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Lawrence's Penumbra

Andrew Koppelman[†]

Matthew Limon, a developmentally disabled man, had just turned eighteen when he had oral sex with a developmentally disabled boy who was a few weeks short of fifteen. Kansas's general criminal sodomy law prohibits "sodomy with a child who is 14 or more years of age but less than 16 years of age," without regard to consent, the age of the offender, or the sex of the parties.¹ Had the encounter been heterosexual, the penalty for this statutory rape would have been fairly mild. Kansas's "Romeo and Juliet" law greatly reduces the penalties for young people under nineteen who engage in consensual sexual activity with teenagers between fourteen and sixteen.² If that law had applied, Limon would have received, at most, a sentence of fifteen months. But because the "Romeo and Juliet" law expressly excludes homosexual activity, Limon was sentenced to more than seventeen years in jail (206 months, to be precise), five years of court supervision after his release, and classification as a "sexual offender" for the rest of his life.³

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1. KAN. STAT. ANN. § 21-3505(a)(2) (1995).

2. The law also requires that the age difference be less than four years. KAN. STAT. ANN. § 21-3522(a) (Supp. 2002). The more specific "Romeo and Juliet" statute controls whenever an activity is covered by both this law and the general sodomy law. See *State v. Williams*, 829 P.2d 892, 897 (Kan. 1992).

3. Petition for Writ of Certiorari, *Limon v. Kansas*, 123 S. Ct. 2638 (2003) (No. 02-583). The consequences of being classified as a sexual offender are potentially severe. Under the Kansas Offender Registration Act, Limon must register with the sheriff of any county in which he resides or is temporarily domiciled. KAN. STAT. ANN. §§ 22-4901 to -4912 (1995). The information required under the registration, in effect, becomes public information. As such, it is available for inspection at the Sheriff's office and on any Internet Web site sponsored by a Sheriff's department or the Kansas Bureau of Investigation. For a first conviction, this registration provision remains in effect for ten years after conviction or, if confined, for ten years after parole or release. *Id.* § 22-

The U.S. Supreme Court vacated Limon's conviction and remanded the case for reconsideration one day after it decided *Lawrence v. Texas*,⁴ in which it invalidated Texas's sodomy law. The Court indicated that the *Limon* case should be given "further consideration in light of *Lawrence*,"⁵ but did not explain further.

The relevance of *Lawrence* is not obvious. The statute challenged in *Lawrence* criminalized all homosexual sex. The Court struck it down as an improper infringement on personal liberty. The Court held that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,"⁶ but it did not say whether the basis of its holding was the weakness of the state's interest, the degree of intrusion, or some combination of these. It is not clear whether the Court applied strict scrutiny, minimal scrutiny, or something in between. It is most obscure which future cases will be affected by the holding of *Lawrence*.⁷

Nonetheless, the appellate decision upholding Limon's conviction makes it clear that a remand is necessary. When presented with a claim that Limon's treatment violated the Equal Protection Clause, the Kansas Court of Appeals concluded that the claim was foreclosed by *Bowers v. Hardwick*,⁸ which had rejected a privacy-based challenge to a law prohibiting sodomy.

The impact of *Bowers* on our case is obvious. The United States Supreme Court does not recognize homosexual behavior to be in a pro-

4906(a)(1) (1995 & Supp. 2002). Upon a second or subsequent conviction, the statute requires registration for the rest of the offender's lifetime. *Id.* § 22-4906.

4. 123 S. Ct. 2472 (2003).

5. *Limon v. Kansas*, 123 S. Ct. 2638 (2003) (mem.).

6. *Lawrence*, 123 S. Ct. at 2484. Mary Anne Case has observed that the word "which" in this sentence signals that the following clause is nonrestrictive, and that nonrestrictive clauses do not define the antecedent noun. Thus, one could end the sentence with a period after "interest" without changing its meaning. The meaning would be different if the Court used "that" instead of "which." Mary Anne Case, *Of This and That in Lawrence v. Texas*, 2004 SUP. CT. REV. (forthcoming). This is technically correct, but it is far from clear that the Court was conscious of the distinction between "which" and "that" or meant its word choice to signal that the weakness of the state's interest was doing all the work in its reasoning.

