KING ARTHUR IN A YANKEE COURT: THE UNITED STATES SUPREME COURT'S USE OF EUROPEAN LAW IN LAWRENCE V. TEXAS

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I. INTRODUCTION

In July 2003, the United States Supreme Court ruled in a six to three decision[1] that a state statute proscribing "deviate sexual intercourse with another individual of the same sex"[2] violated the United States Constitution. The Court in this landmark decision held that the "State cannot demean [the petitioners'] existence or control their destiny by making their private sexual conduct a crime."[3]

The Due Process Clause of the Constitution's Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[4] According to the Court, the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their

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1. Lawrence v. Texas, 123 S. Ct. 2472 (2003).
2. *Id.* at 2476 (quoting Tex. Penal Code Ann. § 21.06(a) (2003)).
3. *Id.* at 2484.
4. U.S. CONST. amend. XIV, § 1.

conduct without intervention by the government."[5] The Court concluded that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[6]

Lawrence v. Texas has garnered a considerable amount of media coverage and legal criticism because of the majority's use of foreign law in its opinion. While the Court asserted that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries,"[7] it provided very little insight into the legal reasoning of the judiciaries of those countries as to why homosexual sex is considered an integral part of human freedom.[8]

After a litany of references to foreign decisions protecting homosexual conduct, the Court admonished that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[9] This direct comparison between the United States and other countries invites an analysis of the law upon which foreign cases were decided and the reasoning of their courts. Without such an analysis we cannot be satisfied that Texas' governmental interest is less "legitimate or urgent"[10] than that of those foreign governments whose similar statutes were invalidated. The purpose of this article is to provide that analysis as it pertains to the European Court of Human Rights case *Dudgeon v. United Kingdom.*

To stress the importance of analyzing any case that is cited as precedent is not to concede the majority's implication that a State needs to show that its governmental interest in circumscribing any behavior is as legitimate or urgent than that of a foreign country. If an American court relies on the decision of another American court, it is expected that the decision being relied upon is analogous in reasoning to the case for which it is being cited as authority. That *Dudgeon* is not an American case should not exempt it from the same scrutiny.

II. DUDGEON, THE CONVENTION, AND THE EUROPEAN COURT OF HUMAN RIGHTS

The majority in *Lawrence v. Texas* made explicit reference to *Dudgeon v. United Kingdom.*[11] In *Dudgeon*, the European Court of Human Rights ruled that certain laws of Northern Ireland "which have the effect of making certain

5. *Lawrence*, 123 S. Ct. at 2484.
6. *Id.*
7. *Id.* at 2483.
8. *Id.*
9. *Id.*
10. *Lawrence*, 123 S. Ct. at 2483.
11. *Id.* at 2481.

homosexual acts between consenting adult males criminal offences"[12] violated Article Eight of the European Convention of Human Rights.[13] Article Eight provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[14]

The Vice-President of the European Commission of Human Rights said, "the European Court of Human Rights has for all practical purposes become Western Europe's constitutional court. Its case law and practice resembles that of the U.S. Supreme Court,"[15] comparing the influence of the European Court of Human Rights (E.C.H.R.) to the United States Supreme Court's interpretation of the United States Constitution's Bill of Rights.[16] The E.C.H.R. was established in 1959 by the Council of Europe for the purpose of enforcing the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[17] The Convention, "drawn up within the Council of Europe in 1950," was "opened for signature" by Contracting States in 1953.[18] According to Article One of the Convention, the signatory nations ("High Contracting Parties") are obliged to "secure to everyone within their jurisdiction the rights and freedoms defined in Section One," which includes Article Eight.[19]

In *Lawrence*, Justice Kennedy, writing for the majority, used almost the same words used in Article Eight of the Convention when he asserted that the "petitioners are entitled to respect for their private lives."[20] The similarities of *Lawrence* and *Dudgeon* do not end there. Both *Lawrence* and *Dudgeon* chronicle the debate over the issue of anti-sodomy statutes in the United States and Europe respectively, describing a trend toward abolishing same-sex sodomy prohibitions. Both *Lawrence* and *Dudgeon* make note of a reluctance to enforce existing anti-sodomy laws in their respective jurisdictions. Both Courts come to the same conclusion: that the most powerful judicial body in their jurisdiction must make the ultimate decision concerning the propriety of laws proscribing homosexual behavior. The legal framework upon which this conclusion was

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12. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 4 (1981).

