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LAWRENCE & THE ROAD FROM LIBERATION TO EQUALITY

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To think about the future of lesbian and gay rights in the wake of *Lawrence v. Texas*,¹ we inevitably need to look to the past. After all, the movement that first sparked efforts to challenge statutes like the Texas “Homosexual Conduct” law was not a rights movement at all.² Instead, when lesbian, gay, bisexual, and transgender individuals began organizing in 1969, their rallying cry was for liberation.³ To gauge what *Lawrence* means, then, we need to think in terms of both liberation, as the movement’s early aim, and legal equality, which is the dominant demand of today’s activists and advocates.⁴

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1. 539 U.S. 558 (2003).

2. See MARGARET CRUIKSHANK, *THE GAY AND LESBIAN LIBERATION MOVEMENT* 61–71 (1992).

3. See *id.*; see also ERIC MARCUS, *MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 1945–1990 AN ORAL HISTORY* ix (1992).

4. See Freedom to Marry, at http://www.freedomtomarry.org/document.asp?doc_id=1005&page=2 (last visited Oct. 16, 2004) (describing the organization as the “gay and non-gay partnership working to win marriage equality nationwide.”); Gay & Lesbian Advocates & Defenders, at http://www.glad.org/About_GLAD/from_the_executive_director.shtml (last visited Oct. 16, 2004) (identifying GLAD as “New England’s leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression.”); Human Rights Campaign, About the Human Rights Campaign, at http://www.hrc.org/template.cfm?section=about_hrc (last visited Oct. 16, 2004) (characterizing the group’s mission as “[w]orking for lesbians, gay, bisexual and transgender equal rights.”); Lambda Legal, About Lambda Legal, at <http://www.lambdalegal.org/cgi-bin/iowa/about> (last visited Oct. 16, 2004) (“Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education, and public policy work.”); Marriage Equality, at http://www.marriageequality.org/about_us.php (last visited Oct. 16, 2004) (“The organization’s sole purpose and focus is to end discrimination in civil marriage so that same-sex couples can enjoy the same legal and societal status as opposite-sex couples.”); National Center for Lesbian Rights, at <http://www.nclrights.org/about.htm> (last visited Oct. 16, 2004) (describing the organization as “a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, free legal advice and counseling, and public

To carry out this contextualized inquiry, let us consider first how *Lawrence* fits in with some of the early goals of the gay movement and then consider why anti-gay discrimination has not crumbled in the wake of the Court's passionate pronouncement of the core humanity of lesbians and gay men.

As just mentioned, the gay liberation movement of the late 1960s and 1970s did not, generally speaking, prioritize the right to marry or to serve in the military.⁵ Instead, the movement's chief claim was for sexual and social freedom: freedom from state laws criminalizing the sexual intimacy of lesbians and gay men and freedom from harassment by law enforcement officers who took advantage of sodomy laws to stalk and extort patrons at gay bars, to shut down lesbian dances, and to otherwise make the lives of lesbians and gay men miserable.⁶ To put the point more positively, the demand was for freedom to live as open lesbians and gay men without the threat (and reality) of state interference.

education.”); National Gay and Lesbian Task Force, at <http://www.thetaskforce.org/aboutus/whatwedo.cfm> (last visited Oct. 16, 2004) (“We work to build the grassroots political strength of our community by training state and local activists and leaders, working to strengthen the infrastructure of state and local allies, and organizing broad-based campaigns to build public support for complete equality for LGBT people.”).

5. Although this was generally true, some early advocacy and litigation sought equality in both of these arenas. See *Berg v. Claytor*, 591 F.2d 849, 850 (D.C. Cir. 1978) (challenging policy that separated from service seamen who engaged in sexual acts with a same-sex partner); *Matlovich v. Sec’y of the Air Force*, 591 F.2d 852, 854–55 (D.C. Cir. 1978) (challenging discharge from military service based on sexual orientation); *Adams v. Howerton*, 486 F. Supp. 1119, 1120–21 (C.D. Cal. 1980) (challenging refusal to recognize same-sex couple’s marriage in immigration context), *aff’d on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (challenging state’s refusal to grant marriage license to same-sex couple); *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1974). See generally WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 98–137 (1999) (discussing legal restrictions on the lives of gay people during the 1960s and 1970s and challenges brought against those laws); RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY—VIETNAM TO THE PERSIAN GULF* (1993) (detailing stories of lesbians and gay men in the military).