7. When the reasoning of *Lawrence* is scrutinized by a trained logician, the consequences are not pretty. See, e.g., Richard D. Mohr, *The Shag-a-delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 363 (2004).

8. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

tected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently, at least under an equal protection analysis.⁹

Whatever the merits of this interpretation of *Bowers v. Hardwick*,¹⁰ it was indispensable to the court's disposal of Limon's equal protection claim. *Lawrence* overruled *Hardwick*, depriving the court of appeals's reasoning of a key underpinning. Thus, remand was necessary.

Beyond this, however, it is not clear that Limon should get any comfort from *Lawrence*. There are plenty of reasons why the state could rationally treat homosexual sex differently from heterosexual sex. It could think that there is a moral difference between the two activities. It could think that the stigma attached to one activity is greater than that attached to the other, so that it is a graver thing to induce a teenager to have homosexual sex than to have heterosexual sex. There are plenty of bases on which the court could affirm Limon's conviction on remand.

Is there anything in *Lawrence* that helps Limon? Justice Kennedy's majority opinion was careful to limit the reach of its holding, and some of the opinion's language suggests that it has no relevance whatever to Limon's case. The opinion indicated that *Lawrence* should be resolved "by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."¹¹ The Court determined that certain sexual privacies were protected, but it emphasized that "[t]he petitioners were adults at the time of the alleged offense,"¹² and later emphasized that "[t]he present case does not involve minors."¹³ The Court obviously did not intend to call into question the constitutionality of statutory rape laws. The Court also limited its holding in other ways, by conspicuously ignoring legal arguments that were stronger and

9. Petition for Writ of Certiorari app. at 12a, *Limon v. Kansas*, 123 S. Ct. 2638 (2003) (No. 02-583) (including a copy of the unpublished decision, *Kansas v. Limon*, No. 85,898 (Kan. App. Feb. 26, 2002)). Thanks to Mary Anne Case for pointing out the importance of this passage.

10. It is actually a pretty poor interpretation and was repudiated in *Lawrence* by Justice O'Connor, who was a member of the majority in *Hardwick*. See *infra* note 40.

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

12. *Id.*

13. *Id.* at 2484.

more persuasive than the mushy right-to-liberty argument (and which would have been very helpful to Limon), but which would have proven too much. The Court did not hold that there was anything wrong per se with classifications on the basis of sexual orientation, much less that discrimination against gays was constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment because the group is the object of pervasive prejudice.¹⁴ Such a holding would probably have invalidated the U.S. military's exclusion of gays. President Bill Clinton ran into political disaster when he tried to take on the military's policy, and the Supreme Court evidently has no desire to start down that road.

Nor did the Court hold that discrimination against gay people was an impermissible form of sex discrimination,¹⁵ the most powerful argument of all. If the state prosecutes Ricky because of his sexual activities with Fred, and does not take action against Lucy for doing exactly the same things with Fred, then Ricky is suffering legal disadvantage because of his sex.¹⁶

14. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari), *reh'g denied*, 471 U.S. 1062 (1985); *Watkins v. United States Army*, 847 F.2d 1329, 1341-52 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 CAL. L. REV. 797, 816-27 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297-1309 (1985).

15. See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53-71 (2002).

16. Neither the majority opinion nor O'Connor's concurrence mentioned this argument, but Scalia thought he discerned it in O'Connor's reasoning. He sought to rebut the claim that *Loving v. Virginia*, 388 U.S. 1 (1967), which held that laws against interracial marriage were racially discriminatory, was relevant to gays' claims.

In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies.

Lawrence, 123 S. Ct. at 2495 (Scalia, J., dissenting) (citations omitted). This reasoning misstates what the Court did in the miscegenation cases. In both *Loving*, which discussed white supremacy, and its precursor, *McLaughlin v. Florida*, 379 U.S. 184 (1964), which did not, the Court held that the statutes classified on the basis of race and so were subject to strict scrutiny. If a law classifies by race on its face, then the challenger has no burden of proving a discriminatory purpose. The same is true of sex-based classifications. See

In any prosecution under the Texas statute, the sex of the participants is an element of the crime that the prosecutor must prove.¹⁷ This argument goes too far for the present Supreme Court. It implies the legality of same-sex marriage,¹⁸ an issue that the Court clearly intends to avoid.¹⁹

So here's the puzzle: Just what principle might *Lawrence* stand for that was violated by the state in *Limon*? What ought the Kansas courts to do on remand, and why?