13. *Id.* at 23.

14. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

15. Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 307, 310 (2002) (citing J.A. Frowein, *Recent Developments Concerning the ECHR, in* LAWS, RIGHTS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (J. Sundberg ed. 1986)).

16. Kleijkamp, *supra* note 15, at 310.

17. Information document issued by the Registrar of the European Court of Human Rights, *at* http://www.echr.coe.int/Eng/Edocs/HistoricalBackground.htm#Convention (last visited Oct. 11, 2003).

18. *Id.*

19. Convention, *supra* note 14, at art. 1.

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

based, and the reasoning employed to arrive at it, says much about the perception that each Court has of its own role in the democratic process.

III. THE CONVENTION'S ARTICLE EIGHT AND THE CONSTITUTION'S FOURTEENTH AMENDMENT

The European Court of Human Rights and the United States Supreme Court share a similar power: the power to declare government action within their respective jurisdictions to be in violation of a governing document.[21] In the case of the E.C.H.R., that document is the Convention.[22] For the Supreme Court, that document is the Constitution.[23] Because the E.C.H.R. and the Supreme Court have come to the same conclusion from different bodies of law, a comparison of those legal documents is in order.

Article Eight of the Convention gives the E.C.H.R. the power to decide what constitutes a legitimate state interest. With express language, it empowers the E.C.H.R. judges to do that job. Article Eight, Section Two gives the Court the task of making a final determination of what laws are "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[24]

This language effectively affords the Court a power normally reserved to a legislature; it requires them to balance personal privacy against the good of society and a state's interest in protecting that good. The entity in a democratic society that makes the final decisions concerning what is necessary in that democratic society is usually a body of elected lawmakers, if not the people themselves. To the extent that these decision-makers are not elected, the "democratic" society is not very democratic. Nonetheless, when the Convention gives this decision-making power to a group of judges, the fact that they are not elected makes them no less lawmakers.

Judges, in the traditional sense, apply pre-determined norms, previously enacted laws, and transcendent principles—preformed decisions about what is necessary in a democracy—to the cases that come before them. One need not agree with the foregoing characterization of a judge's role to acknowledge that if what is necessary in a democracy has not been finally decided by the time a judge is hearing a case, then the judge must decide then and there what is necessary. The Convention authorizes the E.C.H.R. to do just such last-minute

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21. Kleijkamp, *supra* note 15, at 311.

22. *Id.*

23. *Id.*

24. Convention, *supra* note 14, at art. 8, § 2.

decision-making. The E.C.H.R. judges do not write the laws of the member nations, but they do act as the final arbiters of what government actions are necessary for national security, public safety, economic well-being, prevention of disorder or crime, and protection of health or morals.[25]

Whether the power that the Convention confers on the E.C.H.R. can accurately be characterized as legislative is a semantic debate for another place. What is pertinent is that the text of the United States Constitution does not confer that power upon the United States Supreme Court. Consider the clause upon which the majority in *Lawrence* relied in overturning Texas' statute. The Due Process Clause of the Fourteenth Amendment, although it does not include the word "privacy," does have something to say about liberty. Yet the text of the Due Process Clause gives the Supreme Court the power to determine, not whether a state can deprive an individual of liberty, but whether due process has been afforded the person whose liberty has been deprived: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."[26]

The Due Process Clause presupposes that states can deprive a citizen of freedom. Justice Scalia, conceding that the Texas statute "undoubtedly imposes constraints on liberty," as do laws "prohibiting prostitution, [and] recreational use of heroin," pointed out in his dissent that "[t]he Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided.*"[27]

The Supreme Court has relied on this logic before. In *Gregg v. Georgia*, the Court upheld a Georgia statute that imposed the death penalty against a challenge that capital punishment violated the Eighth and Fourteenth Amendments to the Constitution.[28] The Court argued that rather than prohibiting the death penalty, the Constitution presupposes its existence in American law.[29] "[T]he Fourteenth Amendment ... similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law."[30] The Due Process clause does not give persons the right not to be put to death; neither does it give persons the right not to be deprived of liberty. The State retains the right to take both life and liberty from its citizens.