6. See *Cyr v. Walls*, 439 F. Supp. 697, 699 (N.D. Tex. 1977) (challenging police harassment at a gay conference); *Stoumen v. Reilly*, 234 P.2d 969, 970–71 (Cal. 1951) (en banc) (mandamus hearing to annul the loss of a liquor license that was revoked because gay people “patronized said premise and used said premise as a meeting place”); *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 13–14 (N.J. 1967) (holding that the Division of Alcoholic Beverage Control improperly suspended a liquor license “because apparent homosexuals were permitted to congregate at bars”); 3 ARTHUR S. LEONARD, *The Gay Bar and the Right to Hang Out Together*, in *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* 190, 192–95 (John W. Johnson ed., 1993). See generally WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* 336–75 (2d ed. 1997) (reviewing history of restrictions on gay and lesbian social and political life).

Interestingly though, if we look back to laws governing sexuality in the 1970s when this movement took force, it turns out that nearly every state had numerous statutes prohibiting all sorts of sexual relationships between consenting adults.⁷ There were sodomy laws that banned oral and anal sex but did not, for the most part, single out same-sex couples for their penalties.⁸ There were (and still are) fornication laws forbidding sexual relationships between unmarried adults.⁹ Adultery laws limited the sexual freedom of married adults.¹⁰ And, before *Eisenstadt v. Baird*¹¹ was decided in 1972, states were free to impose criminal punishment for the provision of birth control to unmarried individuals.¹² As a matter of positive law, with most consensual, private, non-commercial sexual relationships criminalized, it is fair to say that the sexual freedom of all adults, especially outside of marriage, was on roughly the same footing.¹³

The problem, as we know, and as *Lawrence* acknowledged, was not so much the enforcement of positive law as the invocation of those laws outside the criminal prosecution context.¹⁴ Although the story of sodomy laws' secondary effects is familiar to anyone who has studied gay rights jurisprudence, I want to offer three classic examples from the worlds of family law, employment discrimination, and politics to provide a platform for gaining perspective on *Lawrence's* aftermath.

First, consider the many custody and visitation cases in which a parent's identity as lesbian or gay or a parent's sexual relationship with a same-sex partner provided grounds for a court to limit parental contact with a child.¹⁵ The Virginia Supreme Court's determination in *Bottoms v. Bottoms* was perhaps the most notorious of these because the court took the extreme step of shifting custody from a lesbian

7. See *infra* text accompanying notes 8–10.

8. RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 65–71 (1996) (reviewing history of sodomy laws in the United States); see also Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1076–77 (1988); Nan D. Hunter, *Life After Hardwick*, 27 *HARV. C.R.-C.L. L. REV.* 531, 538 (1992).

9. POSNER & SILBAUGH, *supra* note 8, at 99–102. The constitutionality of these laws has been called into question after *Lawrence*. See Nan D. Hunter, *Living with Lawrence*, 88 *MINN. L. REV.* 1103, 1112 (2004).

10. POSNER & SILBAUGH, *supra* note 8, at 103–10.

11. 405 U.S. 438, 454–55 (1972).

12. *Id.*

13. See sources cited *supra* notes 10–12.

14. See *Lawrence v. State*, 539 U.S. 558, 575–76 (2003).

15. See *Ex parte H.H.*, 830 So. 2d 21, 22–25 (Ala. 2002); *Thigpen v. Carpenter*, 730 S.W.2d 510, 512 (Ark. Ct. App. 1987); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995).

parent to the child's grandmother.¹⁶ Among the court's reasons for doing so was the mother's admission that she had violated Virginia's sodomy law.¹⁷

In the employment context, law student Robin Shahar lost her offer of employment with the Georgia Attorney General's office when Michael Bowers, then the Attorney General, learned that Shahar planned to marry a woman in a religious ceremony.¹⁸ He justified his decision on the grounds that he could not impugn the credibility of his office, which enforced Georgia's sodomy laws, by having a presumed lawbreaker as an assistant attorney general,¹⁹ even though the Georgia law applied equally to his gay and non-gay employees.²⁰

And, in the political context, as jurisdictions throughout the country debated adoption of anti-discrimination laws that would cover sexual-orientation, the existence of a state sodomy prohibition became a familiar argument of the opposition.²¹ How can a community possibly prohibit anti-gay discrimination, opponents of the sexual orientation protection would ask, when the state is permitted to impose criminal penalties on gay people's sexual conduct?²²

In other words, even when the law criminalized specific acts between same-sex partners (or all adults), the problem for gay people was not so much that the sex acts themselves were punished as that gay people were uniquely identified as lawbreakers, albeit

16. *Bottoms*, 457 S.E.2d at 108-09.

17. *See id.* at 108. It bears noting that the sodomy law referenced in the court's opinion applied to all Virginians without regard to sexual orientation. VA. CODE ANN. § 18.2-361(A) (Michie 1996). Other courts relied on laws singling out same-sex couples for punishment as grounds for restricting custody or visitation of a lesbian or gay parent. *See, e.g., Thigpen*, 730 S.W.2d at 512. For additional discussion of custody litigation involving lesbian and gay parents, see, for example, Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. LAW. 95 (2002) and Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

18. *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997) (en banc).