The *Lawrence* Court quotes with approval Justice Stevens's claim in his *Hardwick* dissent that "the 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."²⁰ The only evidence Stevens cited, however, was the miscegenation laws, which were condemned by an entirely different constitutional principle. Neither he nor any other Justice intends, as Justice Scalia protests in dissent, to invalidate "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."²¹ The Court is not saying that morals laws are never permissible.

The *Lawrence* Court does not say that the state interest

KOPPELMAN, *supra* note 15, at 55–63.

17. Justice O'Connor writes that "Texas treats the same conduct differently based solely on the participants." *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring). This statement, however, is not accurate. She should have written that Texas treats the same conduct differently based solely on the sex of the participants. Thanks to Catharine MacKinnon for pointing this out.

18. See KOPPELMAN, *supra* note 15, at 71. For a thoughtful alternate reading of the sex discrimination argument, claiming that it need not go this far, see Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002). Clark's essay is one of the very few articles I've read that substantially improved my understanding of the sex discrimination argument—and believe me, I've read everything. See generally Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

19. "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 123 S. Ct. at 2484. For a similar reservation, see *id.* at 2487–88 (O'Connor, J., concurring).

20. *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

21. *Id.* at 2490 (Scalia, J., dissenting) (suggesting that all such laws are now suspect). Justice Scalia also gets carried away here. Whatever he may think of masturbation, no state has ever criminalized it. Masturbation is unmentioned in RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* (1996).

has no weight, but only that it lacks sufficient weight to justify the burden it places on individual liberty.²² But if the Court is saying that private conduct between consenting adults is always protected, most of the laws on Justice Scalia's list really would be invalid. Prohibitions of adultery and fornication intrude on the personal and private life of individuals as much as sodomy laws do.²³

More helpful is the Court's reliance on *Romer v. Evans*²⁴ to hold that the precedent of *Hardwick*, which held sodomy unprotected by the right to privacy, had "sustained serious erosion."²⁵ Just how had *Romer* eroded *Hardwick*? The Court explained that *Romer* had

invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state anti-discrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.²⁶

There is no logical inconsistency between the two cases: The burden on gays in *Romer* was extraordinary, while *Hardwick* involved a prohibition of conduct that imposed no punishment on persons who refrained from that conduct.²⁷ The Court held that *Romer* was, nonetheless, pertinent to *Lawrence* because "[w]hen 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."²⁸

The *Lawrence* Court thus suggested that if a law has the effect of encouraging prejudice against gay people, it will diminish the weight that is given to the state's purposes when the Court balances those purposes against the burden the law imposes. This gives rise to a new puzzle: Why should that effect matter in this way?

22. *Lawrence*, 123 S. Ct. at 2484 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.")

23. Such laws are occasionally enforced. See POSNER & SILBAUGH, *supra* note 21, at 98, 103.

24. 517 U.S. 620 (1996).

25. *Lawrence*, 123 S. Ct. at 2482.

26. *Id.* (quoting *Romer*, 517 U.S. at 624, 634).

27. The consistency of the two cases is argued further in KOPPELMAN, *supra* note 15, at 6-34.

28. *Lawrence*, 123 S. Ct. at 2482.

Even for African-Americans, the group that receives the highest level of constitutional protection against discrimination, disparate impact without more does not state a constitutional claim.²⁹ Of course, the Court did not hold that laws that stigmatize and discriminate against gays are subject to heightened scrutiny. All criminal laws stigmatize and encourage discrimination against those who violate them. For example, discrimination in the granting of student loans against those who violate drug laws is increasingly common.