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25. *See id.*

26. U.S. CONST. amend. XIV, § 1.

27. *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting) (emphasis in original).

28. Gregg v. Georgia, 428 U.S. 153 (1976).

29. *Id.* at 177. ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.")

30. *Id.*

The dissent in *Lawrence* asserts that, "there is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim."[31] It is with this claim that the majority opens its opinion:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[32]

Justice Kennedy's idea of liberty may presume what he says it does, but the Fourteenth Amendment does not presume any freedom of "certain intimate conduct."[33] The Constitution's text[34] does include protections for "thought, belief, [and] expression,"[35] but the majority's addition of "certain intimate conduct,"[36] is just that—an addition. While the *Dudgeon* court may have relied on an express right to privacy in the Convention, the Constitution does not provide any express right upon which the *Lawrence* court can base its asserted entitlement to respect for "private lives" or the "realm of personal liberty which the government may not enter."[37]

This illuminates an inherent difference between the structure of Article Eight and that of the Constitution's Fourteenth Amendment, although at first blush they may appear similar. Article Eight prohibits government "interference" with the right to private and family life and lists various exceptions to that prohibition.[38] The Fourteenth Amendment's Due Process clause prohibits government "deprivation of life, liberty, and property" and lists an exception to that prohibition—the provision of due process. This ostensible similarity in structure belies very important and effectual textual differences.

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31. *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting).

32. *Id.* at 2475.

33. *Id.*

34. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

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

36. *Id.*

37. *Id.* at 2484.

38. Convention, *supra* note 14, at art. 8.

The Convention grants individuals express rights. The rights granted to individuals by the Constitution are most often characterized by prohibitions on governmental power. The difference has been explained as the distinction between negative and positive rights.[39] A recent comparative law article explains that the Convention proclaims "positive rights," "phrased in affirmative terms,"[40] e.g., "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[41] The article points out that, in contrast, the Constitution guarantees "negative rights" by limiting the power of government: "[s]imilar protection is granted by the Fourteenth Amendment of the Constitution which provides, in part, that '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.'"[42]

The right to privacy that the Supreme Court has recognized in past decisions is "a judicial extrapolation from the Due Process Clause of the Fourteenth Amendment."[43] Moreover, while the word "liberty" is actually found in the Fourteenth Amendment, the right to liberty relied upon by the court in *Lawrence* is similarly extrapolated from text that guarantees only the right to due process of law.[44] Having found unenumerated rights in the text of the Constitution, the Court has had to find unenumerated balancing tests in order to take into consideration the government's inevitable need to encroach upon those rights from time to time.[45]

As the article explains, the Convention prescribes a balancing test, ready-made for the E.C.H.R.: "[T]he Convention does provide in Articles 8 through 11 specific requirements for standards of review, which the European Court, after concluding that a Member State interfered with an applicant's substantive right or freedom, must apply to determine whether the interference is

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39. Kleijkamp, *supra* note 15, at 314.

40. *Id.*

41. Convention, *supra* note 14, at art. 8, § 1.

42. Kleijkamp, *supra* note 15, at 314 (quoting U.S. CONST. amend. XIV, § 1).

43. Robert A. Ermanski, Comment, *A Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT'L & COMP. L. REV. 141, 159 (1992).

44. Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus on the process by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.")