19. *Id.* at 1101. Later, Michael Bowers admitted to having violated the State's adultery ban while serving as Attorney General. James Vicini, *US Supreme Court Denies Appeal by Lesbian Lawyer*, AAP NEWSFEED, Jan. 13, 1998. The sodomy law that allegedly necessitated Robin Shahar's loss of employment with the Georgia Attorney General's office was later invalidated in *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (striking down Georgia's sodomy law in a case involving sexual contact between a man and a woman).

20. GA. CODE ANN. § 16-6-2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.").

21. *Cf. Jane S. Schacter, Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 366 (1997).

22. *See id.* at 388.

unconvicted, and then made to suffer in other ways.²³

When *Lawrence* reversed *Bowers*²⁴ and held that the state could not outlaw same-sex sexual relations, gay people's free exercise of sexuality could no longer be limited on account of the criminal law. Therefore one might think, with lawbreaker status removed, the state would be left with no reason to continue to treat lesbians and gay men differently from non-gay people in the secondary contexts where such great concern about lawbreaking had been expressed. In other words, if the only barrier to full equality was that gay people's sexual intimacy could be criminalized, we would expect to see all other sexual orientation-based barriers falling away.

However, while we are barely past the first anniversary of *Lawrence*, we have not seen a single anti-gay barrier fall away without a fight. Instead, we see legislators and presidential candidates, and even, to a limited degree, President George W. Bush, conceding the unfairness of non-recognition of gay and lesbian relationships at the same time as they fight tooth and nail against equalizing marriage itself.²⁵ We see anxious efforts of elected officials in Massachusetts and elsewhere to offer civil union status to same-sex couples—which is understood, Vermont-style, as the functional equivalent of marriage within a state²⁶—yet pulling out all stops to bar access to marriage.²⁷

Some courts have likewise demonstrated similar determination to sustain gay people's inequality on the heels of *Lawrence*'s removal of the stigma of criminality. Two examples will be explored briefly here. In one of these cases, *Lofton v. Secretary of the Department of Children and Family Services*,²⁸ the Eleventh Circuit sustained a ban on adoption by gay people for reasons entirely unrelated to sexual

23. See *id.* at 366.

24. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia statute criminalizing sodomy).

25. See, e.g., *Bush Calls for Ban On Same-sex Marriages* (Feb. 25, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html> (endorsing a constitutional amendment that would restrict marriage to different-sex couples) (last visited on Oct. 27, 2004).

26. "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." VT. STAT. ANN. tit. 15, § 1204(a) (2002).

27. See Dana Mulhauser, *Dispatch from the Massachusetts Constitutional Convention, The Tragic Lives of State Legislators* (Feb. 13, 2004), at <http://slate.msn.com/id/2095452/> (reporting that a majority of Massachusetts legislators desired to ban marriage of same-sex partners but were divided on whether to create civil unions) (last visited Oct. 27, 2004).

28. 358 F.3d 804, 827 (11th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3247 (U.S. Oct. 13, 2004) (No. 04-478).

freedom.²⁹ Instead, the court held, the state can legitimately want children to grow up in a home where parents have the possibility of being legally married and can give children advice about heterosexual relationships.³⁰ Heterosexual parents, in other words, are better role models for children who are wards of the state.

Something similar happened in *State v. Limon*.³¹ There, the Kansas Court of Appeals upheld on remand a seventeen-year criminal sodomy sentence of an eighteen-year-old man for having consensual oral sex with a fourteen-year-old.³² If the fourteen-year-old had been a young woman rather than a young man, the sentence imposed would have been less than seventeen months.³³ The lead justification accepted by the court in *Limon* was that Kansas could legitimately discourage voluntary sexual behavior between young adults and minors that deviates from traditional sexual mores.³⁴

In other words, the resounding message from *Lofton* and *Limon* is this: Even if the state can no longer criminalize gay people's sexual relationships, we still do not want children to think that it is perfectly acceptable to be gay. The message underlying the willingness of elected officials to offer some recognition to gay and lesbian couples but not traditional recognition in the form of marriage is similar—it is not as good to be gay as it is to be heterosexual.

At a deeper level, it seems, the concern expressed is not just that children will become more tolerant and accepting of gay people they encounter—after all, even the President in his effort to bar gay people from marrying is talking about tolerance and respect.³⁵ Why would the state be concerned about tolerance if tolerance had no effect on people's lives, other than to facilitate cooperation among neighbors and co-workers? Tolerance and even respect would seem, in that vein, to be well within any government's interests.

Instead, I believe the fear is that all of this tolerance may begin to make it more enticing to be gay. In other words, underlying the legislative debates and the cases is the concern that more young people may absorb the message that it is perfectly acceptable to be

29. *Id.* at 818, 827 (concluding that law prohibiting lesbians and gay men from adopting is rationally related to the state interest of providing stability for adoptive children).