On the other hand, the Court has said that under certain circumstances, disparate impact can reveal an illicit motive. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."³⁰ Moreover, the social meaning of laws can sometimes be relevant to their constitutionality. The Texas statute's impact reveals something about its purpose. The fact that its audience will understand it as an invitation to discriminate is evidence that it was so intended.³¹ And while it is logically possible for persons to discriminate against gays on moral grounds without any animosity toward them, this is a poor description of how antigay prejudice actually operates in the contemporary United States.³²

Lawrence is full of language that demonstrates the Court's concern with the subordination of gays as a group, rather than just the liberty of individuals. At issue is the ability of gays to "retain their dignity as free persons."³³ *Hardwick* must be overruled because "[i]ts continuance as precedent demeans the lives of homosexual persons."³⁴ If any sodomy law remains on the books, "its stigma might remain" even if it is unenforceable.³⁵ Gay people are entitled to "respect for their private lives."³⁶ The state must not "demean their existence or control their destiny."³⁷

29. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

30. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

31. See Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777, 779 n.12 (2001).

32. See KOPPELMAN, *supra* note 15, at 21-25.

33. *Lawrence*, 123 S. Ct. at 2478.

34. *Id.* at 2482.

35. *Id.*

36. *Id.* at 2484.

37. *Id.*

The Court does not say that *Lawrence* is like *Romer* in that it involves "a bare . . . desire to harm a politically unpopular group,"³⁸ but that it is the most coherent implication of the *Lawrence* opinion. Moreover, that language does appear in Justice O'Connor's concurrence.

Justice O'Connor would have invalidated the Texas law under the Equal Protection Clause of the Fourteenth Amendment. She observed that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."³⁹ Quoting *Romer*, she concludes that the Texas statute "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."⁴⁰ The majority does not expressly embrace Justice O'Connor's equal protection theory, but it does declare it to be "a tenable argument."⁴¹

Justice O'Connor's reasoning explains what is left mysterious by the majority opinion: why the state interest is deemed

38. *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), quoted in *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

39. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

40. *Id.* at 2486 (quoting *Romer v. Evans*, 116 S. Ct. 620, 634 (1996)). Justice O'Connor declined to overrule *Hardwick*. She observed that *Hardwick* did not reach the equal protection question. *Id.* at 2486. She thereby undermined the reasoning of every court of appeals that had addressed the issue, because they had all regarded the equal protection issue as controlled by *Hardwick*. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 102-04 (D.C. Cir. 1987); see also *Romer v. Evans*, 517 U.S. 620, 640-41 (1996) (Scalia, J., dissenting). That reasoning, always ridiculous, see KOPPELMAN, *supra* note 15, at 30-31, should now be laid to rest. "Three minutes' thought would suffice to find this out; but thought is irksome and three minutes is a long time." A.E. HOUSMAN, *From the Prefaces: Juvenal*, in *SELECTED PROSE* 56 (John Carter ed., 1961).

The strangest part of Justice O'Connor's concurrence is her claim that "I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society." *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring). This seems oblivious to the majority opinion's observation that nine such laws, all of long standing, were among those invalidated by the Court's decision. *Id.* at 2481. Perhaps Justice O'Connor is imagining a situation in which the law is vigorously enforced against people of all sexual orientations. Sodomy laws, of course, do most of their damage without being enforced at all. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

41. *Lawrence*, 123 S. Ct. at 2482.

insufficient to justify the burden on liberty here despite its sufficiency in other cases where the law bans consensual conduct between adults. In those cases, there is no reason to think that there is animosity toward the persons affected, or a bare desire to harm a politically unpopular group. The prejudice against gay people evidently is what changes the equation in *Lawrence*.⁴²

This reasoning, however, does not offer a clear principle with which to decide future cases. The "bare desire to harm" criterion seems even more malleable than the liberty interest that the majority opinion purports to rely on. How does one decide which unequal treatment is the result of hostility and which has a rational basis?

The *Limon* remand suggests that what was done to Limon might be on the impermissible side of the line. But if we stop the analysis here, then the lower court has little guidance on remand as to what "further consideration" it ought to give to the case.