45. Kleijkamp, *supra* note 15, at 315. ("[T]he Supreme Court...was forced to 'create some judicial exceptions' to the absolute language of, for example, the First Amendment's Freedom of Speech Clause or the Fourteenth Amendment's Due Process Clause.") (quoting Gregory P. Propes, Wherefore Art Thou Deference? The European Court of Human Rights, Military Discipline, and Freedom of Expression, 19 HOUS. J. INT'L., 281, 286 (1996)).

justified."[46] If a government interferes with a person's right to privacy, that interference must be "in accordance with the rule of law" and must be "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[47]

"In contrast to the E.C.H.R., the Supreme Court's balancing remains mostly implicit, once the regulation has passed its initial legitimacy hurdle."[48] Gerda Kleijkamp notes that the Supreme Court's strict scrutiny test, which demands that any government infringement on "fundamental liberty interests" be "narrowly tailored to serve a compelling state interest,"[49] closely resembles the E.C.H.R.'s "review of a Member State's interference with an applicant's fundamental right or freedom."[50] Kleijkamp explains that the government must not only prove that its interference is "'in accordance with the law,' 'pursues a legitimate aim' and 'is necessary in a democratic society,'" but must also prove that it is "motivated by a 'pressing social need'" and "no greater than necessary and should utilize the least intrusive means possible."[51]

According to the United States Supreme Court's due process clause rational basis test, if the Court does not find that a right is fundamental, a state must prove only that its interference with that right is rationally related to a legitimate government interest.[52]

IV. THE DIFFERING ROLES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE SUPREME COURT

"To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[53] Justice Kennedy's use of the *Dudgeon* case in *Lawrence*, without any explanation as to *Dudgeon*'s reasoning or bases, obscures the fact that what the *Lawrence* Court did is not what the E.C.H.R. did in *Dudgeon*. The E.C.H.R., applying Article Eight's explicit right to privacy, was acting in

46. Kleijkamp, *supra* note 15, at 321.

47. Convention, *supra* note 14, at art. 8, § 2.

48. Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189, 206 (1990).

49. *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

50. Kleijkamp, *supra* note 15, at 321.

51. *Id.* (citations omitted).

52. *See id.* at 322.

53. *Lawrence*, 123 S. Ct. at 2483.

accordance with its Conventional role as the arbiter of what government action is "necessary in a democratic society."[54]

The Fourteenth Amendment does not give the Supreme Court the role of arbiter of what government action is "necessary in a democracy."[55] It requires only that due process is afforded to people whose liberty is deprived.[56] Despite having divergent roles—the Supreme Court's role being decidedly more limited than that of the E.C.H.R.-both courts embark on a very similar analysis of public policy considerations.

In *Dudgeon*, "the E.C.H.R. focused its attention on recent developments in the member states in public perceptions of the limits of acceptable government interference as reflected in legislative developments in the member states."[57] Article Eight of the Convention allows this type of analysis; in fact, it actually provides for it. It is relevant to look to the member states in determining what is "necessary in a democratic society."[58] What is working? What is not working? If a significant number of countries have repealed anti-sodomy laws without detriment to their security, safety, economy, order, health or morals,[59] then the conclusion could be drawn that such laws are not "necessary in a democratic society."

The E.C.H.R. also considered how the anti-sodomy laws were enforced, noting that the majority of the very infrequent instances of prosecution involved "persons under eighteen."[60] This too is a fitting analysis for a court charged with applying Article Eight. If the court is to determine what laws are necessary, it would do well to look to the member nations. If those nations are not prosecuting existing anti-sodomy laws, the conclusion that such laws are not "necessary in a democratic society"[61] may be warranted.

> It being accepted that some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the

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54. Convention, *supra* note 14, at art. 8, § 1.

55. *Id.* at art. 8, § 2.

56. *See* U.S. CONST. amend. XIV, § 1.

57. Dubber, *supra* note 48, at 210-11.

58. *Id.* at 205. ("The ECHR initially assesses whether the particular law challenged responds to a pressing social need. In this inquiry, the court may take into account evidence of a popular consensus on the issue, whether the regulation has fallen into disuse, and the state's ability to further the law's aims in the absence of the challenged regulation.")

59. Convention, *supra* note 14, at art. 8, § 2.

60. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 11 ("During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors, that is persons under eighteen.")

