as their most looming authority regarding queer lives.

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166. A search through national gay media reveals multiple stories regarding Gunn's murder. See, e.g., *N.J. Teen Killed After Revealing Her Sexuality*, THE ADVOCATE, Wed., May 14, 2003; *Newark Man Sought in Lesbian Murder*, THE ADVOCATE, May 15, 2003. However, a Lexis search conducted on October 8, 2003, for references to "Sakia & Gunn" in "major newspapers," found no sources.

167. For an excellent analysis of the silence around Gunn's murder, see Kelly Cogswell & Ana Simo *Erasing Sakia: Who's to Blame?*, THE GULLY, (Aug. 1, 2003), available at <http://www.gully.com> (last visited Feb. 11, 2004).

168. A much more complete discussion of the role of homophobia in the courts is developed in, Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 149-60 (2001).