30. *Id.* at 822.

31. 83 P.3d 229 (Kan. Ct. App. 2004).

32. *Id.* at 232.

33. *Id.* at 243 (Pierron, J., dissenting).

34. *Id.* at 236–37.

35. *Bush Wants Marriage Reserved for Heterosexuals* (Oct. 28, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/07/30/bush.gay.marriage> (last visited Oct. 27, 2004).

gay and that this message, alone, will wind up influencing the sexual orientation—or at least the sexual practices—of our nation's youth. So in Congress,³⁶ state legislatures,³⁷ *Lofton*,³⁸ and *Limon*,³⁹ the thought is that even if the government cannot use criminal law, it is entitled to send the message of gay people's inferiority other ways, so that children do not think it is as good to be gay as it is to be straight.

But is that correct? Can the state freely disapprove of being gay if it is not free to disapprove of same-sex sexual intimacy?

Although a full exploration of this question is beyond the scope of these remarks, I want to suggest that constitutional jurisprudence will not supply a comprehensive answer. Instead, the most fruitful source for understanding the persistence of anti-gay discrimination in the wake of *Lawrence* lies at the intersection of law, politics, and culture where rational reasoning is not necessarily the dominant force.

My suggestion is that we think about the current debates and the conflict between *Lofton* and *Limon*'s majority opinions⁴⁰ and *Limon*'s dissenting opinion⁴¹ as reflecting a sort of national adolescence with respect to the status of gay people. On the one hand, we are witnessing a steady march toward what I would call maturity—that is, in my view, a world in which an individual's sexual orientation has no legal relevance to rights or responsibilities and where, accordingly, legal distinctions based on sexual orientation cannot stand.⁴² On the other, we are experiencing strong resistance to this development. Those who defend the continuing relevance of gay identity to parenting and marriage effect the equivalent of the adolescent's slammed door through their seemingly willful refusal to engage with rational counterarguments to their position.

From this vantage point, I want to return to the question of sexual freedom where this discussion began. After all, today—as far as

36. See, e.g., Defense of Marriage Act, 1 U.S.C. § 7 (2003) (defining marriage as “only a legal union between one man and one woman”).

37. See, e.g., VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002) (Vermont's civil union statutes); Mulhauser, *supra* note 27 (reporting that the majority of the Massachusetts legislature appear to ban marriage by same-sex partners).

38. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

39. *Limon*, 83 P.3d at 236–37.

40. *Lofton*, 358 F.3d at 819; *Limon*, 83 P.3d at 236–37.

41. *Limon*, 83 P.3d at 249.

42. Some exceptions would likely remain even if a general rule were embraced barring sexual orientation-based classifications. See, e.g., Jeffrey P. Brinkman, Case Note, *Veney v. Wyche: Not in My Cell—The Constitutionality of Segregating Prisoners Based on Their Sexual Orientation*, 12 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 375, 376 (2003).

the positive law is concerned—many of the sexual freedom goals of the gay liberation movement of the early 1970s have been won.⁴³ Gay people can no longer be thrown in jail for sexual intimacy.⁴⁴ Police officers cannot use sodomy laws to shut down gay bars and lesbian dances.⁴⁵

Indeed, in most respects, sexual freedom for consenting adults is at the highest watermark to date. We can read—in books, magazines, and on the Internet—about every imaginable sexual act. We can see all sorts of sexual activity on network television at any hour of the day, let alone the intense and explicit sexual activity on cable. Simulation of sexual acts—even in the middle of the Super Bowl—is considered perfectly fine as a legal matter so long as the barest bit of clothing remains.⁴⁶

Against this background of sexual freedom in a post-*Lawrence* world, it appears that the governments, which can no longer justify restricting gay people based on criminal status, are calling on concerns about children's sexual identity to do the work that sodomy laws once did. And over the next several years, as the case law continues to develop, we will see whether *Lawrence* has truly destabilized the discriminatory regime of *Bowers* or whether fear about child development will be permitted to replace *Bowers* as an all-purpose justification to support restrictions on gay people's full equality.

Ultimately, I believe this country will outgrow its adolescent rebellion over the acceptability of gay people. The question for us, at this moment, is whether and how we will be able to limit the damage it does along the way.

43. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Cf. CRUIKSHANK, *supra* note 2 (reviewing and analyzing goals of the gay and lesbian liberation movement).

44. *Id.*

45. See cases cited *supra* note 6.

46. See *FCC to Probe Super Bowl Halftime* (Feb. 2, 2004), at http://money.cnn.com/2004/02/02/news/companies/superbowl_fcc (last visited Oct. 27, 2004).