61. Convention, *supra* note 14, at art. 8, § 2.

> contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.[62]

The E.C.H.R., in answering this question, is assuming its rightful role not only as interpreter of what the Convention says, but as arbiter of what is necessary in a democratic society. The Member Nations of the Council of Europe understood when they became members that the E.C.H.R. is, as far as Article Eight is concerned, the final arbiter of what is "necessary in a democratic society" with respect to "interference by a public authority with the exercise" of the "right to respect for his private and family life."[63]

The states that ratified the Fourteenth Amendment of the United States made no such concession to the Supreme Court. The Constitution does not give its Supreme Court the power to decide what is necessary in a democracy. After ratification of the Fourteenth Amendment, the States retained the power to deprive their citizens of life, liberty or property as long as they ensured that those citizens enjoyed "due process of law." Each citizen, regardless of race, would henceforth be guaranteed due process of law, without regard to how compelling a government's interest may be in depriving them of that process. Legislators remained the arbiters of what is necessary in the democratic society of each State.

For the Supreme Court, which has not been granted the power to decide what is necessary in a democracy, a survey of the criminalization and decriminalization of same-sex sodomy is a gratuitous exercise. What difference does it make how many states have repealed laws that punish homosexual conduct, when what is really at issue is whether the Constitution gives states the power to pass anti-sodomy laws in the first place?

The Court intended to overrule *Bowers v. Hardwick*, which anthologized the history of anti-sodomy laws in America in order to discredit the argument that sodomy is a fundamental right "deeply rooted in this Nation's history and tradition."[64] Yet the majority in *Lawrence* did not find that Texas had deprived the plaintiff of a fundamental right; it did not apply strict scrutiny. "[W]hile overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: 'Respondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.'"[65]

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62. *Dudgeon, supra* note 60, at 11.

63. Convention, *supra* note 14, at art. 8.

64. *Bowers*, 478 U.S. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

65. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting)(quoting *Bowers*, 478 U.S. at 191) (emphasis

Nonetheless, the majority attempted to establish that "early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally."[66] It posited that "laws targeting same-sex couples did not develop until the last third of the 20th century."[67] Yet the Court's reasoning does not lead it to the conclusion that there is a fundamental right to engage in homosexual sodomy.

If bestowing fundamental right status on sodomy was not its aim, the Court's analysis of American sodomy laws must have served another purpose altogether—describing a great national debate, and positioning itself as the institution to bring it to resolution. "States with same-sex prohibitions have moved toward abolishing them," the Court asserted.[68] The Court described how the American Law Institute omitted laws against consensual sex in its Model Penal Code in 1955,[69] after which states began to "change [their] laws to conform to the Model Penal Code."[70] This all tends to "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[71] If some states, like Texas, are yet unaware of, or refuse to conform to, this emerging awareness, the Court presumably sees itself as ideally positioned to bring the trend to the attention of such intransigent lawmakers.

The majority discussed the states' divergent treatment of same-sex sodomy as though it were a circuit-split—a situation in which the same issue is decided differently by lower federal courts, and the highest court in the land must resolve the matter. Likewise, if states cannot agree on whether to criminalize sodomy, the Court must assume the role of its European cousin and become the arbiter of what laws are "necessary in a democracy." That the Court is assuming this new role is further evidenced by its discussion of a "pattern of non-enforcement" of sodomy laws "with respect to consenting adults acting in private."[72] The Court infers from the supposed reluctance of law enforcement officials, district attorneys, and attorneys general across America what the people of Texas have never expressed by democratic means: that they want their statute repealed.

However, differences in state law concerning homosexual sodomy do not amount to the legislative equivalent of a split in opinions among the circuit

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66. *Id.* at 2479.

67. *Id.*

68. *Id.* at 2480.

69. *Id.* (citing MODEL PENAL CODE § 213.2, Comment 2, at 372 (1980)).

70. *Lawrence*, 123 S. Ct. at 2481.

71. *Id.* at 2480.

72. *Id.* at 2481.

courts. Rather, this statutory variation is a reflection of the divergent views of the citizens of various American states, represented by laws, enacted by their elected officials. The dissent concedes that, "Texas is one of the few remaining States that criminalize private, consensual homosexual acts."[73] However, it rejects the notion that the Supreme Court should compel Texas to follow the trend of its sister states: "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed ... by a Court that is impatient of democratic change."[74]

V. THE CULMINATION OF EXPANDING SUPREME COURT POWER

In his dissent, Justice Scalia laments that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[75] Yet the Court has gone a step farther. It has taken measures to change the rules of engagement. It has thrown off the encumbering former role, and taken for itself that of the European Court of Human Rights: arbiter of what is necessary in a democratic society. To be accurate, it must be pointed out that this change began decades ago when the Court assumed the duty of rating governmental interests by its own special formulas. That the Court decided that the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"[76] presupposes what has now long been accepted: Texas has an obligation to justify its intrusion into private life with something more than due process of law.