The trouble is that laws that discriminate against gays often *both* express moral disapproval *and* reflect a desire to harm an unpopular group.⁴³ If the analysis of *Lawrence* presented is correct, the rule now seems to be that courts must determine, on a case-by-case basis, the primary purpose of any such law. This rule leaves plenty of room to cook the books when that seems necessary to accommodate irresistible political forces. The exclusion of gay people from the army largely rests on primitive revulsion,⁴⁴ and the refusal to recognize same-sex marriage rests on similarly dubious motives;⁴⁵ but the Court does not need to admit any of this in order to uphold these exclusions or, more likely, to refuse even to examine them.⁴⁶

42. So why did no other Justice join Justice O'Connor's concurrence? (Thanks to Mary Anne Case for posing this question.) I speculate that it is because she declined to overrule *Hardwick* and wanted to decide the case in a narrow way that would not reach gender-neutral sodomy laws. No other Justice wanted to follow her to these conclusions, and it is not clear how they could have easily separated out, and confined their joiners to, those strands of her argument that were consistent with, or even necessary to, the reasoning of the majority opinion.

43. See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

44. See generally Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179 (1995).

45. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 158-76 (1996).

46. Better to refuse to hear a case than to decide it wrongly. See Andrew

In short, *Lawrence* can easily be denounced as poor judicial craftsmanship. Its reasoning is obscure, and it lays down no clear rule. As we have seen, however, the Court had very good political reasons for avoiding transparency in both its reasoning and its rule. If statesmanship is any important part of the judicial craft, then *Lawrence's* level of craftsmanship may be quite high.

This is not to say that *Lawrence* produces no rule of law at all. Part of what troubled the Court in *Lawrence* was that sodomy laws singling out gays are a fairly recent development in the law, only arising in the 1970s.⁴⁷ Similarly, in *Romer*, the Court was troubled that the challenged disqualification "is unprecedented in our jurisprudence," and it declared that "[i]t is not within our constitutional tradition to enact laws of this sort."⁴⁸ Extraordinary burdens, it appears, arouse suspicion.

Thus, the one clear rule that emerges from (but probably does not exhaust) the fog of *Lawrence*, when considered in light of *Limon*, is the following: *If a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.*

Traditional moralists will object that this presumption is unfair. If one thinks that one's moral views are correct, changing circumstances may require that one pursue those moral views through novel means. The novelty of the means, one might reasonably argue, should not automatically entail a presumption of bad motive. Some contemporary antigay rules are unprecedented, but the emergence of an active, widespread gay rights movement is also unprecedented. A prohibition such as the Texas law that singles out homosexual sex is one possible response to that movement. The Texas law could be, and was, supported by people of good will who do not question the equal dignity of gay people.⁴⁹

The answer is that every legal presumption that protects some interest against the state has costs. It will surely impair some legitimate government interest. A rule that the state may not discriminate on the basis of race will sometimes prevent the

Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 163-64 (1988).

47. See *Lawrence*, 123 S. Ct. at 2479-80.

48. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

49. See, e.g., Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135 (1997).

state from pursuing legitimate ends.⁵⁰ A strong First Amendment will protect some worthless and harmful speech.⁵¹

So, *Lawrence* should be enough to get Limon out of jail.⁵² The singling out of gay youth for such remarkably harsh treatment would seem to pose a severe equal protection problem. Kansas must treat same-sex and opposite-sex statutory rape on equal terms.⁵³

The Kansas court would then face a statutory question whether the "Romeo and Juliet" provision should be extended to same-sex sodomy or whether it should be invalidated altogether, even as to persons of opposite sex. *People v. Liberta* presented a similar problem.⁵⁴ *Liberta* invalidated on equal protection grounds the spousal rape exemption to New York's rape law.⁵⁵ The *Liberta* court held that the legislature, if faced with the choice, would probably extend the prohibition of rape to married persons, rather than abolish the crime altogether, and thus chose to leave intact that portion of the statute under which the defendant was convicted.⁵⁶

50. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

51. "[I]f the state needs no stronger justification for dealing with speech than it needs for dealing with other forms of conduct, then the principle of freedom of speech is only an illusion." Frederick Schauer, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 8 (1982); see also George Kateb, *The Freedom of Worthless and Harmful Speech*, in *LIBERALISM WITHOUT ILLUSIONS* 220 (Bernard Yack ed., 1996).

52. It should also constrict the ability of states to adopt choice of law rules that entirely ignore same-sex civil unions that are valid in other states. Even the Southern states during the Jim Crow era did not deal so harshly with interracial marriages, which were as much an anathema to them as same-sex marriages are to any state in the contemporary United States. See Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 64 OHIO ST. L.J. (forthcoming 2004).