Nonetheless, Justice Scalia is correct in his implication that *Lawrence* reveals an even deeper shift in the Court's role. In fact, *Lawrence* is arguably a much more momentous decision than *Dudgeon* was. After *Dudgeon*, the balancing test between the right to privacy and the interest of the government remained codified in Article Eight of the Convention. The protection of morals, to the extent that it is necessary in a democratic society, remained a governmental interest that could justify interference with the right to respect for a person's private life.[77] The *Dudgeon* opinion only reaffirmed that fact: "As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters ... is one of the matters which the national authorities may legitimately take into account in exercising their discretion."[78]

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73. *Id.* at 2497 (Scalia, J., dissenting).

74. *Id.*

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

76. *Id.* at 2484.

77. *See* Convention, *supra* note 14, at art. 8.

78. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 19.

However, as Justice Scalia lamented in his dissent, *Lawrence's* majority opinion effectively forecloses the protection of morals as a legitimate justification for a state's regulation of non-violent sexual behavior.[79] "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[80] This is an epochal shift in Supreme Court jurisprudence.[81] The dissent connects the dots, asserting that if "the promotion of majoritarian sexual morality is not even a *legitimate* state interest," then criminal laws against adult incest and bestiality cannot "survive rational-basis review."[82] Those who have sought to overturn anti-sodomy laws realize the importance of this development. In a forward-looking law review article entitled, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, James D. Wilets and Charlene Smith expounded what has become a winning strategy:

> The second strategy is to argue that morality alone cannot be used as a justification to strike down or uphold a law. This strategy questions the court's ability to apply objective criteria to determine whether the morality upon which the legislation is based represents a legitimate governmental purpose, or whether it simply represents the illegitimate biases of society towards a particular disfavored group.[83]

VI. JUSTICE KENNEDY'S NON-SEQUITURS

The *Lawrence* majority's reliance on foreign precedence reveals faults in Justice Kennedy's reasoning, if not a disregard for the Constitutional structure of the United States federal government.

If the Convention allows E.C.H.R. judges to determine what laws are necessary in a democratic society, then the Constitution must allow the Supreme Court to determine whether anti-sodomy laws are no longer necessary to the American democracy. This does not follow. The Court's reasoning disregards

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79. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (warning that the majority opinion "decrees the end of all morals legislation").

80. *Id.* at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

81. *Id.* at 2490 (Scalia, J., dissenting) (recalling that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation," and citing a list of cases upholding, on the basis of public morality, laws proscribing such activity as the sale of sex toys and public indecency).

82. *Id.* at 2495 (Scalia, J., dissenting).

83. James Wilets & Charlene Smith, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, 24 SEATTLE U. L. REV. 49, 54 (2000).

the decidedly different scopes of review afforded to the E.C.H.R. and the Supreme Court by the language of Convention and the Constitution, respectively.

The majority's reference to British statutory bans on sodomy likewise bares its flawed reasoning. "A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct ... Parliament enacted the substance of those recommendations 10 years later."[84] The implication is that if the British Parliament decriminalizes homosexual conduct, the Supreme Court should decriminalize homosexual conduct. This overlooks the fact that British Parliament is a legislative body and the Supreme Court is not. The Texas legislature could have repealed its anti-sodomy law, just as Parliament did. However, the Supreme Court is not a legislature.

The *Dudgeon* decision and British Parliament's repeal of sodomy statutes, if taken as persuasive authority, militate against Supreme Court action. If they provide any suggestion at all, it is this: the United States should codify its right to privacy and legislatively eliminate anti-sodomy laws.

VII. *LAWRENCE'S* LIBERTARIAN IDEALS

Justice Kennedy and the *Lawrence* majority may have a point that appeals to many Americans: perhaps states should not enjoy the presumption that their deprivation of a person's liberty is valid. Perhaps our liberties would be more secure if our Constitution presumed, as the Convention does, that deprivation of liberty or invasion of privacy is invalid unless the court determines that it is "necessary in a democratic society." Perhaps the Supreme Court should decide which laws serve the interest of security, safety, prosperity, and health. Perhaps state governments should legislate only public morality and leave private morality to the individual.[85]

However, the text of the Constitution does afford states the presumption that their deprivation of personal liberty is valid; the Constitution does not grant the Supreme Court the power to decide which laws serve society's interests; and nothing in the Constitution enjoins states from promoting private morality as well as public morality.

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84. *Lawrence*, 123 S. Ct. at 2481.

85. The Institute for Justice, in its amicus curiae brief in support of the petitioners, drew a distinction between public and private morality:

> There is a crucial difference ... between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere—something that falls under the police power of state—and criminalizing private consensual conduct that harms neither the individuals involved nor the general public —something that is outside the bounds of police power.

Brief of Amici Curiae The Institute for Justice at 14, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-1-2).

Two-thirds of Congress and three-fourths of the state legislatures could change all that. Article Five of the Constitution provides a procedure to amend the text of the Constitution. But Due Process jurisprudence has made the Article Five amendment process unnecessary, paving the way for the Supreme Court to make those changes itself.

VIII. A LEGAL STRATEGY BEARS FRUIT

James D. Wilets, in an article published in 1994, outlined a legal strategy of utilizing international law to bring about the invalidation of anti-sodomy laws in the United States.[86] He enumerated "three principal strategies," suggesting that "legal practitioners ... [d]irectly apply the terms of international treaties that have been ratified by the United States government ... [u]se international law to guide the interpretations of U.S. domestic laws, [and] [d]irectly apply 'customary international law.'"[87] Professor Wilets described a customary international norm as "a principle or practice accepted as 'customary' by the world's countries," that "binds all governments, including those that have not specifically recognized it, so long as they have not expressly and persistently objected to its development."[88] However, he was not optimistic that attempts to apply these customary international laws or norms would be successful, lamenting that "it is, however, unlikely that a U.S. court would find the criminalization of same-gender private sexual behavior as violative of a binding customary international human rights norm."[89]

Professor Wilets' strategic prescience was mitigated only by the cautiousness of his optimism. The majority in *Lawrence* did find that the Texas statute was "violative of a binding[90] customary international human rights norm."[91] The law proscribes what the Court describes as a "right ... accepted as an integral part of human freedom in many other countries."[92]

What the Court did not do might say a lot about its strategy. The Court did not employ Professor Wilets' first suggested strategy: application of interna-

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86. James D. Wilets, *Pressure from Abroad: U.N. Human Rights Ruling Strengthens Hopes for U.S. Gays and Lesbians*, 21 HUM. RTS. 22 (1994).

87. *Id.* at 23.

88. *Id.* at 43.

89. *Id.*

90. The Court did not find the norm binding in the sense that it was bound to follow it; however, it considered the norm persuasive even thought it was not part of a binding treaty. Furthermore, foreign precedent was not found persuasive because of the substance of foreign law or the reasoning of foreign courts. (Neither was discussed, beyond that they have decriminalized same-sex sodomy.) For these reasons, the Court's use of foreign precedent falls into Professor Wilets' third category: an international norm.

91. Wilets, *supra* note 86, at 43.

92. *Lawrence*, 123 S. Ct. at 2483.

tional treaties that have been ratified by the United States.[93] Forgoing this strategy may serve to insulate the *Lawrence* decision from future threats. If it had relied on international treaties, as it was urged to do by amicus curiae,[94] and if those treaties were subsequently dissolved, the Court's opinion would be weakened.

Neither did the Court not use Professor Wilet's second strategy—use of international law to guide the interpretation of United States law. While the Court mentioned the conclusions of foreign courts, it did not describe the law upon which the foreign opinions were based. Nor did it describe the foreign courts' reasoning process. The majority's use of foreign jurisprudence was based, not on the substance of foreign law or the superiority of international legal reasoning, but on the simple supposition that if other nations accept a purported right as "an integral part of human freedom," then American courts should do so as well.

What the Court did do was precisely what Professor Wilets predicted would be a long shot: directly apply a "customary international norm."[95] However, by relying on a totality of international law as persuasive "values we share with a wider civilization,"[96] the Court has preempted debate that Professor Wilets' *binding* international norms[97] would have demanded: Can an international norm ever be binding on all governments?[98] If so, what implications would that have for the rule of law and representative democracy?[99] Do State anti-sodomy laws and a Supreme Court decision upholding their constitutionality[100] amount to express and persistent objection[101] to the development of customary international norms? If so, would those objecting countries not be

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93. Wilets, *supra* note 86, at 23.

94. Brief of Amici Curiae of Mary Robinson, et al. at 11-12, Lawrence v. Texas 123 S. Ct. 2472 (2003) (No. 02-102) (citations omitted) ("In *Toonen v. Australia* (1994), the United Nations Human Rights Committee followed the *Dudgeon* Court's reasoning and rejected this Court's reasoning in *Bowers*. The Committee construed Article 17 of the International Covenant on Civil and Political Rights, which applies to 149 states party with combined populations of at least three billion people. These countries include the United States, which ratified the Covenant on June 8, 1992.")

95. Wilets, *supra* note 86, at 43.

96. *Lawrence*, 123 S. Ct. at 2483.

97. Wilets, *supra* note 86, at 43.

98. *Id.*

99. *See Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.") (emphasis in original).

100. *Bowers*, 478 U.S. 186 (upholding a Georgia state law banning sodomy).

101. Wilets, *supra* note 86, at 43.

bound by the norm? These questions, although pertinent, are for another article. *Lawrence v. Texas* has provided much to contemplate.

In *Lawrence,* the Court has made its innovations clear. It will now fill a role comparable to that of the E.C.H.R.: ultimate public policy decision-maker. In its new capacity, the Supreme Court will consider international norms and "values we share with a wider community"[102] as persuasive authority, as it does the text of the Constitution.

IX. CONCLUSION

Lawrence v. Texas shows the extent to which the Court regards the Constitution as mere persuasive authority, along with past Supreme Court decisions, legislative statistics and public policy suggestions from abroad. While portraying this modern approach to Constitutional review, *Lawrence* left Due Process jurisprudence largely unchanged. If a right is deemed fundamental, infringement of that right must still be narrowly tailored to serve a compelling state interest. If a right is not fundamental, infringement of that right must only be rationally related to a legitimate government interest.[103] The revolutionary alteration of the *Lawrence* decision is the pronouncement that the preservation of morals is no longer a legitimate government interest.[104]

If the American people are to reassert their right to make laws that reflect their morals (a right that, on paper, the Member Nations of the Council of Europe still retain)[105] the Due Process framework must be changed. It must be thrown out wholesale, and the presumption that a state may take life, liberty, and property must be restored. *Lawrence* has not ushered in an era, as some libertarians might hope, in which no one can impose his "moral disapproval"[106] upon another. The *Lawrence* Court has not scrubbed the laws of America clean of morality. It has only ensured that the moral convictions of a Supreme Court majority can always trump a moral consensus of American voters.

The Institute for Justice, in its *amici curiae* brief on behalf of the petitioners, warns of the dangers of elected officials: "Legislators are perfectly capable of invading liberty, and that is why government is limited."[107] Duly

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102. *Lawrence*, 123 S. Ct. at 2483.

103. *See id.* at 2483 ("The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual") (emphasis added); *id.* at 2483 ("... no showing that in this country the governmental interest in circumscribing personal choice is somehow more *legitimate* or urgent.") (emphasis added).

104. *Id.* at 2483-84.

105. *See* Convention, *supra* note 14, at art. 8, § 2.

106. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring).

107. Brief of Amici Curiae The Institute for Justice at 6, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-1-2).

noting the Institute's caveat, it must be remembered that legislators are elected by the people; Supreme Court justices are appointed for life.[108]

108. *See* THE FEDERALIST No. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.")