53. Since this Article was first drafted, the Court of Appeals of Kansas, on remand, has upheld Limon's sentence. *State v. Limon*, 83 P.2d 229 (Kan. App. 2004). Its remarkable reasoning confirms that the statute is inexplicable absent animus toward gays. For example, the court argues that the state can rationally treat homosexual statutory rape more harshly than heterosexual statutory rape because "[t]he survival of society requires a continuous replenishment of its members," and "sexual acts between same-sex couples do not lead to procreation on their own." *Id.* at 237. Evidently the statute can be defended only by claiming, with a straight face, that statutory rape is *less* harmful if the fourteen-year-old girl becomes pregnant. If this is the best rational basis the court can come up with, then there is no rational basis. See *id.* at 243-49 (Pierron, J., dissenting).

54. 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).

55. *Id.* at 576-78.

56. *Id.* at 578.

The contrast with *Liberta*, however, is striking. In that case, the state's interest in preserving the prohibition of rape was easy to comprehend. "Statutes prohibiting such behavior are of the utmost importance, and to declare such statutes a nullity would have a disastrous effect on the public interest and safety."⁵⁷ But what interest, other than a bare desire to harm, would justify Kansas's subjection of its heterosexual young adults to harsh criminal penalties, just to subject gay young adults to the same penalties?⁵⁸

Lawrence, it appears, has a penumbra. There is a rule contained therein that is not stated in the opinion, but that will govern future cases. There are precedents for this kind of signal from the Court. A week after it decided *Brown v. Board of Education*,⁵⁹ a case where the Court also faced considerable political resistance, it similarly remanded a case involving the exclusion of black people from opera performances in an amphitheater leased from the state.⁶⁰ That case did not involve any issue that was discussed in the *Brown* opinion, but it soon became clear that the *Brown* Court meant more than it was saying.⁶¹

57. *Id.*

58. The Court of Appeals of Kansas denies that there is severability, but it does so tautologically, noting that severance would alter the statutory scheme. See *Limon*, 83 P.3d at 240. Of course, severance always does that. "In determining whether the invalid portion of a statute may be severed from the valid portion, the question is whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised or rejected altogether." NORMAN J. SINGER, *SUTHERLAND'S STATUTORY CONSTRUCTION* § 44:4, at 559–60 (6th ed. 2000). A law is not severable if "by sustaining only a part of the statute, the purpose of the act is changed or altered." *Id.* § 44:7, at 583. But absent gay exclusion, the Romeo and Juliet provision is "independent of the invalid portion and . . . form[s] a complete act within itself," *id.* § 44:4, at 562–66, so severance would hardly "defeat the intent of the legislature." *Id.* § 44:8, at 588. "There is . . . a presumption that a legislative body generally intends its enactments to be severable, especially in the case where it will preserve the constitutionality of the enactment." *Id.* § 44:3, at 556–57.

59. 347 U.S. 483 (1954).

60. *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (per curiam).

61. The Court, however, remained cryptic for some time. In a series of per curiam decisions after *Brown*, the Court summarily affirmed lower court decisions invalidating laws segregating public beaches and bathhouses, municipal golf courses, a municipal bus system, courtroom seating, and public restaurants. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 681–82 (2d ed. 2002). The first of these courts reasoned that after *Brown*,

it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the

The broader upshot is that all antigay laws are now under suspicion. The severest ones are unconstitutional. The courts will not smash the great edifice of antigay law in the United States with a single judicial blow, and it would be foolish for them to try. But the edifice is crumbling.

State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional.

Dawson v. Mayor of Balt. City, 220 F.2d 386, 387 (4th Cir.) (per curiam), *aff'd*, 350 U.S. 877 (1955) (mem.). This interpretation is a pretty tortured reading of *Brown*, which focused solely on the unequal educational results of segregation. Presumably the patrons of the black beaches got just as wet as the patrons of the white ones. See *Lonesome v. Maxwell*, 123 F.Supp. 193, 194–95 (D.C. Md. 1954), *rev'd*, 220 F.2d 386 (4th Cir. 1955) (noting earlier court finding and parties' stipulation that Baltimore beach facilities were physically equal for both races). Nonetheless, the Supreme Court upheld this ruling and the following cases without comment, until at last it cited the whole string of cases for the proposition that "it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam).