Lawrence's Criminal Law

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"The rules of morality are not the conclusion of our reason."

David Hume, TREATISE OF HUMAN NATURE (1739)[1]

"There is nothing 'private' or 'consensual' about the advertising and sale of a dildo."

Williams v. Morgan, Eleventh Circuit Court of Appeals (2007)[2]

INTRODUCTION

Imagine that you are a teenage girl, and that you want to have sex with your boyfriend. In the state where you live, you can do so by having intercourse with him. That act will be lawful so long as the

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[1] Quoted in F.A. Hayek, *The Legal and Political Philosophy of David Hume*, *in* HUME: A COLLECTION OF CRITICAL ESSAYS 335, 343 (V.C. Chappell, ed., Univ. of Notre Dame Press 1968). Long consigned to relative obscurity, Hume (1711-76) is now considered "[t]he most important philosopher ever to write in English." *David Hume*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/hume/ (last modified May 15, 2009).

[2] 478 F.3d 1316, 1322 (11th Cir. 2007) (quoting Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1237 n.8 (11th Cir. 2004)) (rejecting a constitutional challenge to Alabama's statute criminalizing the sale of sex toys). *See infra* Part III(B)(1)-(2).

two of you are within three years of each other's ages. Now, again imagine that you are a teenage girl, but instead of a boyfriend you have a girlfriend with whom you wish to have oral sex. Or, imagine that you are a teenage boy, and that you wish to have oral or anal sex with your boyfriend. But, if you have a *same-sex* teenage love interest, you dare not engage in the acts you desire, for the highest court in your state has interpreted the state's "crimes-against-nature" statute to criminalize *your* desired conduct. If you engage in the proscribed act, you may end up in jail for your deed.[3] Under the court's reading of the statute, your straight friends can lawfully have a form of sex—vaginal intercourse—that matches their natural inclinations, but you cannot engage in the sexual acts that match your natural inclinations.

If you know anything about the law, you will be especially surprised that your state's supreme court issued this ruling four years *after* the United States Supreme Court's 2003 decision in *Lawrence v. Texas*.[4] In *Lawrence*, the Court overturned its 1986 decision in *Bowers v. Hardwick*[5] and invalidated Texas's sodomy statute. In its holding, the Court announced a right to sexual autonomy in a ruling specific to sexual minorities but generally applicable to everyone. The decision was widely viewed as a landmark constitutional law holding, as significant to sexual minorities as *Brown v. Board of Education*[6] was to racial minorities and *Roe v. Wade*[7] was to women. In broad terms, the Court seemingly invalidated all criminal laws that infringe on private, consensual, non-commercial sexual acts.

Despite *Lawrence*'s purported landmark status and the vast amount of commentary that the decision has produced,[8] the case has had remarkably little impact on substantive criminal law as applied by lower federal courts and state courts.[9] Several theories may explain

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[3] *See In re* R.L.C., 643 S.E.2d 920 (N.C. 2007). *See infra* Part III(A)(1)-(2). For an analysis of similar statutes in other states, and of these statutes' effect on gay and lesbian youth, see Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008).

[4] 539 U.S. 558 (2003).

[5] 478 U.S. 186 (1986).

[6] 347 U.S. 483 (1954).

[7] 410 U.S. 113 (1973).

[8] A Westlaw Journal and Law Review database search conducted on July 23, 2010, revealed 226 articles with *Lawrence* named in the titles of the articles and nearly 4,000 articles discussing *Lawrence.*

[9] The Appendix provides a sample of the criminal cases in which courts have found *Lawrence* inapplicable or distinguishable. For an initial discussion of the reasons for

this state of affairs,[10] but fundamentally *Lawrence* has failed as substantive criminal law precedent because courts do not accept its theoretical premise. The most remarkable aspect of the *Lawrence* decision was its rejection of *Hardwick*'s focus on majoritarian morality—a popular determination of what is "right" and what is "wrong"—as a legitimate basis for a criminal law.[11] The majority opinion in *Lawrence* rejected *Hardwick* on this score, requiring that a criminal law be based on an identifiable harm.[12] In this way, the Court stepped squarely into the harm vs. morality debate in criminal law theory that reaches back at least as far as mid-19th century philosophers, including John Stuart Mill,[13] and continued in the 20th century most famously in the debate between H.L.A. Hart (advocating the harm principle approach) and Lord Patrick Devlin (advocating the morality approach).[14]

Under *Lawrence*'s harm principle,[15] the government must justify criminalization by demonstrating a specific, provable harm.

Lawrence's failure as criminal law precedent, see J. Kelly Strader, *Resurrecting* Lawrence v. Texas *as a Basis for Challenging Criminal Prosecutions*, CRIM. JUST., Summer 2010, at 30.

[10] *See infra* Part II(B)(2).

[11] *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1281-82 (2004).

[12] *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003); *see also id.* at 583 (O'Connor, J., concurring) (rejecting moral disapproval of a group as a basis for criminalization). For scholarly commentary on this point, see Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 415 (2004) ("[*Lawrence*] ends legal moralism as a constitutional principle."); Goldberg, *supra* note 11, at 1235 ("*Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking.").

[13] *See* JOHN STUART MILL, ON LIBERTY (1859).

[14] The "Hart-Devlin" debate focused on the decriminalization of certain vice offenses as recommended in the 1957 British Wolfenden Report of the Committee on Homosexual Offenses and Prostitution. The scholarship on the harm/morality debate is voluminous. For an overview of this ongoing debate, see Bernard E. Harcourt, *Foreword: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers [Raising Questions About* Lawrence*, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503 (2004); Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3, 14 (2004).

[15] *See, e.g.*, 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988); 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984). See *infra* Part I(B)(2), for a fuller discussion of the harm principle. For an overview of the literature relating to the

Majoritarian notions of morality do not provide an adequate basis for criminal laws, in this view, because such notions are inherently subjective. Such notions also risk the targeting of unpopular minorities or those holding unpopular views. The *Lawrence* majority was explicit in its rejection of the majoritarian morality-based criminalization model.

Even after *Lawrence*, however, lower federal courts and state courts continue to apply *Hardwick*-era majoritarian morality as the fundamental criminalization principle.[16] Not only do these courts find ways to distinguish *Lawrence*, but they also ignore its underlying reasoning in a manner that shows a veiled contempt for the decision itself.[17] In the teenage sex case discussed at the beginning of this article, the court upheld a criminal proscription against oral sex involving minors because the law furthered "the goal of promoting proper notions of morality among our State's youth"[18]—this despite *Lawrence*'s admonition 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."[19] Also, many courts show a general aversion to discussing plainly and clearly those issues that involve sex and things sexual.[20] And finally, courts sometimes just seem too complacent to do a thorough analysis of the harm that results from the criminal conduct.[21] Judicial Puritanism plus philosophical disagreement plus judicial inertia equals *Lawrence* as a criminal law precedential blip rather than a criminal law precedential earthquake. Similarly, despite some recent notable gays rights

harm-morality debate, including writings by Patrick Devlin, Joel Feinberg, H.L.A. Hart, Ronald Dworkin, Richard Posner, and others, see Goldberg, *supra* note 11, at 1235 n.9.

[16] *See infra* Part III.

[17] *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986), and stating that despite *Lawrence*'s holding criminal laws may still be based upon the morality principle announced in the now-overruled *Hardwick*).

[18] *In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007).

[19] Lawrence v. Texas, 539 U.S. 558, 577 (2003) (emphasis added) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[20] See *infra* Part III, for an overview of courts' failure explicitly to discuss the alleged harms involved in such sexual offenses as sodomy, prostitution, adultery, and fornication.

[21] *Id.*

victories, *Lawrence* has had far less impact as a gay rights decision than many initially predicted.[22]

This article has two complementary goals. The first goal is to bring *Lawrence* to life as a substantive criminal law case—indeed, as perhaps the most important substantive criminal law case in our country's history—by establishing the harm principle as our guiding theory of criminalization. This article also undertakes a second goal—to demonstrate how *Lawrence*, properly applied, can help eradicate the heterocentric criminal law bias still endemic in state courts and lower federal courts.

To establish *Lawrence* as groundbreaking criminal law precedent, this article takes two preliminary steps. First, it reimagines *Lawrence* as a case as important to criminal law doctrine as it is to constitutional law doctrine. Few cases have produced as much commentary in such a short amount of time as *Lawrence*, but the great bulk of this commentary has evaluated *Lawrence*'s constitutional law implications.[23] This article focuses on *Lawrence* as the criminal law case that it is.

Second, this article analyzes *Lawrence*'s adoption of the harm principle and envisions a mechanism for applying the harm principle going forward in criminal cases. The usual rejoinders to a harm-principle-based reading of *Lawrence* are that (a) *Lawrence* did not adopt the harm principle,[24] or, even if it did, (b) the harm principle is meaningless because anything can be defined as harm,[25] or, even if *Lawrence* adopted the harm principle and we can define harm, (c) the harm analysis is too complex for courts to undertake.[26] This article

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[22] *See* Justin Reinheimer, Comment, *What* Lawrence *Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 505 (2008) (noting that *Lawrence* has had "remarkably little impact" on gay rights litigation). *See also infra* note 166 and sources cited therein.

[23] *See infra* notes 82-90 and accompanying text.

[24] *See, e.g.*, Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer*,* Lawrence*, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) ("*Lawrence* does not hold that the Constitution incorporates the harm principle.").

[25] *See, e.g.*, Bernard E. Harcourt, *Criminal Law: The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113-14 (1999) ("Claims of harm have become so pervasive that the harm principle has become meaningless . . . .").

[26] *See, e.g.*, Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 971 (2010) ("The concept of 'harm' itself so eludes definition that it has been employed to describe all manner of conduct with no tangible or emotional injury, no victim, and no significant risk creation.").

will show that the first proposition is demonstrably false under any careful analysis of *Lawrence*, and that the second is based on a rhetorical sleight-of-hand (anything can be called harm and therefore harm does not mean anything) that does not withstand analysis. And the third proposition—that courts are unable to do the harm analysis—evinces a basic misunderstanding of the work that courts in criminal cases do all the time.

This article proposes that "harm" from criminal statutes be subjected to traditional criminal law causation analysis. Courts in criminal cases are used to evaluating the causation element of any crime; this element simply asks whether there is sufficient proof that the alleged wrongdoing caused the harm. Flowing from the *Lawrence* decision's theoretical innovation is the decision's impact on fundamental criminal law doctrine: under the meaningful rational basis review that *Lawrence* requires for such laws, governments must justify their criminal laws by proving that the criminalized activity *causes* demonstrable harm.

If courts were required to apply the harm analysis, then they would be unable to continue to use the heterosexual paradigm to sustain criminal laws that have no basis under *Lawrence*'s harm principle. This paradigm—which *Lawrence* rejects—presumes that any sexual activity other than vaginal intercourse between a man and woman is immoral and subject to criminalization because of that immorality.[27] Had the court in the case discussed at the beginning of this article applied *Lawrence*'s harm principle, then, it would have been unable to hold that teenage vaginal intercourse is "natural" and legal while teenage oral and anal sex are "unnatural" and illegal. Courts applying the harm principle would be unable to cast teen sexual minorities into effective sexual apartheid by legitimizing heterosexual intercourse but criminalizing the sexual activities in which teen sexual

[27] *See* Marc Stein, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 493 (2005) (describing the "heteronormative vision of sexual freedom, equality, and citizenship that had guided the Court since the 1960s"). Originally, this paradigm confined "moral" sex to vaginal intercourse between a *married* man and woman. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 758-70 (2006) (describing the history of "licit sex" as heterosexual intercourse within marriage). In light of the Supreme Court's pre-*Hardwick* holding extending the constitutional right-to-privacy to unmarried persons, *see* Eisenstadt v. Baird, 405 U.S. 438 (1972), strictly speaking the paradigm now is not limited to married persons. *But see* Owens v. State, 724 A.2d 43, 53 (1999) (citing *Hardwick* and holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage").

minorities engage.[28] Such a law, whether or not enforced, stigmatizes those minorities in profound ways.[29]

Part I of this article provides an overview of *Lawrence*, focusing on its origins as a criminal prosecution, on the criminal law doctrine that underpins the decision, and on the reasons for the decision's limited precedential impact. Part II explicates *Lawrence*'s substantive criminal law, both in its adoption of the harm principle and its rejection of *Hardwick*'s heteronormative criminal law assumptions. Part III analyzes how the courts have responded to *Lawrence*'s substantive criminal law holding, focusing on sodomy and sex toy statutes, and advocates application of a robust and clear-eyed version of the harm principle. Simply put, in order to justify criminalization, the state should be required to demonstrate an articulable, provable harm.

I. *LAWRENCE* AS A CRIMINAL CASE

As with *Roe v. Wade*,[30] most commentators tend not to focus on *Lawrence* as a criminal law case.[31] Opponents of the *Roe* decision frame the case as a prime example of judicial activism encroaching on a moral choice that should be left to the states; they do not focus on abortion laws as criminal statutes that send women to jail.[32]

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[28] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET ch. 1-2 (1999).

[29] Justice Scalia made this point vividly in his *Lawrence* dissent by noting the impact that *Harwick* had on the rights of homosexuals even apart from states' (non)-enforcement of same-sex sodomy statutes. Lawrence v. Texas, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting). *See* Recent Cases, *Constitutional Law—Standing—Tenth Circuit Denies Standing to Man Seeking Invalidation of Utah's Consensual Sodomy Law*, 118 HARV. L. REV. 1070, 1070 (2005) (noting that the continued existence of unenforceable sodomy statutes post-*Lawrence* has the potential to stigmatize and harm sexual minorities).

[30] 410 U.S. 113 (1973).

[31] Tellingly, *Roe* is very rarely covered in law school criminal law courses but is a core case in law schools' constitutional law classes. The scholarly commentary on the constitutional law implications of the *Roe* decision is vast. For an overview, see Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281 (2009).

[32] *See, e.g.*, Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 44-45 (1975) (stating that *Roe* is a case in which "judicial activists" have "discovered" and constitutionalized "subconstitutional level values").

Opponents of *Lawrence* frame the issue similarly.[33] Both cases are far more likely to be covered in a law school constitutional law course than a criminal law course, and the commentary likewise focuses on the constitutional doctrinal underpinnings of both cases.[34] And when *Lawrence* is analyzed principally as a gay rights case, the focus is on the constitutional rather than the criminal law implications of the case.[35] This section refocuses on *Lawrence* as the criminal law case that it is.

A. *Lawrence* as a Criminal Prosecution

The facts leading to the *Lawrence* criminal prosecution began when the police received a report of a weapons disturbance in John Lawrence's residence.[36] Four officers went to the residence and entered the living room unannounced. From there, two of the deputies looked into an adjoining bedroom and reported seeing Lawrence and Tyron Garner having anal sex.[37] This activity violated Texas's homosexual sodomy statute.[38] Although the officers could have

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[33] *See, e.g.*, Christian J. Grostic, Note, *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation*, 105 MICH. L. REV. 151, 172-73 (2006).

[34] *See, e.g.*, Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1063 (2008); Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355, 378 (2006). The scholarly commentary analyzing *Lawrence* as a constitutional law case vastly outweighs the commentary analyzing *Lawrence* for its effect on substantive criminal law doctrine. For examples of the latter, see Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 322-24 (2006) (analyzing *Lawrence*'s possible effect on strict liability in sex offender registration laws); Adil Ahmad Haque, Lawrence v. Texas *and the Limits of Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 3 (2007) (arguing that, under *Lawrence*, governments may not criminally punish harmless acts under the Eighth Amendment).

[35] *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1090-1110 (2004); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1399 (2004).

[36] Lawrence v. Texas, 539 U.S. 558, 562 (2003). This report turned out to be false. *See* Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1483 (2004).

[37] *Lawrence*, 539 U.S. at 563. According to the Court, "The right of the police to enter d[id] not seem to have been questioned." *Id.*

[38] TEX. PENAL CODE ANN. § 21.06(a) (West 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."). The statute defines "[d]eviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person;" or "(B)

merely issued the two men a warning for this misdemeanor violation, the officers issued a criminal citation.[39] And, although the officers had the discretion to not arrest the men once the officers had issued the citation, the officers decided to arrest the two men and take them to jail.[40] The two men remained in custody until their arraignment the following evening.[41]

After originally pleading "not guilty," the men later pleaded "no contest" to the criminal sodomy charge and were convicted of the charge in the county criminal court; each defendant was subjected to a criminal fine.[42] In an en banc decision on rehearing, the Texas Court of Appeals affirmed the convictions.[43] The United States Supreme Court granted certiorari.

B. *Lawrence* as a Substantive Criminal Law Decision

1. Hardwick's *Morality Principle*

The *Lawrence* case raised a constitutional challenge nearly identical to the one that had reached the Court just seventeen years before *Lawrence* was decided. The Court, in *Bowers v. Hardwick*, upheld Georgia's sodomy statute in the face of a due process challenge on facts quite similar to those in *Lawrence*.[44] In a five-to-four vote, the *Hardwick* Court framed the issue as whether there was "a fundamental right to engage in homosexual sodomy," even though Georgia's sodomy statute applied to both same-sex and opposite-sex sexual relations.[45] In its analysis, the Court in *Hardwick* relied heavily on the "ancient roots" of laws criminalizing homosexual sodomy.[46]

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the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01(1) (West 2003). There is some dispute as to whether the deputies actually witnessed the defendants engaging in sexual activity. *See* Carpenter, *supra* note 36, at 1466 (concluding that it was likely that the officers did not see the men having sex).

[39] *See* Carpenter, *supra* note 36.

[40] *Id.*

[41] *Lawrence*, 539 U.S. at 563.

[42] *Id.* Apparently, this led to the first reported criminal conviction under this law for private, consensual sex, Carpenter, *supra* note 36, at 1472, although it was likely that there were a number of convictions where defendants "pleaded guilty to the offense, paid whatever fine was imposed, and hushed up about their convictions." *Id.* at 1473.

[43] *Lawrence*, 539 U.S. at 563.

[44] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[45] *Id.* at 190-91 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the

The Court in *Hardwick* also explicitly found that a majoritarian belief that homosexual sodomy is "immoral and unacceptable" provided a sufficient basis to withstand a due process challenge to Georgia's sodomy law.[47] In an oft-cited concurrence, Chief Justice Burger asserted that the sodomy law was supported by "Judeao-Christian moral and ethical standards" and by "millennia of moral teaching."[48]

The *Hardwick* decision was enormously influential.[49] Courts relied upon *Hardwick* in a wide range of areas, including decisions relating to adoption, marriage, sodomy, and many others.[50] Lower federal courts and state courts appeared enamored with the *Hardwick* decision and its reasoning.[51]

Despite *Hardwick*'s wide acceptance by lower courts, the decision was one of the most criticized in the Court's history.[52] Commentators derided the Court's framing of the issue, the Court's flawed use of history, and the Court's evident animus towards homosexuals.[53] The late Justice Powell, one of five members of the majority, later stated that he believed he had erred in voting with the majority in that case.[54]

2. Lawrence's *Harm Principle*

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laws of the many States that still make such conduct illegal and have done so for a very long time.").

[46] *Id.* at 192.

[47] *Id.* at 196 ("The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

[48] *Id.* at 196-97 (Burger, C.J., concurring).

[49] *See infra* notes 50-51.

[50] *See Lawrence*, 539 U.S. at 589-90 (Scalia, J., dissenting) ("Countless 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.").

[51] *See id.* (Scalia, J., dissenting) (citing cases).

[52] *See* Eskridge, *supra* note 35, at 1036 n.53 (citing sources and concluding that "*Hardwick* generated more universal negative comment than any other decision upholding a statute in the Court's history.").

[53] *See, e.g.*, Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1075-76, 1079-81 (1988).

[54] *See* Kenji Yoshino, *Can the Supreme Court Change Its Mind?*, N.Y. TIMES, Dec. 5, 2002, at A43 ("Justice Lewis Powell, who cast the deciding vote in the 5-4 decision [in *Hardwick*], admitted several years later that he believed he made a mistake in joining the majority.").

Given the animus towards *Hardwick* apparent in the *Lawrence* majority decision's rhetoric, the Court in 2003 seemed eager to overturn *Hardwick*.[55] In so doing, the Court held that Texas's sodomy law violated a right to sexual privacy rooted in the Due Process Clause.[56] The Court found that the liberty interest inherent in substantive due process "presumes an autonomy of self that includes . . . certain intimate conduct."[57] The Court, in rather startling language, declared that "[*Hardwick*] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[58] Justice O'Connor, who had been in the *Hardwick* majority, concurred in the result, but relied upon the Equal Protection Clause rather than the Due Process Clause, and declined to completely overrule *Hardwick*.[59]

Both the majority and concurring opinions directly noted that they were rejecting *Hardwick*'s reliance on majoritarian morality as a legitimate basis for criminalization.[60] Initially, the Court noted that, in the Model Penal Code, the American Law Institute declined to provide for "criminal penalties for consensual sexual relations conducted in private," in part, because such statutes regulate "private conduct *not harmful to others*."[61] The Court stated, "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning

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[55] Justice Kennedy, the author of the *Lawrence* majority decision, had also authored the decision in *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated on Equal Protection grounds a voter initiative that repealed laws prohibiting discrimination based on sexual orientation. In light of *Romer*, Justice Kennedy in *Lawrence* appeared eager to overrule *Hardwick*. Justice O'Connor joined the majorities in both cases, although writing a separate decision based on the Equal Protection Clause in the latter. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

[56] *Lawrence*, 539 U.S. at 578.

[57] *Id.* at 562.

[58] *Id.* at 578.

[59] *Id.* at 582 (O'Connor, J., concurring).

[60] *See id.* at 577, 582. By relying on the Equal Protection Clause rather than the Due Process Clause, Justice O'Connor necessarily focused on the moral disapproval of sexual minorities as a group rather than upon the specific acts at issue. But the group at issue is defined by the nature of the acts towards which it is inclined. As Justice Scalia noted in his *Romer* dissent, "[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." 517 U.S. at 641 (Scalia, J., dissenting) (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[61] *Lawrence*, 539 U.S. at 572 (emphasis added).

of the relationship or to set its boundaries absent *injury to a person* or abuse of an institution the law protects."[62]

The Court then confronted the criminal law philosophy and doctrine upon which *Hardwick* rested. In particular, the Court in *Lawrence* exposed the essentially religious basis of the earlier decision: "[T]he Court in [*Hardwick* asserted] that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[63] The Court acknowledged the "profound and deep convictions" and "ethical and moral principles" that lead many to condemn homosexual sex. The Court responded, as plainly and directly as it could, that such beliefs, while deserving of respect from the Court, are not the proper basis for a criminal law: "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[64] And if this were not clear enough, the Court concluded, "Our obligation is to define the liberty of all, not to mandate our *own moral code*."[65]

Finally, by adopting Justice Stevens' dissenting language in *Hardwick* as the majority language in *Lawrence*, the Court fell squarely on the Hart/harm principle side of the divide: "[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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[66]

Justice O'Connor's concurring opinion, while on its face resting upon constitutional grounds different from those underlying the majority opinion, sounded a similar theme.[67] Apparently unwilling to disavow her majority vote in *Hardwick*, Justice O'Connor was able to join the result in *Lawrence* by basing her conclusion on the Equal Protection Clause. Justice O'Connor had previously joined the

[62] *Id.* at 567 (emphasis added).
[63] *Id.* at 571.
[64] *Id.*
[65] *Id.* (emphasis added) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).
[66] *Id.* at 577-78 (emphasis added) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
[67] *Id.* at 582 (O'Connor, J., concurring).

majority in *Romer v. Evans*,[68] in which the Court relied upon the Equal Protection Clause to strike down a voter initiative repealing laws prohibiting discrimination based on sexual orientation. As Justice Scalia noted in his *Romer* dissent, it is difficult to square the outcomes in *Romer* and *Hardwick*: "[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[69] In this light, Justice Scalia was quite correct that the Equal Protection Clause and the Due Process Clause work hand-in-hand with respect to laws criminalizing same-sex sexual activity.[70]

Just as the *Lawrence* majority's due process-based opinion has strong equal protection underpinnings,[71] Justice O'Connor's equal protection-based opinion contains strong due process underpinnings by equating the minority group's status with the conduct in which it engages. Majoritarian morality is not a sufficient justification for a criminal law under either constitutional provision. As Justice O'Connor stated, the issue before the Court was whether "*moral disapproval* is a legitimate state interest" to justify Texas's same-sex sodomy statute.[72] Justice O'Connor's concurrence, like the majority opinion, hit the point with sufficient clarity and frequency that her intent is clear: "[W]e have never held that *moral disapproval*, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."[73] And she made the point once more: "Texas' invocation of *moral disapproval* as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy."[74] By applying an equal protection analysis, Justice O'Connor necessarily focused on the group at issue. The underlying message in both opinions is the same: we cannot use the criminal law to stigmatize a sexual minority.

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[68] 517 U.S. 620 (1996).
[69] *Id.* at 641 (Scalia, J., dissenting).
[70] *See* State v. Limon, 122 P.3d 22, 28 (Kan. 2005) (citing Justice Scalia's *Romer* dissent and holding that *Lawrence*'s underlying reasoning also applies to Equal Protection analysis), discussed *infra* Part III(A)(2).
[71] *See infra* note 85 and accompanying text.
[72] Justice O'Connor's rhetoric and philosophical thrust have much in common with the *Lawrence* majority opinion. In this light, her focus on equal protection may be seen as an understandable attempt to justify her majority vote in *Hardwick*.
[73] Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring) (emphasis added).
[74] *Id.* at 583 (emphasis added).

Thus, the harm principle adopted in *Lawrence* is clear. As Bernard Harcourt has written, "The Court's ruling is the coup de grâce to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations."[75] Although some have argued that the holding is essentially limited to the rights of gays and lesbians,[76] or that the holding is limited to fundamental rights,[77] nothing in the many passages quoted above limits the holding in either of those ways. The few lower courts to have given effect to *Lawrence*'s harm principle have not interpreted *Lawrence* to be so limited.

So, here is *Lawrence*'s harm principle: morality is not an adequate or sufficient basis for criminalization. Morality is inherently subjective, and is frequently based on religious precepts, as the *Hardwick* concurrence acknowledged.[78] The "moral" viewpoints of a segment of society—whether religious-based or not—cannot be the proper basis for criminalization in a secular society.

Commentators, advocates, and scholars were quick to anoint *Lawrence* as a groundbreaking civil rights decision. The *New York Times* aptly observed that "pundits on both sides and legal scholars from across the political spectrum said that with the Supreme Court's June 26 ruling in *Lawrence v. Texas*, the country was at a revolutionary moment akin to the aftermath of the decisions in *Brown v. the Board of Education*, which banned school segregation, and *Roe v. Wade*, which legalized abortion."[79] In his *Lawrence* dissent, Justice Scalia predicted that the decision would lead to the invalidation of "[s]tate laws against bigamy, same-sex marriage, adult incest,

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[75] Harcourt, *supra* note 14, at 503-04.
[76] *See* McGowan, *supra* note 24, at 1313.
[77] *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1157 (2004).
[78] Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *See* Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 12-18 (2005) (analyzing the religious bases of popular sexual morality).
[79] Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at N8. *See also* Eskridge, *supra* note 35, at 1040 ("*Lawrence* represent[s] a regime shift for gay people analogous to the regime shift that *Brown* and *Loving* represented for people of color and that *Roe* and *Craig* represented for women."); Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 ALB. L. REV. 81, 93 (2004) (making the same comparison). For a comprehensive listing of comparisons between *Lawrence* and *Brown*/*Roe*, see Reinheimer, *supra* note 22.

prostitution, masturbation, adultery, fornication, bestiality, and obscenity" and ultimately result in a "massive disruption of the current social order."[80] All these predictions turned out to be premature, overly optimistic, or flat wrong. In fact, in case after case, state courts and lower federal courts have distinguished or otherwise failed to follow *Lawrence* in a variety of criminal law contexts.[81] This section examines why this is so.

In its immediate aftermath, *Lawrence* produced an astonishing amount of commentary focusing on what the decision really means as a matter of constitutional law doctrine.[82] Many of these commentators observed that the decision is confusing at best and incomprehensible at worst.[83] First, the Court never specifically stated whether the interest at stake was a privacy interest or a liberty interest.[84] Second, the majority decision on its face relied on due process but employed rhetoric and analysis more apt for equal protections analysis.[85] Third,

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[80] Lawrence v. Texas, 539 U.S. 558, 590, 591 (2003) (Scalia, J., dissenting).

[81] The decision has had limited impact as precedent in some other areas, including the military's "Don't Ask, Don't Tell" policy and gay adoption. *See, e.g.*, Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 610-11 n.86 (2006) (citing cases); Mark Strasser, Lawrence*, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 296-302 (2006) (offering examples of lower courts' tendency to distinguish *Lawrence* in areas including family law and criminal law). For an overview of the status of same-sex marriage litigation, see Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1695-96 (2010); Matthew Cohen, Comment, *If "I Do," Then So Should You: An Analysis of State Constitutional Bans on Same-Sex Marriage*, 39 SW. L. REV. 365, 382-84 (2009). *See* the Appendix for a listing of cases that fail to give *Lawrence* its full precedential weight.

[82] *See* Jamal Greene, *Beyond* Lawrence*: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1868 (2006) ("An extraordinary number of commentators have weighed in on [*Lawrence*'s] holding . . . ."). For an overview of scholarly analyses and disagreements over *Lawrence*'s meaning, see Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 271-80 (2005-2006).

[83] *See, e.g.*, Greene, *supra* note 82, at 1868 (*Lawrence* is "famously obtuse.").

[84] *Compare, e.g.*, Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1584 (2005) (*Lawrence* is grounded in liberty interests), *with* Carpenter, *supra* note 77, at 1160-61 (*Lawrence* is grounded in privacy interests). The *Lawrence* majority explicitly stated that it was relying on the Due Process Clause, all the while relying heavily on its key right to privacy cases—*Griswold*, *Eisenstadt*, and *Carey*. *See Lawrence*, 539 U.S. at 564-66. Justice Scalia called the majority on this apparent inconsistency. *See id*. at 594-95 (Scalia, J., dissenting).

[85] As Cass Sunstein summed it up, "*Lawrence*'s words sound in due process, but much of its music involves equal protection." Cass R. Sunstein, *What Did* Lawrence

as both the *Lawrence* dissent and many commentators have noted, the Court failed to state that the defendant's constitutional right was a "fundamental" right for purposes of substantive due process.[86] If a right is "fundamental," then under some Supreme Court precedent the strict scrutiny test applies—that is, the government infringement on the right must be "narrowly tailored to serve a compelling state interest."[87] Under that same precedent, if the right is not fundamental, then the rational basis test applies—a test that is usually much easier to meet.[88] The Court never articulated the nature of the right at issue or the level of review it was applying, and commentators and courts are justifiably confused.[89] Most courts, relying on *Lawrence*'s statement that "the Texas statute furthers no legitimate state interest," conclude that the Court applied a rational basis analysis.[90]

Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 55 SUP. CT. REV. 27, 30 (2003). For an analysis of the equal protection component of *Lawrence*, see Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902 (2004).

[86] *See Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting); Barnett, *supra* note 84, at 1585. Under some Supreme Court precedent, a right is not "fundamental" for purposes of substantive due process unless it is either "implicit in the concept of ordered liberty" or "deeply rooted" in our "tradition or history." *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Most courts conclude that *Lawrence* did not recognize a fundamental right. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.32 (5th Cir. 2008); Seegmiller v. Laverkin City, 528 F.3d 762, 771 (10th Cir. 2008). *But see* Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1303 (11th Cir. 2004) (Barkett, J., dissenting) (*Lawrence* recognized a fundamental right to sexual privacy). In the Arizona sex toys case, the Fifth Circuit concluded that the Court in *Lawrence* simply found it unnecessary to categorize the right at issue because the state could not show a rational basis for the Texas sodomy statute. *Reliable Consultants*, 517 F.3d at 745 n.32.

[87] *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[88] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 415 (1997) ("[T]he government's objective only need be a goal that is legitimate for government to pursue."). *See infra* Part II(B)(3).

[89] The articles are legion. *See, e.g.*, Sunstein, *supra* note 85, at 45 ("Was *Lawrence* based on rational basis review, or instead on something else? It is astonishing but true that this question is exceedingly difficult to answer."); Tribe, *supra* note 85, at 1916 (describing the confusion over the standard of review applied in *Lawrence*). Some have predicted that *Lawrence* will spell the end of the two-tiered substantive due process analysis. *See* Randy E. Barnett*, Scrutiny Land*, 106 MICH. L. REV. 1479, 1495 (2008).

[90] *Lawrence*, 539 U.S. at 578. *See, e.g.*, Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005) (concluding that *Lawrence* did not apply strict scrutiny), *cert. denied*, 546 U.S. 988 (2005); Kansas v. Limon, 122 P.3d 22, 30 (Kan. 2005) ("Typically, a search for

The point here is not to solve the many constitutional law puzzles that *Lawrence* has created. Legions of commentators and lower court judges have been hard at that task since the decision was rendered. For present purposes, let us assume that *Lawrence* defines an interest—the right to sexual autonomy—that is grounded in liberty interests under the Due Process Clause, but also has roots in the Equal Protection Clause; that the Court did not describe the right as a fundamental right; and that rational basis analysis applies.[91]

Apart from its constitutional opaqueness, the *Lawrence* decision provided courts with an additional route for circumventing the holding. As shown in the Appendix, case after case distinguishes *Lawrence*, citing one passage from the opinion, without engaging in any serious analysis. Initially, the Court focused on the facts before it: "The case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[92] Then, in the language that has served to undercut *Lawrence*'s precedential value, the Court continued, "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."[93]

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a legitimate interest signifies a rational basis analysis."). Some commentators, however, argue that the *Lawrence* Court held that a fundamental right was at stake and applied strict scrutiny. *See* Carpenter, *supra* note 77, at 1156 ("[*Lawrence*'s] parallels to the Court's fundamental-rights cases are unmistakable.").

[91] As noted *supra* notes 31-35, this article explicitly endeavors to cast *Lawrence* as a substantive criminal law case. To that end, the article does not undertake a substantive analysis of the intricate and complex relationship between the Equal Protection Clause and the Due Process Clause. There are many sources for that analysis, including a number of sources that focus on *Lawrence*. *See, e.g.*, Sunstein, *supra* note 85, at 30; Tribe, *supra* note 85, at 1902. For present purposes, it is worth noting that *Lawrence* is a substantive due process case that relies upon the right to privacy. But *Lawrence* also draws heavily upon the decision in *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated on equal protection grounds a voter initiative that repealed laws prohibiting discrimination based on sexual orientation. The *Romer* decision focused on the targeting of a group while *Lawrence*, at least on its face, focused on the targeting of particular acts. As discussed above, *see supra* notes 82-89 and accompanying text, *Lawrence* seems to be grounded in both doctrines.

[92] *Lawrence*, 539 U.S. at 578.

[93] *Id*.

Courts in criminal cases have used this limiting language to distinguish *Lawrence* without any analysis at all.[94] These courts seem to view the language as placing an absolute barrier on *Lawrence*'s reach, rendering the case inapplicable to all cases involving a minor, coercion, public conduct, nonconsensual conduct, or prostitution.[95] Some courts also read the "public conduct" limitation literally, so that any activity that does not occur in a private place such as a bedroom does not fall within *Lawrence*'s ambit.[96] Under this reading, *Lawrence* would be inapplicable to any commercial activity.[97]

These courts are surely over-reading the passage upon which these courts uniformly rely. Nothing in *Lawrence*'s holding limits the decision to the narrow issue of sodomy laws in general, or to oral and anal sex in private between consenting adults in particular. Indeed, the Court's own analysis belies the interpretation of the limiting language as absolute. For one thing, the Court relied on its earlier decision invalidating a state law that criminalized the sale of contraceptive devices to persons under the age of sixteen, thus extending the right to sexual privacy both to minors and to public commercial activities.[98]

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[94] *See, e.g.*, *Muth*, 412 F.3d at 817 (consensual adult incest); United States v. Bach, 400 F.3d 622, 628 (8th Cir. 2005) (child pornography involving minor above age of consent); State v. Freitag, 130 P.3d 544, 545-46 (Ariz. Ct. App. 2006) (prostitution); State v. Van, 688 N.W.2d 600, 615 (Neb. 2004) (consensual sexual activity involving bondage, discipline, and sadomasochism); State v. Moore, 606 S.E.2d 127, 129-132 (N.C. Ct. App. 2004) (statutory rape). *See also* Strader, *supra* note 9, at 33-34 (discussing *Lawrence*'s "limiting" language).

[95] *See, e.g.*, United States v. Palfrey, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (public acts and prostitution); *Freitag*, 130 P.3d at 545-46 (same); State v. McKenzie-Adams, 915 A.2d 822, 836 (Conn. 2007) (nonconsensual activity); State v. Thomas, 891 So. 2d 1233, 1237 (La. 2005) (public, commercial sexual conduct); State v. Senters, 699 N.W.2d 810, 816 (Neb. 2005) (minors); State v. Whiteley, 616 S.E.2d 576, 580 (N.C. Ct. App. 2005) (same); *In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007) (same).

[96] *See, e.g.*, Tjan v. Commonwealth, 621 S.E.2d 669, 672 (Va. Ct. App. 2005) (rejecting challenge to a conviction of solicitation to engage in sodomy in a department store bathroom stall, explaining that the case involved "*public* sexual conduct [and] does not implicate the more narrow liberty interest upheld in *Lawrence*").

[97] *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) (state ban on the sale of sexual devices); *Palfrey*, 499 F. Supp. 2d at 41 (prostitution); People v. Williams, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004) (same).

[98] Lawrence v. Texas, 539 U.S. 558, 566 (2003) (relying on Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a state law that made it a crime to distribute contraceptives to unmarried individuals because it infringed on the right to control reproduction);

For another, the Court's post-*Lawrence* actions indicate that the decision applies to minors. In one state case, *State v. Limon*, a male teenager engaged in private, consensual oral sex with a male minor and was sentenced to a term many times greater than the term he would have received had his sex partner been female.[99] The Supreme Court remanded for reconsideration in light of *Lawrence* and the Kansas Supreme Court ultimately reversed, finding *Lawrence* controlling.[100] If the Court in *Lawrence* had intended for its decision to never apply to cases involving minors, it would not have remanded the *Limon* case; the remand would have been pointless.[101]

In the context of the decision in its entirety, *Lawrence*'s "limiting" language—"[t]he present case does not involve . . ."—is simply another way of saying, in effect, "This is a straightforward case involving no showing of harm. We are leaving harder cases, in which the state might well be able to prove harm, for another day."[102] This language, which has wreaked so much havoc in decisions applying *Lawrence*, was surely designed to give the opinion a moderate cast. And the language also appears to respond to Justice Scalia's strategic

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Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning a law banning the use of contraceptives and banning counseling or aiding and abetting the use of contraceptives). In his *Bowers v. Hardwick* dissent, Justice Stevens saw the Court's prior decisions in *Griswold*, *Eisenstadt*, and *Carey* as protecting an essential "interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting). Justice Stevens neither limited his articulation of the constitutional right to adults nor excluded minors.

[99] 122 P.3d 22, 24 (Kan. 2005). This case is discussed more fully in Part III(A), *infra.*

[100] Limon v. Kansas, 539 U.S. 955, 955 (2003) (vacating the Supreme Court of Kansas's decision in *Limon* in light of *Lawrence*). Although *Lawrence* was a due process decision, the Kansas court—on remand for reconsideration in light of *Lawrence*—overturned the defendant's sentence on equal protection grounds. This result gives credence to the argument that *Lawrence* is grounded in both strands of constitutional law jurisprudence. *See supra* note 80 and accompanying text.

[101] A few courts have explicitly recognized that *Lawrence*'s "limiting" language does not place absolute limits on the holding. In *Reliable Consultants*, *Inc. v. Earle*, the Fifth Circuit majority explicitly rejected the dissent's suggestion that *Lawrence* did not apply because the sale of sex toys occurred in public. 517 F.3d 738, 744 (5th Cir. 2008). And as to minors, the Kansas Supreme Court pointedly noted in *Limon* that "the demeaning and stigmatizing effect upon which the *Lawrence* Court focused is at least equally applicable to teenagers, both the victim and the offender, as it is to adults and, according to some, the impact is greater upon a teen." *Limon*, 122 P.3d at 29.

[102] *See* Strader, *supra* note 9, at 34.

dissent. But nothing in the opinion suggests that the language places an absolute, substantive limitation on the holding.

Apparently grounded in both substantive due process's protection of specific activities and equal protection's prohibition against group discrimination, courts have correctly applied *Lawrence* in equal protection cases involving minors[103] and a due process case involving public commercial activities.[104] So, under both strands of constitutional law analysis, the "limiting" language should not dissuade courts from applying *Lawrence*'s essential holding.

3. Justice Scalia's Preemptive Attack on Lawrence's *Harm Principle*

Another reason why *Lawrence* has such little impact surely has to do with Justice Scalia's dissent.[105] *Lawrence* is one of those rare cases in which the dissenting opinion seems to have attracted as much attention, over the long term, as the majority opinion.[106] Labeled "radical" and "incendiary,"[107] the dissent's rhetoric is truly jarring. For example, Justice Scalia both accuses the majority of having "signed on to the so-called homosexual agenda" and labels homosexuality as a "lifestyle"—rather than an orientation—that many view as "immoral and destructive."[108]

Why did Justice Scalia employ such dramatic language? Some commentators have speculated that the rhetoric resulted from a sort of judicial temper tantrum.[109] But looking at how some courts have

[103] *See, e.g.*, *Limon*, 122 P.3d at 29 ("[T]he demeaning and stigmatizing effect upon which the *Lawrence* Court focused is at least equally applicable to teenagers, both the victim and the offender, as it is to adults and, according to some, the impact is greater upon a teen.").

[104] *See Reliable Consultants*, 517 F.3d at 744 (rejecting the argument that *Lawrence* does not apply because the sale of sex toys involves public, commercial activities).

[105] Lawrence v. Texas, 539 U.S. 558, 586-92 (2003) (Scalia, J., dissenting).

[106] Harcourt, *supra* note 14, at 506 ("Despite the vitriolic tone, Justice Scalia's dissent is remarkably insightful—in certain respects prescient—in situating the *Lawrence* decision in its proper social and political context, and it offers a useful heuristic to help interpret the result.").

[107] *Id.* at 503, 505.

[108] *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home.").

[109] *See, e.g.*, Kevin F. Ryan, *A Flawed Performance*, VT. B.J. & L. DIG., Fall 2003, at 5, 8 ("Scalia's pairing of sodomy with incest and bestiality is both bizarre and wildly provocative . . . [and] one might as well say that permitting whites and blacks to

interpreted *Lawrence*,[110] an alternate explanation is that Justice Scalia crafted his dissent with a clear end in mind—to scare lower courts off of *Lawrence* entirely. Throughout his opinion, Justice Scalia sought to paint a very steep and frightening slippery slope that would threaten to undo legislation ranging from economic regulation to every sort of vice crime and marriage law. At various points, Justice Scalia asserted that the decision would lead to the invalidation of laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, . . . obscenity," child pornography, use of heroin, and workplace regulations.[111]

If Justice Scalia's point was to frighten courts off of *Lawrence*, he succeeded to a remarkable degree. If his point was to provoke the "limiting" language in the majority opinion, his tactics were doubly effective in keeping courts from applying *Lawrence* to its full degree. Even if the *Lawrence* dissenters lost the battle on the day *Lawrence* was issued, they seem to be winning the war.[112]

For *Lawrence* to be realized as a landmark substantive criminal law decision, courts will have to take the decision's theoretical underpinnings seriously and ignore Justice Scalia's parade of horribles in his dissenting opinion. Once that happens, then all the other reasons that lead courts to limit their application of *Lawrence*—the constitutional law debates, *Lawrence*'s own language, and Justice Scalia's dissent—will no longer have the effect of dampening the decision's impact. The next section turns to the task of elucidating *Lawrence*'s substantive criminal law and establishing the case as groundbreaking criminal law precedent.

II. *LAWRENCE*'S CRIMINAL LAW THEORY

For *Lawrence* to have the impact of a groundbreaking criminal law decision—in the same way that constitutional criminal procedure

marry opens the door to people marrying their dogs—the leap involved is both outrageous and mean-spirited.").

[110] *See* Curtis Waldo, *Toys Are Us: Sex Toys, Substantive Due Process, and the American Way*, 18 COLUM. J. GENDER & L. 807, 820 n.87 (2009) ("Perhaps ironically, Justice Scalia's dissent has now become the 'authoritative' guide to lower circuit courts as to the meaning of *Lawrence*."). *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1320 (11th Cir. 2007) (relying on Justice Scalia's dissent to reject a challenge to a statute criminalizing the sale of sex toys).

[111] *Lawrence*, 539 U.S. at 590, 592, 599, 601, 604 (Scalia, J., dissenting).

[112] *See, e.g.*, *Reliable Consultants*, 517 F.3d at 744.

decisions such as *Katz*[113] and *Miranda*[114] have affected criminal procedure cases—we first have to assume that the courts have a role in setting bounds on substantive criminal law akin to the role that courts play in setting bounds on government investigations and prosecutions as a matter of criminal procedure. We will then have to find that *Lawrence* indeed establishes substantive limits on criminalization. Finally, we will have to ascertain how lower courts can apply those limits in the variety of contexts to which they are relevant.

A. Constitutional Constraints on Substantive Criminal Law

Beginning the process of realizing *Lawrence* as a seminal case of substantive criminal law requires accepting the proposition that the United States Supreme Court and state supreme courts have developed a body of substantive constitutional criminal law. Scholars have long debated whether courts in general, and the United States Supreme Court in particular, have produced an identifiable body of such law.[115] Most United States Supreme Court criminal cases deal with procedural issues.[116] Constitutional Criminal Procedure is a universal law school course offering; courses in constitutional criminal (substantive) law are far less common, perhaps partly because that law does not form a neat

[113] Katz v. United States, 389 U.S. 347 (1967). For an overview of Fourth Amendment "search" law and the principles derived from *Katz*, see 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 72-76 (4th ed. 2006).

[114] Miranda v. Arizona, 384 U.S. 436 (1966). For an overview, see DRESSLER & MICHAELS, *supra* note 113, at 467.

[115] *See* Tennen, *supra* note 14, at 3 ("For quite some time, scholars have debated whether or not there are any constitutional limits to substantive criminal law."). *Compare, e.g.*, Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509-510 (2004) (citing Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1269-72 (1998)) ("[T]he law of crime and punishment has remained virtually untouched by constitutional scrutiny."), *with* Tennen, *supra* note 14, at 3 ("[A]lthough the Court has cautiously resisted the chance to constitutionalize criminal law overtly, it has been delving into substantive criminal law since the turn of the twentieth century."). The same observation holds true for state constitutional constraints. *See* Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMPLE L. REV. 521, 521-22 (1998) (recognizing that commentators focus on state constitutional limits on criminal procedure and pay little attention to such limitations on substantive criminal law).

[116] These generally concern rights under the Fourth Amendment's prohibition against unreasonable searches and seizures, the Fifth Amendment's right against compelled self-incrimination, the Sixth Amendment's rights to counsel and trial by jury, and the Fifth and Fourth Amendment's right to procedural due process.

body of doctrine, at least compared with the body of law that constitutes constitutional criminal procedure.[117] The Court's substantive criminal law cases run the gamut from straightforward interpretations of statutory language, to quasi-constitutional cases limiting statutory interpretation, to constitutional law cases. Overarching theories and doctrines are often difficult to divine from such a dispersed body of case law.

Nonetheless, the United States Supreme Court and state supreme courts regularly delve into substantive criminal law. Most obviously, the Supreme Court frequently interprets federal criminal statutes and has created a large body of case law from which to draw basic principles of statutory interpretation.[118] At times, this law becomes quasi-constitutional—as with the doctrine of lenity, which requires ambiguous criminal statutes to be read in favor of the defendant.[119] And the Court for decades has enforced constitutional constraints on the scope and content of criminal laws, both state and federal.[120] These constraints have been grounded in the First Amendment's right to free speech,[121] the Fifth and Fourteenth Amendments' right to liberty,[122] the Eighth Amendment's prohibition

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[117] *See* Brown, *supra* note 26, at 971 ("It is a bizarre state of affairs that criminal law has no coherent description or explanation.").

[118] *See, e.g.*, NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT (5th ed. 2010).

[119] *See* United States v. Santos, 553 U.S. 507, 514 (2008). The doctrine is compelled by constitutional provisions, including the Due Process Clause's requirement of fair notice. *See* Liparota v. United States, 471 U.S. 419, 427 (1985). *See generally* Dan M. Kahan, *1994 Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 ("More than a simple canon of construction . . . the rule of lenity . . . is considered essential to securing a variety of values of near-constitutional stature.") (internal quotation marks omitted).

[120] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[T]here are constitutional limitations on the conduct that a State may criminalize."). For an overview, see Tennen, *supra* note 14, at 61-72.

[121] *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973); Cohen v. California, 403 U.S. 15, 26 (1971); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969); Street v. New York, 394 U.S. 576, 594 (1969).

[122] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (parental right to determine their children's education); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (parental right to control the upbringing of their children).

against cruel and unusual punishment,[123] the general constitutional right to privacy,[124] and the Due Process Clause's right to fair notice.[125]

Some commentators argue that the Court historically has had a limited role in creating substantive criminal law. This commentary focuses on how the Court has handled questions related to elements of crimes, particularly mens rea. Specifically, much of the commentary on the Court's role in developing substantive criminal law has analyzed the constitutional propriety of strict liability as the basis for a criminal conviction.[126] Because the Court has accepted strict liability as a basis for criminal statutes,[127] the reasoning goes, the Court has basically taken a hands-off approach to criminalization.[128] This

[123] *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law criminalizing the *status* of being a drug addict violated the Eighth Amendment). *But see* Powell v. Texas, 392 U.S. 514, 532, 537 (1968) (distinguishing *Robinson* and upholding public drunkenness conviction).

[124] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[125] A criminal statute must (1) give fair notice as to the conduct proscribed and (2) establish minimal guidelines to govern law enforcement. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983); Rose v. Locke, 423 U.S. 48, 50 (1975). "Vagrancy" and "loitering" statutes are often invalidated on these grounds. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[126] *See, e.g.*, Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 ("Mens Rea is an important requirement [for criminal liability], but it is not a constitutional requirement, *except sometimes*.") (emphasis added). *See also* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 943 (1999). The Court has sanctioned strict liability for public welfare offenses, which involve threats to public health and safety. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943) (upholding the federal conviction of a corporate officer for shipping adulterated and misbranded drugs and interpreting the statute to call for strict liability). *Cf.* Montana v. Egelhoff, 518 U.S. 37 (1996) (defendant did not have a right to introduce voluntary intoxication defense). For a discussion of *Lawrence*'s effect on strict liability crimes, see Carpenter, *supra* note 34, at 321-24.

[127] *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958); Dubber, *supra* note 115, at 518-19.

[128] In two cases, the Supreme Court held that strict liability crimes do not violate due process. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975). But the Court's holdings are narrowly confined; they apply only to "public welfare" offenses where there is substantial potential harm to the public and where Congress clearly intended to impose strict liability. And in both cases, the defendants were subject to minor penalties. For an analysis of these cases, see J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 2.07[B] (2d ed. 2006).

observation, however, ignores the limited role that the Court has assigned to strict liability crimes,[129] which ultimately play a minor role in our system of criminalization. And this commentary by its nature implicitly recognizes the nature and substance of the substantive constitutional criminal law doctrine that the Court has created.[130]

Even conceding that the Court has historically enforced substantive criminal law constraints only haltingly, it is now true that the Court no longer shies away from enforcing substantive federal constitutional limits on criminal laws. In *Robinson v. California*, the Court famously held unconstitutional a California law that made it a crime to be an addict.[131] But in *Powell v. Texas*, the Court seemed to limit *Robinson* to its facts and stated that substantive criminal law doctrines "have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."[132] However, from the current perspective, this 1968 language has been rendered virtually obsolete by cases ranging from *Roe* to *Lawrence*.

The Court's progression from *Hardwick* to *Lawrence* shows the potential scope of the courts' role in substantive criminal law. Whether *Lawrence* portends a reinvigorated review of some questionable criminal law doctrine remains to be seen. Certainly, some established doctrines, such as strict liability[133] and vicarious liability for co-conspirators,[134] are deeply flawed and merit reexamination. But for now, the task is for courts to give full effect to what *Lawrence* has already done for the reform of substantive criminal law.

B. Resurrecting *Lawrence's* Harm Principle

1. Recognizing Harm as the Guiding Principle

[129] Outside the public welfare arena, the Court has generally been reluctant to approve of strict liability offenses. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (reading a mens rea provision into the statute).

[130] And the role of state supreme courts in the same regard cannot really be questioned. *See* Chemerinsky, *supra* note 81, at 1696-97.

[131] 370 U.S. 660, 676-77 (1962).

[132] Powell v. Texas, 392 U.S. 514, 536 (1968) (plurality opinion).

[133] *See supra* note 102 and accompanying text (strict liability).

[134] This is referred to as the "*Pinkerton*" doctrine. *See* Pinkerton v. United States, 328 U.S. 640 (1946). For an interesting discussion regarding vicarious liability for co-conspirators, see Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585 (2008).

As discussed in Part I(B)(2) above, *Lawrence*'s language leaves no doubt that the Court came down squarely on the Hart/harm side of the criminalization debate. Yet many disagree as to whether *Lawrence* adopted the harm principle at all, either fully or partially.[135] Those who question or reject the conclusion that *Lawrence* engages in wholesale adoption of the harm principle ignore the history of the harm/morality debate and the philosophical thrust and plain language of *Lawrence* itself.

The Court in *Lawrence* did not adopt the harm principle out of thin air. Earlier decisions had pointed in this direction, and important commentators had been advocating for this principle for years.[136] And *Lawrence*'s adoption of the harm principle, although momentous, was not without grounding in the Court's jurisprudence. As Suzanne Goldberg has shown, the Court has long been wary of using morality as the principal basis for legislation.[137] In this sense, *Hardwick* is the outlier in the Court's jurisprudence, not *Lawrence*. Further, as discussed in Part II(B)(3) below, for years state courts have applied the harm principle when assessing the constitutionality of criminal statutes.

Despite *Lawrence*'s clear adoption of the harm principle, courts across the country continue to uphold laws and affirm prosecutions for activities that should at least merit serious challenge following *Lawrence*. Yet, in most of these cases, the courts do not

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[135] *Compare* Allen, *supra* note 34, at 1056 ("*Lawrence* should be understood as limiting a legislature's ability to act based solely or dominantly on morality."), Dubber, *supra* note 115, at 568 ("[*Lawrence*] struck down a homosexual sodomy statute on the ground that the proscribed conduct does not inflict harm in the relevant sense."), Goldberg, *supra* note 11, at 1236 (proposing that laws need to be supported by "demonstrable facts"); *and* Nan D. Hunter, *Living With* Lawrence, 88 MINN. L. REV. 1103, 1112 (2004) (states must justify laws post-*Lawrence* by "some form of objectively harmful effects"), *with* Carpenter, *supra* note 77, at 1157-58 (positing that morality is a sufficient justification under the rational basis test but not where a fundamental right is concerned and that *Lawrence* recognized a fundamental right), *and* McGowan, *supra* note 24, at 1313 ("*Lawrence* has not ruled out moral distaste as a rational basis for state regulation . . . [and] *Lawrence* does not hold that the Constitution incorporates the harm principle."). Prof. McGowan argues that morality is an insufficient basis only where sexual minorities have been targeted. Although lower courts have generally been cramped in their readings of *Lawrence*, they have not followed McGowan's interpretation of *Lawrence* either. *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) (invalidating Virginia's anti-fornication statute under *Lawrence*).

[136] *See* Goldberg, *supra* note 11, at 1235.

[137] *Id.* at 1240-41.

even engage in serious analysis of whether *Lawrence* should control. In Part III below, this article analyzes some of the key cases upholding those statutes. But for present purposes, let us simply note that the cases—sometimes explicitly, sometimes implicitly—reject *Lawrence*'s adoption of the harm principle.[138] There are many examples of these cases, and the topics at issue range from sodomy to sex toys and pornography.[139] For instance, the Eleventh Circuit upheld a statute criminalizing the sale of sex toys based on the "promotion and preservation of public morality."[140] The North Carolina Supreme Court upheld the state's sodomy statute based upon "the goal of promoting proper notions of morality."[141]

The issues courts must grapple with after *Lawrence* are (1) defining the concept of "harm" going forward, and (2) determining how the state must prove the "harm" necessary to justify a criminal statute. This analysis focuses on criminal laws; the burden on the state to justify a law is nowhere higher than when that law threatens to infringe individuals' liberty interests by sending them to jail and branding them criminals.[142] As the Constitution recognizes at various points, the criminal sanction is qualitatively different from all other forms of sanctions and must be justified with a level of clarity not required elsewhere in the law.[143]

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[138] *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) ("[W]e find that public morality survives as a rational basis for legislation even after *Lawrence* . . . ."); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004) ("[O]ur own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest.").

[139] *See, e.g.*, *Williams*, 478 F.3d at 1322 (declining to extend *Lawrence* to invalidate a law prohibiting the sale of sexual devices); 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 341 (Ala. 2010) (same); State v. Senters, 699 N.W.2d 810, 816 (Neb. 2005) (declining to reverse a child pornography conviction under *Lawrence* where the defendant filmed himself having sex with his girlfriend, who was above the age of consent); *In re* R.L.C., 643 S.E.2d 920 (N.C. 2007) (declining to invalidate a law prohibiting oral sex between minors under *Lawrence*).

[140] *Williams*, 478 F.3d at 1319.

[141] *In re R.L.C.*, 643 S.E.2d at 925.

[142] *See* Haque, *supra* note 34, at 43 (arguing that *Lawrence* can be read to hold "only that the enforcement of popular morality is not a legitimate state interest in the important but limited context of criminal legislation"). *See infra* Part II(B)(3) (discussing the "rational basis" needed for criminal laws).

[143] *See* Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781, 785 (1994) (freedom from incarceration as fundamental right); Douglas Husak, *The Criminal Law as a Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004) ("[C]riminal law . . . must be evaluated by

2. Establishing Harm as a Workable Standard

One of *Lawrence*'s principal lessons is that "morality" does not provide a workable criminalization standard. Those who advocate a morality-based approach do not explain how to identify the moral principles applicable to criminalization, other than by looking to religion or to "intuitions and principles of virtuous living."[144] As *Lawrence* said, religion is not an appropriate basis for criminalization.[145] If instead we were to look to popular "intuitions," how would we ascertain them? Presumably, we would rely on opinion polls, election results, or some other similar device.[146]

But if we took the opinion poll/electoral approach to criminalization, then the United States Supreme Court should not have stricken down criminal bans on interracial marriage, for at the time of the decision in *Loving v. Virginia* 70 percent of the public favored such laws, and more states had anti-miscegenation statutes at the time of *Loving* than had same-sex sodomy laws at the time of *Lawrence*.[147] In some communities in the United States, majoritarian "intuitions" would certainly lead to laws targeting racial, ethnic, religious, and sexual minorities that would never withstand constitutional challenge under a harm-based approach.

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a higher standard of justification because it burdens interests not implicated when other modes of social control are employed."). *Cf.* Witt v. Department of the Air Force, 548 F.3d 1264, 1270-71 (9th Cir. 2008) (suggesting that a more thorough form of review is required where criminal conduct is concerned).

[144] Carpenter, *supra* note 77, at 1165. *See also* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford Univ. Press 1965). Those who assert that *Lawrence* is in reality a morals-based decision, *see, e.g.*, McGowan, *supra* note 24, at 1325, never tell us where "morality" comes from or how we are to ascertain its content and boundaries.

[145] Recognizing that the *Hardwick* decision relied upon "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family," the Court in *Lawrence* responded that "[t]hese considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" Lawrence v. Texas, 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

[146] *Cf.* Carpenter, *supra* note 77, at 1165.

[147] *See* Patricia A. Cain, *Contextualizing* Varnum v. Brien*: A "Moment" in History*, 13 J. GENDER RACE & JUST. 27, 52 (2009).

It is true that in many cases, "harm" and "morality" overlap, but harm is a workable, identifiable standard.[148] "Harm" is based on the normative judgment that self-preservation is the fundamental, universal human instinct and that organized societies exist to meet that end.[149] As discussed below, legislatures and courts can measure physical, psychological, and economic harm; they cannot, however, ascertain or measure principles of morality other than by reference to the "will of the people," a source that does not safeguard individual rights.

Many commentators have debated and will continue to debate the merits and contours of the harm principle.[150] Other commentators continue to assert that Lord Devlin was correct in focusing on morality or, in any event, that the morality principle has been resurrected as the de facto governing criminalization principle.[151] These debates are irrelevant here because the Court in *Lawrence* aligned itself with the harm principle. The relevant question is how that alignment has affected and will affect criminalization post-*Lawrence*. This requires careful analysis of harm caused, and follows from the normative view that society should protect its members from "harm" by, in appropriate cases, criminalizing harmful behavior.[152]

Most of the commentary critical of the harm principle asserts that "harm" is indefinable and therefore does not provide a workable

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[148] *See* Allen, *supra* note 34, at 1048 (stating that laws criminalizing murder must be morality-based); McGowan, *supra* note 24, at 1325. *See also* DEVLIN, *supra* note 144.

[149] In John Locke's words, "[I]n the utmost of bounds of [the government's power] is limited to the public good of society. It is a power that hath no other end but preservation . . . ." JOHN LOCKE, OF CIVIL GOVERNMENT 82 (London, 1690). *See* Tennen, *supra* note 14, at 29-60.

[150] *See* Goldberg, *supra* note 11, at 1305 ("[This] philosophical tightrope walking is not a task for which courts, which are structured to elicit facts and interpret and apply relevant law, are institutionally well suited.").

[151] Carpenter, *supra* note 77, at 1164 ("The Court has never before repudiated morality as a legitimate state interest . . . .").

[152] For a discussion of theories of government that underlie the harm principle, see Dubber, *supra* note 115, at 571 (stating that the relationship between government and individual is one that is deeply embodied by the "state's fundamental obligation to uphold the personal dignity of its constituents, and the basic right to autonomy that underlies it"). For a helpful discussion of the philosophical context of the debate, see Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 366-80 (1977).

standard.[153] As Dale Carpenter puts it, "[H]arm can always be found."[154] There are several responses. Most importantly, the vast majority of criminal statutes are directed to clearly identifiable physical, psychological, or economic harm that the defendant has caused or threatened to another person.[155] Even in instances when the issue is harm to self, the harm is still identifiable—physical, psychological, emotional, and/or economic injury.[156]

Another reason why the attack on the harm principle is overblown is that the actual criminal cases involving situations in which the harm is truly debatable are relatively rare. Only a small portion of criminal statutes target ambiguous harm and very few criminal prosecutions are brought under most of those statutes. The parade of criminal horribles in Justice Scalia's dissent—which includes bigamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity—really boils down to two crimes where litigation is apt to occur: prostitution and obscenity.[157] The other crimes are rarely prosecuted or never prosecuted in the case of private masturbation, given that no laws forbid this activity.[158] So, as

[153] *See* Darryl K. Brown, *Can Criminal Law be Controlled?*, 108 MICH. L. REV. 971, 971 (2010) ("The concept of 'harm' itself so eludes definition that it has been employed to describe all manner of conduct with no tangible or emotional injury, no victim, and no significant risk creation."); Donald A. Dripps, *The Liberal Critique of the Harm Principle*, CRIM. JUST. ETHICS, Summer/Fall 1998, at 3, 8 ("[T]he concept of harm is vague, vague enough that proponents of morals laws could frequently point to some immediate consequence of private vice that can plausibly be characterized as harm.").

[154] Carpenter, *supra* note 77, at 1169.

[155] For a detailed analysis of the application of the harm principle, see JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984).

[156] For most theorists, the most perplexing application of the harm principle involves harm to the self. Under a paternalistic approach, the government may intervene to prevent harm to self when the individual is not fully capable of self-protection/preservation. *See* Tennen, *supra* note 14, at 14 (summarizing the Wolfenden committee's conclusion that the function of criminal law was to "preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide safeguards against exploitation and corruption of others, particularly those who are specially vulnerable"). *See also* H.L.A. HART, LAW, LIBERTY AND MORALITY 16 (1963); FEINBERG, *supra* note 155.

[157] *See infra* Part III(C), for a discussion of harm analysis relating to prostitution and obscenity.

[158] *See* Eskridge, *supra* note 35, at 1089 (masturbation is not a crime anywhere in the United States); *id*. at 1090 ("Although adult incest between siblings is criminal almost everywhere, many states do not include siblings by affinity, and most do not

a practical matter, it is highly unlikely, post-*Lawrence*, that the country will be swept by a wave of decisions that, for example, decriminalize sex with animals.

Even assuming that a claim was brought for, say, incest or bestiality, in both cases the state could well prove harm under the meaningful form of rational basis analysis that *Lawrence* requires.[159] Harm to animals is pretty easy to show—and statutes criminalize animal cruelty in a variety of ways.[160] And asserted psychological harm from incest could also be subject to proof.[161]

Another objection to application of the harm principle is that courts are just not capable of undertaking this kind of analysis and, in any event, that the process would be too time-consuming.[162] This argument flies in the face of reality. Courts constantly analyze, identify, and, in some cases, quantify harm in cases of great complexity. For example, it is difficult to imagine that determining the harm in an adult incest case would be more complex than proving the harm caused by an intricate securities fraud scheme or by a complicated environmental crime.[163] We only have to look to the

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make it a crime for first cousins to have sex. If the reported cases are any guide, these statutes are almost never enforced in cases involving consensual intercourse.").

[159] For analysis of "harm" in a variety of contexts, see *infra* Part III(C).

[160] *See* Allie Phillips, *The Few and The Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, THE PROSECUTOR, July 2008, at 20-22. As of 2008, there were 45 states that imposed felony charges to serious cases of animal cruelty. Additionally, various states have laws which require offenders to undergo court-ordered counseling, psychological evaluations, or impose restrictions on the offender's possession or contact with animals. *See id*. at 20.

[161] *See* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 351-353 (2004).

[162] *See generally* Harcourt, *supra* note 25.

[163] The United States Sentencing Guidelines require courts to calculate the *amount of loss caused by fraud*, and correlate the severity of the sentence to the amount of the loss. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2010). To justify sentence enhancement based on "loss," the government must prove "the *amount of harm that resulted* from the acts or omissions of the defendant." United States v. Hicks, 217 F.3d 1038, 1049 (9th Cir. 2000) (internal quotation marks omitted) (emphasis added). However, this also requires proof that the loss was not caused by independent factors, for example, market forces and unforeseeable events. *See, e.g.*, United States v. Nacchio, 573 F.3d 1062, 1082 (10th Cir. 2009). For an overview of the complexity involved in determining loss causation, see John M. Hynes, *The Unjustified Presumption of Reliance for Newly Issued Securities: Why the Private*

same-sex marriage litigation to see that courts can and do receive and evaluate evidence of different types of asserted harms in a wide variety of contexts.[164] It would hardly place a substantial burden on courts to evaluate this type of evidence in the relatively infrequent *Lawrence*-based challenges to criminal statutes. And once the litigation is concluded as to a particular statute, the principle of stare decisis will preclude re-litigation of the issue.

3. Proving Harm under a Meaningful Rational Basis Review

Because of the severity of the penal sanction, the Court in *Lawrence* determined that the prohibited conduct cannot be criminalized based on morality alone. In so holding, the Court adopted the harm principle. The Court applied a rational basis test to this criminal case, and the Court held that the rational basis had to be meaningful; a bare assertion of a rational basis will not suffice to sustain a "criminal law" with its attendant "stigma" and unique affront to the "dignity" of a person subject to "criminal conviction."[165]

The criminal nature of the statute played a critical role in how the Court articulated the harm requirement. The Court began by noting that the Texas sodomy law resulted in the defendants "being

Securities Litigation Reform Act of 1995 Rang the Death Knell for the Fraud-Created-the-Market Theory, 38 SW. L. REV. 333 (2008).

[164] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (overturning California ban on same-sex marriage); Jesse McKinley, *Closing Arguments in Marriage Trial*, N.Y. TIMES, June 17, 2010, at A15 (describing weeks of expert testimony assessing asserted justifications for California's same-sex marriage ban).

[165] There are a number of United States Supreme Court decisions that apply a more searching rational basis approach, particularly where a law appears to target particular groups. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (invalidating a voter initiative that repealed laws prohibiting discrimination based on sexual orientation); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating a zoning ordinance that denied operation of a housing facility to mentally-disabled people); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a federal law that prevented a household from receiving food stamps if it included individuals who were not related to each other). Professor Eskridge suggests that *Lawrence* adopted a meaningful rational basis analysis that places the burden on the state to justify laws, particularly criminal laws, regulating personal relationships. *See* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA: 1861-2003, ch. 10 (2008). Based upon *Lawrence*'s plain language, this article argues that a more searching rationale basis review is appropriate whenever the challenger is potentially subject to criminal sanction. *See infra* Part III.

punished as criminals."[166] The Court stated that "the issue is whether the majority may use the power of the State to enforce [certain ethical and moral principles] on the whole society *through operation of the criminal law*."[167] The Court went on to emphasize the uniquely stigmatizing role of criminal law: "The stigma this criminal statute imposes, moreover, is not trivial." The Court concluded that sodomy under Texas law is "a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions."[168]

Based upon the above reading of *Lawrence*, then, "rational basis" does not mean "any basis," at least where criminal laws are concerned. The word "rational" has a dictionary meaning: "having reason or understanding."[169] As one state court judge put it, the state may not infringe on individual rights simply "because a rational basis may be 'conceived' for the legislation in question."[170] If, instead, "anything goes" in rational basis analysis, then *Lawrence* would not have been decided as it was and criminal statutes would never be subject to any meaningful review.[171] The Court in *Lawrence* was clear that a criminal law, with its attendant deprivation of liberty and imposition of stigma, cannot survive without a *meaningful* rational basis grounded in fact.

Justice Scalia claimed, in his *Lawrence* dissent, that the majority engaged in an "unheard-of form of rational-basis review."[172] His statement was wrong on its face. The Supreme Court has many

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[166] Lawrence v. Texas, 539 U.S. 558, 567 (2003).
[167] *Id.* at 571 (emphasis added).
[168] *Id.* at 575. The Court noted that the conviction would require the defendants to register as sex offenders in some states, and could also affect their ability to obtain employment, among other consequences. *Id.* at 567. Justice O'Connor made a similar point in her concurring opinion, noting that a conviction under Texas's sodomy law results in collateral consequences in areas including "employment, family issues, and housing." *Id.* at 582 (O'Connor, J., concurring) (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992).
[169] *Rational Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/rational (last visited April 9, 2011).
[170] *See* Ravin v. State, 537 P.2d 494, 515-16 (Alaska 1975) (Boochever, J., concurring).
[171] *See* Michael K. Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature after* Lawrence v. Texas, 43 WAKE FOREST L. REV. 155, 193 (2008) (evaluating the evolution of rational basis analysis since the 1970s away from the "not-insane-therefore-o.k." approach).
[172] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

times engaged in meaningful rational basis review,[173] most notably for our purposes in *Romer v. Evans*, in which the Court struck down a voter initiative that repealed laws prohibiting discrimination based on sexual orientation.[174] And state courts reviewing criminal statutes have been engaging in meaningful rational basis review of "morals" crimes and "victimless" crimes for years. Even before *Lawrence* was decided, courts struck down statutes criminalizing the possession of marijuana in the home,[175] the sale of sexual devices,[176] and marriage between siblings related by adoption.[177] In each of those cases, the court struck down the statute under a rational basis review, finding that the alleged harms were insufficient or nonexistent. Further, as the Court in *Lawrence* recognized, a number of state supreme courts invalidated state sodomy laws, often relying on the harm principle.[178]

Although courts in some high-profile cases have blatantly rejected *Lawrence*'s holding requiring meaningful rational basis review in criminal cases,[179] others have recognized that criminal statutes should be subject to such review. For example, a state supreme court invalidated the state's fornication statute under *Lawrence*.[180] That court explicitly rejected the trial court's finding "that valid reasons such as the protection of public health and encouraging marriage for the procreation of children are 'rationally related to achieve the objective of the statute.'"[181] The state supreme

[173] *See* Higdon, *supra* note 3, at 233-38 (evaluating cases and showing that rational basis test has real meaning in a variety of contexts).
[174] 517 U.S. 620, 640-44 (1996). *See* Barnett, *supra* note 89, at 1495.
[175] *See Ravin*, 537 P.2d at 511 (invalidating a law prohibiting the possession and private use of marijuana, reasoning that "mere scientific doubts will not suffice [and that] [t]he state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied").
[176] *See* State v. Brenan, 772 So. 2d 64, 72-76 (La. 2000) (engaging in extensive review of legislative history and rationales for criminal statute banning sale of sexual devices and finding that that statute did not bear a rational relationship to any legitimate governmental interest).
[177] *See* Israel v. Allen, 577 P.2d 762, 764-65 (Colo. 1978) (invalidating a statute criminalizing marriage between non-blood-related siblings because there was no harmful genetic threat).
[178] *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (citing cases). *See also* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (sodomy law violated equal protection and right to privacy); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (sodomy law violated equal protection).
[179] *See infra* Parts III(A)(1), III(B)(1).
[180] Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005).
[181] *Id.* at 368.

court concluded, "Regardless of the merit of the policies referred to by the trial court, the Supreme Court in *Lawrence* indicated that such policies are insufficient to sustain the statute's constitutionality."[182]

What would proof of harm look like in a post-*Lawrence* criminal case? While *Lawrence* did not lay out an explicit "harm" test, we can derive some general principles from general common law doctrine and from *Lawrence* itself. First, the state must show identifiable harm to person or property.[183] Physical harm, psychological harm, and financial harm would all suffice. That is not to suggest that defining "harm" is always an easy task, but it is a task in which *Lawrence* requires courts to engage.[184]

Second, such harm does not include "harm to society," a meaningless term that conflates harm with morality, often in an effort to invalidate the former as a basis for criminalization.[185] The Court implicitly recognized this conclusion in *Lawrence* by not accepting the "harm to society" justification for sodomy laws (the classic justification provided by Lord Devlin) and correctly labeling this argument as morality-based.[186] In any event, harm to society is not provable and, under the approach advocated here, would therefore not suffice.[187]

Third, we can subject proof of harm to causation principles that are well settled in federal and state law.[188] Courts are accustomed to

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[182] *Id.* at 370. As Professor Eskridge has recognized, the state's proffered rationales would have sufficed under the traditional rational basis analysis. *See* ESKRIDGE, *supra* note 165, at 344.

[183] *See* Goldberg, *supra* note 11, at 1236 (laws need to be supported by "demonstrable facts"); Hunter, *supra* note 135, at 1112 (post-*Lawrence*, states must justify laws by "some form of objectively harmful effects").

[184] For a detailed discussion of the concept of harm, see FEINBERG, *supra* note 155.

[185] Tiffani Lennon, *Stepping Out of the Competing Constitutional Rights Conundrum: A Comparative Harm Analysis*, 82 DENV. U. L. REV. 359, 389 (2004) (harm to others rather than harm to society is required).

[186] Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J,, concurring).

[187] *See* Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 17 (1999) (there is no proof that private sexual acts cause harm to society). Some of the most difficult issues of proof would likely arise in connection with obscenity. *See infra* Part IV(B)(1).

[188] In most jurisdictions, the harm from a criminal activity must be shown by both "but-for" and "proximate" cause tests, which assess whether the harm would have occurred but-for the defendant's act/omission and whether the harm was reasonably foreseeable. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 14.01-14.04 (5th ed. 2009). Whether this is the appropriate standard for addressing the

engaging in criminal causation analysis, in cases both straightforward (homicide cases, typically) and extremely complex (economic crimes, for example).

So, proof of harm requires proof; a bare assertion of harm will not meet the rational basis test. For example, feminist scholars have long asserted that pornography causes harm to women. Such harm is said to include both acts of sexual violence against women and societal degradation of women.[189] These are powerful arguments and may accurately describe pornography's effects. But, in a criminal case, bare assertions of such harm cannot suffice. We need proof—proof that the criminal activity causes the asserted harm. And we can assess the sufficiency of that proof under generally accepted principles of causation applicable in all criminal cases.[190]

C. Resurrecting *Lawrence's* Neutral Sexnorms

The other aspect of *Lawrence*'s substantive criminal law that has enormous potential implications going forward is the rejection of *Hardwick*'s adoption of heteronormative criminalization principles.[191] Despite predictions that *Lawrence* would be a criminal gay rights landmark,[192] the decision has had a mixed impact as a criminal law gay rights case.[193] One way to reinvigorate *Lawrence* as a gay rights case in the criminal context is to focus on its neutral sex norms.

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harm towards which criminal statutes are aimed is a complex topic that courts will need to evaluate as they apply *Lawrence*'s harm principle.

[189] *See* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 26 (1985).

[190] *See* Tennen, *supra* note 14, at 83 ("Without a valid, harm-based justification, the legislature has acted irrationally. That is, the legislation has no rational basis.").

[191] At noted above test at footnote 27, this paradigm presumes that any sexual activity other than vaginal intercourse between a man and woman is immoral and therefore subject to criminalization.

[192] *See, e.g.*, Harcourt, *supra* note 14, at 503 ("[*Lawrence*] will go down in history as a critical turning point in criminal law debates over the proper scope of the penal sanction."); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1554 (2004) ("[*Lawrence*] marked a dramatic milestone in efforts to limit state power to control homosexuality . . . ."); Mark Strasser, Lawrence *and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003, 1004 (2004) (describing *Lawrence* as "a watershed" in the gay rights movement).

[193] *See, e.g.*, Recent Cases, *supra* note 29, at 1070 ("[W]hile *Lawrence* has removed any lingering possibility that adults who engage in consensual noncommercial homosexual activity in the privacy of their own homes will face successful criminal prosecution, it has not eradicated the criminal statutes themselves nor their potential

Although the *Lawrence* decision avoided any discussion of the details and meaning of the sexual acts at issue, the nature of those acts—same-sex anal sex on the facts of the case, same-sex oral and anal sex under the statute itself—confers much of the decision's power as a doctrinal landmark. This is so for a simple reason. Any statute that criminalizes oral and anal sex but not vaginal sex must do so based upon the morality principle, for there is no valid harm-based justification for this distinction.[194] And any statute that criminalizes oral and anal sex—whether the statute applies only to homosexual acts or both to homosexual and heterosexual acts—sends a clear message: vaginal intercourse is the only morally acceptable form of penetrative sexual behavior. Homosexuals engage in illegal conduct any time they engage in intimate sexual activity involving any kind of penetration. Deeply intimate sexual acts are only available to straight people. Those straight people who engage in "normal" sex can meet our moral strictures, as embodied in our laws, but *homosexuals never can*. Homosexual sex is illegal; when "law" and "morality" are one, then homosexuality is immoral, and gay people are confined to a life of celibacy or must risk breaking the law. The *Lawrence* decision, without having the fortitude to put it so plainly, eviscerates such moral objections as the basis for criminal law.

The harm principle has been constitutionalized through *Lawrence* in a way that has profound implications for the lives of gay men, lesbians, bisexuals, and transgendered people. But the *Lawrence* opinion is not limited to people of minority sexual orientations and gender identities. It establishes the harm principle as the law of the land and requires lower courts to follow suit. The next task is to determine why lower courts have, by and large, failed to do so.

III. APPLYING *LAWRENCE*'S SUBSTANTIVE CRIMINAL LAW

For *Lawrence* to fulfill its precedential potential, courts will need to step away from the responses that most of them have had to *Lawrence* so far. Even assuming that a state need merely prove a rational basis to sustain a criminal sanction, *Lawrence* requires that a court do a serious analysis of the asserted justifications to assess whether the statutes truly seek to criminalize harmful activity. And for courts to engage in that exercise, they will need to have a clear

to inflict harm on gay and lesbian Americans."); Reinheimer, *supra* note 22, at 505 (noting that *Lawrence* has had "remarkably little impact" on gay rights litigation).

[194] *See infra* notes 273-75 and accompanying text.

understanding of how to apply the harm principle in specific situations. This section attempts to point the way to that end. It first examines the two areas that have produced the most extensive post-*Lawrence* litigation, sodomy laws and sex toy laws, and then concludes with an analysis of litigation that may occur in the years ahead.

A. Sodomy Laws

Sodomy laws are still on the books and enforced in states around the country in cases that do not involve private, consensual, or noncommercial sexual activities.[195] Those laws are still applied in ways that effectively stigmatize oral and anal sex, and that continue to enforce the hetero-sex norm of *Hardwick* by criminalizing the sexual acts towards which gay men, lesbians, and bisexuals are naturally inclined.[196] The vast majority of those laws have withstood *Lawrence*-based challenges.[197] This section analyzes two of the principal cases addressing challenges to state sodomy statutes and evaluates those decisions according to the substantive criminal law doctrine articulated in *Lawrence*.

1. In re RLC*: Rejecting* Lawrence's *Harm Principle and Maintaining Traditional Sex Norms*

[195] *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (thirteen states had laws criminalizing consensual sodomy in 2003). *See also* ESKRIDGE, *supra* note 165, at 387-408 (appendix listing states and their current sodomy laws). Often, consensual sodomy laws survive post-*Lawrence* scrutiny because as-applied challenges to those laws fail under *Lawrence*'s "limiting" language. For example, police sting operations ensnare gay men with charges of soliciting the officers to commit sodomy in *public* places. *See, e.g.*, State v. Pope, 608 S.E.2d 114, 115-16 (N.C. Ct. App. 2005); Singson v. Commonwealth, 621 S.E.2d 682, 685-89 (Va. Ct. App. 2005). *See also infra* Appendix. For an overview of sodomy and similar laws post-*Lawrence*, see Curtis & Gilreath, *supra* note 171, at 168-75.

[196] *Compare* Franke, *supra* note 35, at 1413 ("[S]ome lower courts may understand *Lawrence* to impose absolutely no check on the legal enforcement of heteronormative preferences."), *with* Stein, *supra* note 27, at 493 ("[*Lawrence*] revised the heteronormative vision of sexual freedom, equality, and citizenship that had guided the Court since the 1960s."). *See also* Dubler, *supra* note 27, at 758-70 (describing the history of "licit sex" as heterosexual intercourse within marriage, and *Lawrence*'s role in undoing this paradigm).

[197] *See* Recent Cases, *supra* note 193, at 1070 ("[W]hile *Lawrence* has removed any lingering possibility that adults who engage in consensual noncommercial homosexual activity in the privacy of their own homes will face successful criminal prosecution, it has not eradicated the criminal statutes themselves nor their potential to inflict harm on gay and lesbian Americans.").

Several cases have rejected *Lawrence*-based challenges to state sodomy laws. Both the holdings and underlying reasoning of these cases elucidate the lower courts' antipathy towards *Lawrence*'s criminal law.

In *In re R.L.C.*, the case discussed at the beginning of this article, a fourteen-year-old boy had been dating a twelve-year-old girl over the course of one spring and summer.[198] During that time, the two engaged in consensual intercourse and consensual oral sex.[199] Over a year after their relationship ended, the boy was charged with the equivalent of sodomy for committing a "crime against nature" with his former girlfriend based on two instances of oral sex.[200] The applicable statute provides that "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon."[201] State courts interpreted the statute to encompass oral sex.[202] Because the boy and girl were within three years of each others' ages, the state's Romeo and Juliet provision applied to its statutory rape law, and the boy could not be charged with a crime based on the vaginal intercourse. The defendant was found guilty of two counts of violating the crime against nature statute and sentenced to six months probation.[203]

The intermediate appellate court upheld the conviction, and the North Carolina Supreme Court affirmed.[204] The court first rejected the defendant's argument that the court should read the crime against nature statute in the context of related statutes[205]—statutory rape,[206]

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[198] *See In re* R.L.C., 643 S.E.2d 920, 921 (N.C. 2007).
[199] *See id.*
[200] *Id*.
[201] N.C. GEN. STAT. § 14-177 (2000).
[202] *See, e.g.*, State v. Poe, 252 S.E.2d 843, 845 (N.C. Ct. App. 1979) ("We believe that persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by [N.C. GEN. STAT. § 14-177 (2000)].").
[203] *In re R.L.C.*, 643 S.E.2d at 921. In some states, such a conviction would require the defendant to register as a sex offender for life. *See, e.g.*, Curtis & Gilreath, *supra* note 171, at 184-85 (describing a case where a fifteen-year-old girl asked a sixteen-year-old boy to let her perform oral sex on him; the boy was later convicted of a crime and required to register as a sex offender).
[204] *See In re R.L.C.*, 643 S.E.2d at 922 (considering only as an "As Applied" challenge to the statute).
[205] *See id.* at 923.
[206] *See* N.C. GEN. STAT. § 14-27.2(a)(1) (2004); *id.* § 14-27.7A.

statutory sex offense,[207] and indecent liberties[208]—all of which require an age differential of at least three years. In response, the court stated—in language highly reminiscent of *Hardwick*—that the crime against nature statute is "derived [from a law] older than our nation, tracing its roots back to . . . 1533."[209] The court then declined to read an age element into the statute, holding that "the plain language of the statute encapsulates the activity [of the boy and girl] and makes such action criminal."[210] Elsewhere, the court observed that "[t]he crime against nature statute prohibits *exactly* the actions committed by [defendant]."[211]

Turning to the defendant's due process challenge, the court stated that, because the defendant was not asserting a fundamental right, the state need only demonstrate a rational basis for the law.[212] The court then defined a rational basis as "any conceivable legitimate purpose."[213] The court quickly dispensed with the defendant's argument that *Lawrence* controlled by noting that the case involved minors.[214] Turning to the state's interest in the law, the court found a rational basis in (1) "the goal of promoting proper notions of morality among our State's youth," (2) "the government's desire for a healthy young citizenry," and (3) the need to protect children from the "psychological implications" of sexual activities.[215]

The majority's reasoning, and the language that it uses to support that reasoning, reveal much about its attitude towards *Lawrence*. First, the North Carolina court asserted that "[t]he law from which North Carolina's crime against nature statute is derived is

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[207] *See* N.C. GEN. STAT. § 14-27.4(a)(1) (2004) ("A person is guilty of a sexual offense in the first degree if the person engages in a sexual act [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.").

[208] *See* N.C. GEN. STAT. § 14-202.2(a) (1996).

[209] *In re R.L.C.*, 643 S.E.2d at 923. This may well have been intended to respond to language in *Lawrence* challenging the *Hardwick* Court's assertion that "to claim that a right to engage in such conduct is deeply rooted in this Nation's history and tradition . . . is, at best, facetious." Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (internal quotation marks omitted), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[210] *In re R.L.C.*, 643 S.E.2d at 923.

[211] *Id.* at 924.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 925.

[215] *Id.*

older than our nation,"[216] without providing any support for its assertion. The court was clearly echoing *Hardwick*'s now-discredited pronouncement that "[p]roscriptions against [consensual sodomy] conduct have ancient roots,"[217] while at the same time ignoring *Lawrence*'s careful historical analysis of the history of sodomy laws.[218] The North Carolina court apparently did not engage in any serious analysis of the history of sodomy laws, which historically were rarely enforced and in any event typically applied to anal sex but not oral sex.[219]

Second, the North Carolina court twice stated that the crime against nature statute on its face covers the defendant's conduct—oral sex—though the statute itself does no such thing.[220] The same court previously *interpreted* the statutory language to cover oral sex, and then only in 1965[221]—belying the concept of "ancient roots." The court did not analyze whether, in the 21st century in the United States, the common perception is that oral sex is a crime against nature while vaginal intercourse is not.[222]

Third, and most important, the court applied a rational basis test (any "conceivable legitimate purpose"), that is no test at all, and

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[216] *Id.* at 923.

[217] Bowers v. Hardwick, 478 U.S. 186, 192 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *See* Goldstein, *supra* note 53, at 1098-1103 (analyzing the flawed history used by the *Hardwick* majority and concurring opinions).

[218] Lawrence v. Texas, 539 U.S. 558, 571 (2003) (concluding after lengthy historical analysis that "the historical grounds relied upon in [*Hardwick*] are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.").

[219] *See* Goldstein, *supra* note 53, at 1082 & n.62-63.

[220] *In re R.L.C.*, 643 S.E.2d at 924 ("The crime against nature statute prohibits *exactly* the actions committed by R.L.C."). *See also id.* at 925.

[221] *See* State v. Harward, 142 S.E.2d 691, 692 (N.C. 1965) (construing broadly crimes against nature statutes as encompassing oral sex).

[222] By all indications, oral sex is as common a sex act as sexual intercourse today in the United States. In 2005, the Centers for Disease Control released the results of its comprehensive study on the sexual behavior of heterosexual males and females ages 15-44. Of adults ages 20-44, 86 percent have had oral sex compared to 93 percent of adults who have had sexual intercourse. Further, the study suggests teenagers are more likely to engage in oral sex than sexual intercourse. According to the results, approximately 55 percent of teenagers have had oral sex versus approximately 51 percent who have had sexual intercourse. *See* WILLIAM D. MOSHER ET AL., SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15-44 YEARS OF AGE, UNITED STATES, 2002, (2005), *available at* http://www.cdc.gov/nchs/data/ad/ad362.pdf.

then found that the test was satisfied by arguments that carry no weight after *Lawrence*. As shown above,[223] morality alone cannot be sufficient simply because the defendant is under eighteen years of age; even the "limiting language" of *Lawrence* does not foreclose an analysis of "actual harm" in situations that involve minors. And the argument that the criminalization of oral sex promotes a "healthy young citizenry"[224] is factually incorrect. The court cited one CDC study and ignored the substantial evidence that engaging in unprotected vaginal intercourse carries a substantial risk of transmitting HIV, while engaging in oral sex carries little or no risk of HIV transmission, and zero risk of pregnancy.[225] If health concerns govern, then vaginal intercourse would be a crime against nature and oral sex would not be.[226] Finally, the court mentioned the psychological health of youth.[227] Yet, the court cited nothing—no studies, no expert testimony, nothing—to support its conclusion that oral sex is more psychologically damaging than vaginal intercourse. The only apparent justification for the distinctions made by the legislature is a morality-based justification that is invalid after *Lawrence*.

For present purposes, the significance of the *R.L.C.* decision lies not so much in its outcome as in its rejection of *Lawrence*'s harm principle. Of course, the North Carolina court might have been bending over backwards to sustain a criminal law in order to punish the fourteen-year-old defendant for having sex with a twelve-year-old girl. But if that is true, the court's real complaint was with the state legislature, which declined to cover this activity under the state's

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[223] *See supra* Part II(B)(2).

[224] *In re R.L.C.*, 643 S.E.2d at 926 ("[T]he government's desire for a healthy young citizenry underscores the legitimacy of the government's interest in prohibiting the commission of crimes against nature by minors. Like vaginal intercourse, non-vaginal sexual activity carries with it the risk of sexually transmitted diseases.").

[225] *See HIV Transmission, Questions and Answers*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/resources/qa/transmission.htm (last modified March 25, 2010) ("[Oral sex] is a less common mode of transmission [for HIV] than other sexual behaviors . . . [and] [w]hile no one knows exactly what the degree of risk is, evidence suggests that the risk is less than that of unprotected anal or vaginal sex.").

[226] For example, oral sex between two women (a form of homosexual sodomy) poses little or no risk of transmission of sexually transmitted disease, while vaginal intercourse is one of the most effective means of transmission. *See* Kansas v. Limon, 122 P.3d 22, 36 (Kan. 2005).

[227] *See In re R.L.C.*, 643 S.E.2d at 925.

statutory rape laws. In any event, the decision's precedential impact reaches far beyond the facts of the case and ensnares all minors who engage in oral or anal sex in that state.

Other decisions have upheld statutes that are unjustifiable under a harm-principle approach. In *McDonald v. Commonwealth*, for example, the defendant was an adult male who was convicted of engaging in private, consensual oral sex (which the court termed "oral sodomy") with a sixteen-year-old female and seventeen-year-old female.[228] The sexual offenses to which the defendant's actions might have subjected him were Virginia's "carnal knowledge" statute[229] and "contributing to the delinquency of a minor" statute.[230] Because the age of consent for oral sex under Virginia's carnal knowledge statute was fifteen, that statute did not apply to the defendant's conduct. And because the state's statute criminalizing contributing to the delinquency of a minor did not cover oral sex, the defendant could not be convicted under that statute for engaging in oral sex with the females.[231] Nonetheless, the Virginia Supreme Court upheld the conviction under the state's *sodomy law*, which contains no age limitation. Because the females were minors under certain other provisions of Virginia law, even though they were above the age of consent, *Lawrence* did not apply, the court said, by virtue of *Lawrence*'s "limiting" language.[232] The court simply dismissed the defendant's argument that he engaged in private, consensual sexual activities with persons who were above the age of consent for purposes of the state's general sex offense statutes. The court engaged in no analysis of whether the defendant's "sodomy" caused harm when that

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[228] McDonald v. Commonwealth, 630 S.E.2d 754, 755 (Va. Ct. App. 2006). For an excellent analysis of the *McDonald* case, see Hillary A. Gerber, A Minor Dilemma: Reconciling Lawrence, Adulthood, and Age of Consent (2007) (unpublished manuscript) (on file with the author).

[229] VA. CODE ANN. § 18.2-63 (2007) ("If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.").

[230] *McDonald*, 630 S.E.2d at 757 ("[W]hen a person eighteen or older engages in consensual *sexual intercourse* with a child 15 or older not his spouse that person has committed a misdemeanor." (quoting VA. CODE. ANN. § 18.2-371 (2008)) (alteration in original) (internal quotation marks omitted).

[231] The defendant was convicted under the contributing to the delinquency of a minor statute for engaging in intercourse with one of the females. *McDonald*, 630 S.E.2d at 757.

[232] *See id.* ("The Supreme Court in *Lawrence* made quite clear that its ruling did not apply to sexual acts involving children.").

act was not even criminalized under the most directly applicable statutes.[233]

The *R.L.C.* and *McDonald* decisions demonstrate some courts' continued adherence to *Hardwick*'s morality-based approach to criminalization. At its core, *Lawrence* holds that states cannot criminalize consensual, private, non-commercial oral and anal sex, whether between same-sex or opposite sex partners. But in the *R.L.C.* case, the court upheld a state law that made it a crime for two minors to have oral sex even though it was not a crime for them to engage in vaginal intercourse.[234] Why? Because the case involved minors, *Lawrence* just did not apply, end of story. And according to the court, the state legislature deemed oral sex to be unnatural and *immoral*, a "crime against nature," whereas vaginal intercourse is natural and normal. The same analysis governed in *McDonald*, in which the court upheld the state's sodomy law as applied to young people, effectively criminalizing the kinds of sexual acts to which sexual minorities would be inclined.

What underlies these opinions? It is significant that the *R.L.C.* court relied on the "psychological health of youth"[235] to justify criminalizing oral sex but not vaginal intercourse. Why did the court conclude that oral sex is more psychologically damaging than vaginal intercourse? Implicit is a belief that traditional, heterosexual sex is psychologically normal and healthy. Any other kind of penetrative sex, oral or anal sex, is not normal and not healthy. Indeed, the statute at issue in the case criminalizes all types of oral and anal sex, including penetration by any parts of the body and by objects.[236] Thus, all kinds of sexual activity to which gay teens would be inclined are

[233] As in *In re R.L.C.*, some might argue that the ages of the parties may have affected the outcome. The defendant in *McDonald* was 45, and the victims were 16 and 17, respectively. 630 S.E.2d at 755. Nonetheless, the holding in each case is age-neutral; if we were to change the age of the *McDonald* defendant to 17, the outcome under the court's analysis would be the same. In any event, the key point here is not the outcomes in the cases, but their failure to engage in the very sort of serious, rational harm-based analysis that *Lawrence* requires.

[234] *In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007). In *R.L.C.*, the defendants were convicted under North Carolina's "crime against nature" statute. *See* N.C. GEN. STAT. ANN. § 14-177 (West 2000) ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.").

[235] *See In re R.L.C.*, 643 S.E.2d at 925.

[236] *See* State v. Stiller, 590 S.E.2d 305, 306-07 (N.C. Ct. App. 2004).

outlawed.[237] Mr. R.L.C. had an option. Young gay people do not. By definition, they are sexual outlaws in North Carolina, a result that should not withstand constitutional scrutiny after *Lawrence*.[238] Whether the argument is due process-based, as the *Lawrence* majority decision purports to be, or equal protection-based, as some argue *Lawrence* truly is,[239] the point is the same: criminalization of private, consensual sexual activities must meet a meaningful rational basis test. That test cannot be met by reliance on distinctions between "natural" sex and "unnatural" sex, *i.e*., a "crime against nature."

As shown in the Appendix, courts have repeatedly rejected *Lawrence*-based challenges to criminal statutes. What lessons can we draw from these kinds of post-*Lawrence* opinions? For criminal law analysis, these courts ignored *Lawrence*'s underlying theory and doctrine, rejecting *Lawrence*'s harm principle and relying on *Hardwick*'s morality rationale to sustain the laws at issue. For gay rights analysis, heterosexuals, who as a group are the ones more likely to practice "natural" sex, are entitled to engage in that behavior. Straight youth can have "natural" sex, that is, vaginal intercourse. For gay youth, however, the sort of penetrative sex that they would be likely to practice—anal intercourse or oral sex—is criminal behavior.[240] States have legislated and prescribed natural, hetero-sex, and the state supreme courts have approved of this scheme, even after *Lawrence*.

2. State v. Limon*: Applying* Lawrence's *Harm Principle and Rejecting Traditional Heteronorms.*

So how would a court engage in a clear-eyed application of the harm principle in a sodomy case? We need look no further than the Kansas Supreme Court's decision in *State v. Limon*.[241] This controversial criminal case had twice progressed through the Kansas courts, ending with a reversal by the Kansas Supreme Court based upon a straightforward application of *Lawrence*'s harm principle.

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[237] *See* Curtis & Gilreath, *supra* note 171, at 200 ("[Under] *R.L.C*., the sexual acts that express the sexual orientation of gay minors are always criminal.").

[238] *See id.* at 157 ("[S]tatutes that uniquely punish noncoerced oral or anal sex between minors while leaving vaginal sex unpunished or less severely punished are so irrational that they violate equal protection and the rationality required by due process.").

[239] *See supra* note 85 and accompanying text.

[240] *See* Curtis & Gilreath, *supra* note 171, at 200.

[241] State v. Limon, 122 P.3d 22 (Kan. 2005).

Limon was a male who had turned eighteen just a week before engaging in consensual oral sex with another male who was fourteen years of age.[242] Both were members of a group home and were developmentally disabled. On the basis of the sexual conduct, and a sentence enhancement for two previous similar offenses, the defendant was convicted of sodomy and sentenced to over seventeen years in prison.[243] He was also subjected to five years of post-release supervision and required to register as a sex offender.

Like many states, Kansas has a "Romeo and Juliet" statute applicable to young sex offenders who commit offenses with other young people within a specific age range.[244] In Kansas, an offender under nineteen who commits a sex offense with another person who is fourteen or fifteen but within four years of age of the defendant receives a reduced sentence.[245] Under this statute, Limon's sentence would have been thirteen to fifteen months, with no post-release supervision, and no required sex offender registration—instead of over seventeen years. Under its plain terms, however, the Kansas statute applies only when "the victim and offender are members of the opposite sex."[246] Thus, Limon's sentence was nearly sixteen times longer because he had oral sex with a male instead of a female.

In a pre-*Lawrence* decision, the Kansas intermediate appellate court affirmed Limon's sentence, primarily relying on *Hardwick*, and the Kansas Supreme Court declined to review the decision.[247] Limon filed a petition for certiorari to the United States Supreme Court, which decided *Lawrence* while the petition was pending. The day it decided *Lawrence*, the Court granted Limon's petition and remanded for reconsideration in light of *Lawrence*.[248] The intermediate appellate court again affirmed Limon's sentence, focusing on *Lawrence*'s "limiting" language and finding *Lawrence* inapplicable to Limon because his offense involved a minor. The court also declined to rule

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[242] *Id.* at 24.
[243] *Id.* at 25.
[244] *Id.* For an analysis of Romeo and Juliet statutes, see Curtis & Gilreath, *supra* note 171, at 168-78; Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241 (2009).
[245] *Limon*, 122 P.3d at 24 (citing KAN. STAT. ANN. § 21-3522 (1999)).
[246] *Id.* at 24 (citing KAN. STAT. ANN. § 21-3522 (1999)).
[247] *Id.*
[248] Limon v. Kansas, 539 U.S. 955, 955 (2003) (vacating judgment of *State v. Limon*, 41 P.3d 303 (Kan. 2002), in light of *Lawrence*).

on Limon's equal protection argument because *Lawrence* had not been decided on that ground.[249]

As seen in Part I(B)(2) above, most courts view *Lawrence*'s "limiting" language as absolute and so this could have been the end of the story because the case involved a minor. This time, however, the Kansas Supreme Court took a far more nuanced and enlightened view. Having initially declined to review Limon's sentence pre-*Lawrence*, the Court post-*Lawrence* unanimously found that decision controlling, struck the Romeo and Juliet statute's language excluding homosexual acts, and overturned Limon's sentence. The Court did so based upon the Equal Protection Clause, relying on both *Lawrence* and *Romer*.

Although an equal protection case, the *Limon* court's analysis closely follows *Lawrence* in key respects. First, the court found that the Kansas statute discriminated against homosexuals.[250] Second, the court found that *Lawrence*'s emphasis on the stigmatizing effect of Texas's sodomy law applied with equal force to the sentencing law at issue in *Limon*.[251] Finally, the court dismissed the argument that *Limon* could not rely on *Lawrence* because the victim was a minor, noting that the stigmatizing effect of disparate treatment for homosexuals is at least as great for young people as it is for adults.[252]

Next, the court put the lie to the proposition that rational basis means "any conceivable basis." According to the Kansas court, *Lawrence* found neither that homosexuals are a suspect class nor that homosexual sodomy is a fundamental right. Thus, the court applied the rational basis test. This is the heart of the opinion. Relying heavily on *Romer*, the Kansas court proceeded to determine whether "'classification bear[s] a rational relationship to an independent and legitimate legislative end.'"[253] In this way, the Kansas court was adhering to a form of meaningful rational basis review that courts have

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[249] *Limon*, 122 P.3d at 26.

[250] Although the record did not state whether Limon was a homosexual, the court cited Justice Scalia's *Romer* dissent to make its point: "[T]here can hardly be more palpable discrimination against a class than making the *conduct* that defines the class criminal." *Id.* at 28 (quoting Romer v. Evans, 517 U.S. 620, 641 (1996)). The court later focused on the "harshly disparate sentencing treatment of those 18 years old and younger who engage in voluntary sex with an underage teenager of the same sex." *Id.* at 32.

[251] *Id.* at 28-29.

[252] *Id.* at 29.

[253] *Id.* at 30 (quoting Romer v. Evans 517 U.S. 620, 633 (1996)). For an analysis of this aspect of *Limon*, see Higdon, *supra* note 3, at 240-45.

been applying to criminal statutes in varying degrees since the 1970s.[254]

This is the most significant, detailed, harm-based analysis by any post-*Lawrence* court, and provides a blueprint for courts going forward. Finding no legislative history on the decision to limit the Romeo and Juliet statute to heterosexual activity, the court then proceeded to analyze all of the state's proffered reasons under a rational basis analysis. The court's analysis applies equally to substantive criminalization issues and to substantive criminal sentencing issues.[255] The court's analysis also applies equally to the meaningful rational basis test that *Lawrence* requires, whether the analysis falls under the Due Process Clause or the Equal Protection Clause.

First, the state argued that the statute protected and preserved "the traditional sexual mores of society."[256] The court rejected this argument, based upon *Lawrence*'s holding that majoritarian morality is not a sufficient basis for upholding a criminal law.[257] In finding that popular morality does not constitute a rational basis, the court relied upon the *Lawrence* language discussed in Part I(B)(2) above, including *Lawrence*'s conclusion that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[258] In addition, the court quoted Justice Scalia's conclusion that, if "'the promotion of majoritarian sexual morality is not even a legitimate state interest,' the

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[254] *See* Curtis & Gilreath, *supra* note 171, at 193 ("In the early 1970s, a heightened form of rational basis analysis emerged under equal protection and due process, often referred to as 'rational basis with bite.'" (citing Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-21 (1972))).

[255] *See* Greene, *supra* note 82, at 1919 (*Limon* demonstrates that "the principles of *Lawrence* . . . inform judicial review of a sentencing enhancement no less than they do primary conduct."). *See also* People v. Hofsheier, 129 P.3d 29, 41 (Cal. 2006) (relying on *Lawrence* to hold that there is no rational basis for requiring lifetime sex offender registration for an adult who had oral sex with a sixteen-year-old but not requiring such sex offender registration for an adult who had intercourse with a sixteen-year-old). *Cf.* Gonzalez v. Duncan, 551 F.3d 875, 888-89 (9th Cir. 2008) (holding that a life sentence for failing to update sex offender registration is cruel and unusual punishment under the Eighth Amendment because the sentence serves no rational basis); Christopher J. DeClue, Comment, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 42 SW. L. REV. (forthcoming 2011).

[256] *Limon*, 122 P.3d at 33-34.

[257] *Id.* at 34-35.

[258] *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003)).

statute cannot 'survive rational-basis review.'"[259] The court also found that *Lawrence*'s harm principle applies equally to due process and equal protection challenges to legislation.[260]

Second, the state argued that the law supported the "moral and sexual development of children."[261] Relying upon *Carey*'s holding that states may not criminalize the distribution of contraceptives to persons under sixteen, the court stated that the issue under *Lawrence* was whether "the justifications for criminalizing homosexual activity between teenagers . . . are somehow different than the justifications for criminalizing adult homosexual activity."[262] The court then did exactly the sort of harm-based analysis that *Lawrence* requires. The court noted that the state had provided no "scientific research or other evidence justifying the position that homosexual activity is more harmful to minors than adults."[263] Indeed, the evidence before the court showed that sexual orientation is established by the time a person turns fourteen, that teens' sexual experiences do not affect their sexual orientation, and that efforts to change sexual orientation do not work. Finally, the court noted that, under *Lawrence*, moral disapproval of homosexuality is not a rational basis.[264]

Third, the state relied upon "the coercive effect often existing in a relationship between an adult and a child."[265] The court responded that there was no basis in the record for concluding that consensual homosexual activity involving minors is more coercive than consensual heterosexual activity involving minors. Without proof, the court was unwilling to accept the state's assertion.[266]

Fourth, the state relied upon public health concerns, particularly upon the state's interest in reducing the spread of sexual transmitted diseases in general and HIV in particular. This is an argument long made in support of sodomy laws, an argument that state

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[259] *Id.* at 38 (quoting Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting)).
[260] *Id.* at 34.
[261] *Id.* at 35.
[262] *Limon*, 122 P.3d at 35 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977)).
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.* The court also noted that the purpose underlying the Romeo and Juliet statute—to reduce punishment for teens who engage in consensual sex with other teens—undermined the state's argument. *See id.*

supreme courts have previously rejected.[267] But the argument has had a certain staying power. One post-*Lawrence* commentator argued that *Lawrence* would have come out differently under a rational basis test if the state of Texas had provided evidence of a public-health rationale for its sodomy statute.[268]

The public health argument assumes that any asserted rationale constitutes a rational basis sufficiently meaningful to sustain a criminal statute.[269] The public health rationale, by focusing on some homosexual acts that pose little or no risk of HIV transmission, while ignoring riskier heterosexual acts, suffers from this flaw and should not pass constitutional muster.[270] In the criminal context, as the state court decisions discussed in Part III above show, and as *Lawrence* implies, the harm-based statutory goals must be at least clearly articulated and reasonable. Irrational, post-hoc justifications of the sort asserted in *R.L.C.* and *Limon*, for example, cannot suffice for a criminal statute.

The relevant portion of the *Limon* opinion provides a straightforward application of *Lawrence* on this issue. Examining the scientific and statistical evidence, the court found that "for [the public health] justification to be rational, the prohibited sexual activities

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[267] *See, e.g.*, J. Kelly Strader, *Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 DENV. U. L. REV. 337, 347-52 (1993).

[268] Professor Dale Carpenter argues that *Lawrence* did not apply a rational basis test and that, if it did, a Texas-style sodomy statute could survive constitutional challenge based upon a legislatively determined public health rationale. Carpenter, *supra* note 77, at 1159.

[269] Professor Carpenter's own analysis shows that the public health rationale does not hold water. *See id.* at 1158 ("While the public-health objective is legitimate, same-sex sodomy laws are only tenuously related to it, if at all."). For example, oral sex between two women (a form of homosexual sodomy) poses little or no risk of transmission of sexually transmitted diseases, while vaginal intercourse is one of the most effective means of transmission. *See Limon*, 122 P.3d at 36. For an overview of health justifications that states have asserted in connection with the criminalization HIV-AIDS exposure, see J. Kelly Strader, *Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 DENV. U. L. REV. 337 (1993).

[270] As Professor Dale Carpenter noted, apparently even Justice Scalia found the public health argument so baseless that he did not rely on it in his dissent. Carpenter, *supra* note 77, at 1159. Another court rejected a similarly weak public health argument that the state asserted in support of its criminal fornication statute. Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005) (rejecting the state's argument that extra-marital intercourse created public health risks that provided a rational basis for the state statute criminalizing fornication).

would have to be more likely to transmit disease when engaged in by homosexuals than by heterosexuals; however, this proposition is not grounded in fact."[271] For example, the court noted that a majority of the HIV-positive population in the age group covered by the Romeo and Juliet statute were women, but that "the risk of transmission of [HIV] through female to female contact is negligible."[272] Quoting the Supreme Court's earlier holding that struck down a law criminalizing the sale of contraceptives to minors, the court in *Limon* concluded that "the 'statute's superficial earmarks as a health measure' do not satisfy scrutiny under the rational basis test."[273]

The *Limon* decision is also notable for its rejection of the morality-based assumptions underlying the *Hardwick* decision. In two opinions rendered before the Kansas Supreme Court's opinion in *Limon*, the Kansas intermediate appellate court had dismissed Limon's claim on *Hardwick*-based grounds.[274] First, in a pre-*Lawrence* decision, that court expressly relied on *Hardwick* to reject Limon's claim.[275] Second, even after the United States Supreme Court reversed and remanded that decision for reconsideration in light of *Lawrence*, that same intermediate appellate court reached the same conclusion, essentially ignoring the *Lawrence* decision. Most significantly, the Kansas court on post-*Lawrence* remand quickly found that *Lawrence* was not applicable because the *Limon* case involved a minor.[276] In addition, that court, like the court in *R.L.C.*, flatly rejected the proposition that *Lawrence* created a level sexual playing field for sexual minorities. The court reached this conclusion because, it stated, *Lawrence* rested on due process rather than equal protection grounds.[277]

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[271] *Limon*, 122 P.3d at 36.
[272] *Id.*
[273] *Id.* at 37 (quoting Eisenstadt v. Baird, 405 U.S. 438, 452 (1972)). The court also dismissed two other proffered justifications—that the state had an interest in promoting relationships that lead to procreation and protecting those in group homes. The court simply noted, as to the first, that the state's interest is to discourage, not promote, teen pregnancies, and that the statute on its face bore no relation to the residents of group homes. *Id.* at 37-38.
[274] *Id.* at 25.
[275] The Kansas Supreme Court described the earlier decision: "Limon appealed [his sentence], and the Court of Appeals affirmed his conviction and sentence . . . . The Court of Appeals' decision was based primarily upon *Bowers v. Hardwick* . . . ." *Id.* at 25 (citation omitted).
[276] *Limon*, 83 P.3d at 234.
[277] *Id.* at 234-35.

The Kansas appellate court further analyzed whether there was a rational basis for the statutory sentencing disparity. The court proceeded to rely upon the heterosexual norm as the guiding paradigm: "the legislature could have reasonably determined that to prevent the *gradual deterioration of the sexual morality* approved by a majority of Kansans, it would encourage and preserve the *traditional [read: hetero-] sexual mores of society*."[278] If this were not clear enough, the court continued: "the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the *traditional* sexual development of children."[279] And the coup de grâce: "*traditional* sexual mores concerning marriage and procreation have been important to the very survival of the human race. . . . [S]exual acts between same-sex couples do not lead to procreation on their own."[280] The appellate court, like the court in *R.L.C.*, flatly rejected *Lawrence*'s harm principle and, in the process, rejected *Lawrence*'s holding that homosexuals deserve the same right to sexual privacy as heterosexuals.[281]

In reversing, the Kansas Supreme Court not only squarely applied the harm principle, but in the process also rejected the lower court's *Hardwick*-era, heterocentric view of the right to sexual privacy. The Kansas Supreme Court held that: (1) *Lawrence*'s reasoning that disparate treatment for sexual minorities has a "demeaning and stigmatizing effect" is applicable to all, including young people;[282] (2) protecting "the traditional sexual mores of society" is not a rational basis after *Lawrence*;[283] (3) there is no evidence that discouraging homosexual activity among young people could affect their sexual orientation;[284] and (4) even if there were such evidence, such a hetero-normative legal preference is not a rational basis for a law under *Lawrence*.[285]

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[278] *Id.* at 236 (emphasis added).
[279] *Id.* (emphasis added).
[280] *Id.* at 237 (emphasis added).
[281] *See* Franke, *supra* note 35, at 1412.
[282] State v. Limon, 122 P.3d 22, 29 (Kan. 2005).
[283] *Id.* at 33-34.
[284] *Id.* at 35.
[285] *Id. See* Franke, *supra* note 35, at 1413. For an analogous application of rational basis principles to a law punishing oral sex more severely than intercourse, see People v. Hofsheier 129 P.3d 29, 39-41 (Cal. 2006) (finding no rational basis for requiring lifetime sex offender registration for adult who had oral sex with a sixteen-year-old but not requiring such sex offender registration for adult who had intercourse with sixteen-year-old).

That the Kansas Supreme Court based its holding squarely on *Lawrence* cannot be doubted. The Kansas Supreme Court denied review of the first intermediate appellate decision that upheld Limon's sentence under *Hardwick*. After the United States Supreme Court vacated and remanded that decision, the intermediate appellate court essentially reissued its prior ruling. Only then did the Kansas Supreme Court overtly acknowledge that alleged societal interests in maintaining heterosexuality as the governing norm is not a rational basis for discrimination. The court simply recognized a proposition that should be obvious, yet still is not, to many courts: the right to sexual privacy is neutral as to sex and sexual orientation.

B. Sex Toy Laws

The federal circuit court split over laws criminalizing the sale of sex toys presents the most pointed post-*Lawrence* manifestation of the continued uncertainty over the decision's precedential value.[286] The two circuit court decisions present diametrically opposed views of *Lawrence*'s meaning, with the Eleventh Circuit continuing to adhere to a *Hardwick*-era morality-based approach to criminalization and the Fifth Circuit embracing *Lawrence*'s harm-based approach. The sharply divergent analysis and rhetoric of the opinions portend the continued uncertainty over *Lawrence*'s meaning and significance.

1. Williams v. Morgan*: Rejecting* Lawrence's *Harm Principle and Maintaining Traditional Heteronorms*

The Eleventh Circuit case, *Williams v. Morgan*,[287] involved an Alabama statute that criminalizes the sale of devices used "primarily for the stimulation of human genital organs."[288] This provision, adopted as an amendment to the state's anti-obscenity statute in 1998, is of relatively recent origin.[289] Violations of this criminal statute are

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[286] *See* Jamie Iguchi, Comment, *Satisfying* Lawrence*: The Fifth Circuit Strikes Ban on Sex Toy Sales*, 43 U.C. DAVIS L. REV. 655, 669-71 (2009); Waldo, *supra* note 110, at 818.

[287] Williams v. Morgan, 478 F.3d 1316, 1317 (11th Cir. 2007), *cert. denied sub. nom*, Williams v. King, 552 U.S. 814 (2007). This is the Eleventh Circuit opinion referred to here as "*Williams*."

[288] ALA. CODE § 13A-12-200.2(a)(1) (2000). The statute exempts sales "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." *Id.* § 13A-12-200.4. The statute does not apply to possession or use of the devices, or to non-commercial distribution of the devices. *Williams*, 478 F.3d at 1318.

[289] Williams v. Pryor, 41 F. Supp. 2d 1257, 1258-59 (N.D. Ala. 1999). The district court's initial 1999 decision in this litigation is 37 pages long and contains the most detailed analysis of the statute's history and coverage. *See id*. at 1258-73.

misdemeanors punishable by a $20,000 fine and imprisonment of not more than a year. Subsequent violations are treated as felonies. The *Williams* plaintiffs included married and unmarried users of sexual devices and people who sold those devices in retail stores and from their homes.[290] In *Williams v. Morgan*, the Eleventh Circuit issued its third decision in litigation lasting nearly a decade, and the United States Supreme Court denied review.[291]

When assessing the validity of the statute for the third time, and for the second time post-*Lawrence*, the court framed the issue so as to raise *Lawrence*'s meaning head on: "The only question remaining before us is whether public morality remains a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas*."[292] In a rebuff to the *Lawrence* majority, the court bluntly held that "[b]ecause we find that public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*, we affirm."[293]

Like the court in *R.L.C.*, the court in *Williams* squarely accepted the morality-based justification for the statute the court was evaluating. The court began by assuming that *Lawrence* did not find a fundamental right and that the Court in *Lawrence* had applied a rational basis test to the Texas sodomy law.[294] The *Williams* court acknowledged that language in *Lawrence* states that public morality does not justify criminalization, but then quickly turned to *Lawrence*'s

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[290] *Williams*, 478 F.3d at 1318.

[291] The district court struck down the statute banning the sale of sex toys, holding that the statute violated the right to sexual privacy under a rational basis test. *Williams v. Pryor*, 41 F. Supp. 2d at 1293. The Court of Appeals reversed and remanded, holding that public morality provides a rational basis and directing the court to evaluate the statute under an as-applied challenge to the statute. Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001). On remand, the district court found that the statute violated a fundamental right to sexual privacy under a strict scrutiny test. Williams v. Pryor, 220 F. Supp. 2d 1257, 1284 (N.D. Ala. 2002). Once again, the Eleventh Circuit reversed and remanded, holding that *Lawrence* did not create a fundamental right and directing the district court to determine whether public morality alone is a rational basis in light of *Lawrence*. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1234 (11th Cir. 2004). On remand for the third time, the district court upheld the statute, finding that public morality provides a rational basis for the statute. In the opinion at issue here, the appeals court affirmed. Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007), *cert. denied sub nom*, Williams v. King, 552 U.S. 814 (2007).

[292] Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007).

[293] *Id.*

[294] *Id.* at 1320.

limiting language to distinguish the case: "Unlike *Lawrence,* the activity regulated here is *neither* private *nor* non-commercial."[295] Quoting its own earlier decision, the court provocatively stated that "'[t]here is nothing 'private' or 'consensual' about the advertising and sale of a dildo.'"[296] Because the case involved public activity, *Lawrence* did not apply. For the sake of argument, the court assumed that *Lawrence* required proof of harm. Then the court invoked faux harm principle language—"harm to the public"—to support the statute, without stating what exactly that harm might be or providing any evidence of that alleged harm.[297] The court thus engaged in the rhetorical sleight of hand—morality equals "harm to society"—frequently used to conflate harm with morality.

As an alternative basis for its ruling, the court in *Williams* held that the *Lawrence* Court did not really mean it when it stated that majoritarian morality is an invalid basis for criminalization.[298] If we had any doubt as to why *Lawrence* has largely failed as precedent in criminal cases, we need look no farther than *Williams*'s reliance on *Hardwick* for the proposition that "'[t]he law . . . is constantly based on notions of morality.'"[299] Plainly, the Eleventh Circuit rejected *Lawrence*'s underlying rationale and continued to adhere to an overturned decision that was based upon a different rationale that the Eleventh Circuit continued to accept. The court also cited Justice Scalia's *Lawrence* dissent for the proposition that morality necessarily remains a valid basis for criminalization—otherwise, the court emphasized, quoting Justice Scalia's dire warning, we all face a "massive disruption of the social order."[300]

The *Williams* decision essentially rests on *Hardwick*'s reasoning and on Justice Scalia's *Lawrence* dissent. In a unanimous decision, the court refused to apply *Lawrence*'s basic rationale, and could hardly have been more direct in saying so. The Alabama

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[295] *Id.* at 1322.
[296] *Id.* (quoting Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1237 n.8 (11th Cir. 2004)).
[297] *Williams*, 478 F.3d at 1322 ("States have traditionally had the authority to regulate commercial activity they deem harmful to the public.").
[298] *Id.* at 1323.
[299] *Id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).
[300] *Id.* at 1320 ("To hold that public morality can *never* serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the social order,' one this court is not willing to set into motion." (quoting Lawrence v, Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting)) (internal quotation marks omitted) (alteration in original)).

Supreme Court followed suit when it later used the same reasoning to reject a state constitutional challenge to the state's sex toy statute.[301]

Like the court in *R.L.C.*, the court in *Williams*, in addition to rejecting the harm-principle as the basis for criminalization, reinforced the *Hardwick*-era heterosexual norm. The asserted threat from the "massive disruption to the social order" apparently reflects the belief that "harm to society" will occur from the rampant use of sexual devices. Implicit in the language of the opinion is the threat sex toys pose to male heterosexual dominance.

In its opinion, the Eleventh Circuit mentioned only one of the many sexual devices covered by the statute—the dildo: "There is nothing 'private' or 'consensual' about the advertising and sale of a dildo."[302] Of all the possible sexual devices upon which the court could have focused, it chose the one that most clearly represents the penis. The court did not use the less provocative term "vibrator," perhaps because the record noted that vibrators need not resemble penises.[303] Nor, more significantly, did the court reference any sexual devices primarily used by heterosexual males, such as artificial vaginas and inflatable female dolls.[304]

Instead, of all the myriad sexual devices discussed in the record,[305] the court only mentioned the dildo. We can only speculate,

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[301] In a five-to-two decision, the court in *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 345 (Ala. 2010), relied on *Williams* and held that "public morality can still serve as a legitimate rational basis for regulating commercial activity, which is not a private activity."

[302] *Williams*, 478 F.3d at 1322 (quoting Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1237 n.8 (11th Cir. 2004)) (internal quotation marks omitted). A dildo is "an object resembling a penis used for sexual stimulation." *Dildo Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/dildo (last visited July 13, 2010).

[303] *See* Williams v. Pryor, 41 F. Supp. 2d 1257, 1265 (N.D. Ala. 1999) ("[A] vibrator may or may not be penis shaped and may or may not be used for vaginal insertion.").

[304] *See id.* at 1291.

[305] As the district court stated in its initial opinion, the statute covers:

> [D]evices which depict human genitals. Those devices generally are designed for use as such organs and are used in sexual acts. They include penis-shaped dildos and artificial vaginas. Many sexual devices do *not* represent human genitals, however, and some bear absolutely no resemblance to such organs. Other common sexual devices noted in the record include: vibrators and other stimulators, which may or may not be in the form of a penis, and may or may not be designed for insertion into the vagina; penis

of course, as to why the court chose to distinguish *Lawrence* by employing provocative language that focuses solely on the sale of dildos. But if we believe that the language in judicial opinions means something, this particular passage merits close examination in light of *Lawrence*'s essential harm-based holding.

The *Williams* court chose the dildo, the ultimate representation of the erect penis, as its representative term for all sex toys. Why would the court conclude that a state may determine that it is immoral to sell dildos specifically? Perhaps because dildos do not fit within the traditional, straight, male-dominant view of sexuality.[306] Straight and gay women, and gay men, may use dildos, but not those engaging in traditional, hetero sex. The Court in *Lawrence* held that majoritarian views of what is moral or proper sexual behavior cannot justify criminalizing sexual conduct. It is not too difficult to conclude that the court in *Williams*—having explicitly relied upon *Hardwick*'s morals-based rationale and upon Justice Scalia's morals-based *Lawrence* dissent—invoked the dildo precisely because the dildo represents non-traditional sexuality. Traditional sex is moral; non-traditional sex can be deemed immoral and subject to criminalization. This reading simply comports with the *Williams* decision's plain language rejecting *Lawrence*'s underlying holding that criminalization must be sexually neutral.

2. Reliable Consultants v. Earle*: Applying* Lawrence's *Harm Principle and Rejecting Traditional Heteronorms.*

In contrast to *Williams*, in *Reliable Consultants v. Earle*,[307] the two-member majority of a Fifth Circuit panel held Texas's sex toys statute unconstitutional. Subsequently, the Fifth Circuit issued an

> extenders; penis enlargement pumps; genital rings; anal beads; and inflatable dolls.

Williams, 41 F. Supp. 2d at 1291.

[306] The three-male judge panel included court of appeals judges Charles Wilson and Joel Dubina, as well as district court judge Terrell Hodges sitting by designation. The Alabama Supreme Court waived the same dildo at us in *1568 Montgomery Highway, Inc.* when it quoted the *Williams* dildo language. *See* 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 346 (Ala. 2010).

[307] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008), *en banc reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

order denying an en banc review of the panel decision, over the dissents of seven judges.[308]

The Texas statute at issue, like the Alabama sex toys statute, was an amendment to the state's criminal anti-obscenity statute. The Texas statute criminalizes the "promotion"—defined to include selling, giving, lending, distributing, or advertising—of any device "designed or marketed as useful primarily for the stimulation of human genital organs."[309]

The plaintiffs, who sold sexual devices at retail establishments in the state and from outside the state by mail order, framed the issue in *Lawrence* terms: "the right at stake is the individual's substantive due process right to engage in private intimate conduct free from government intrusion."[310] The state framed the issue in *Hardwick* terms: the right at issue is "the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship."[311] The state of Texas, like the state of Alabama in *Williams*, hoped that the Fifth Circuit, like the Eleventh Circuit, would align itself with *Hardwick* and with Justice Scalia's *Lawrence* dissent.

The court rejected this casting of the issue. Instead of framing the constitutional right in terms of the specific sexual acts, the Fifth Circuit held that it was bound by *Lawrence* to apply a general right to sexual privacy: "The right [that *Lawrence*] recognized was not simply a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding 'the most private human [conduct], sexual behavior.'"[312] The Fifth Circuit also rejected a reading of *Lawrence* that some courts and commentators have supported, which limits *Lawrence* to statutes targeting particular

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[308] Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting from the denial of rehearing en banc). Unlike the Alabama statute in *Williams*, which covers only sales, the Texas statute also covers gifts, and thus would ensnare Santa should he decide to leave a vibrator in a Christmas stocking.

[309] *Reliable Consultants*, 517 F.3d at 740-41 (quoting TEX. PENAL CODE ANN. §§ 43.21(a)(5)-(7) (2008)). The court noted that three other states—Mississippi, Alabama, and Virginia—have similar statutes, while the highest courts in Louisiana, Kansas, and Colorado had held their state's sexual device statutes unconstitutional. *Id.*

[310] *Id.* at 743.

[311] *Id.*

[312] *Id.* at 744 (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)). In quoting from *Lawrence* regarding the right at issue, the Fifth Circuit mistakenly substituted the word "conduct" for "contact. *See id.*

groups. In response, the court emphasized that *Lawrence* was grounded in substantive due process rather than equal protection.[313]

So framed, the court held the statute unconstitutional, citing the Supreme Court decisions overturning bans on the sale and distribution of contraceptives, *Carey* and *Griswold*.[314] The court declined to assess whether a fundamental right was at issue, stating that its obligation under *Lawrence* was simply to assess whether a legitimate governmental interest supported the statute's infringement on the "right to sexual privacy."[315] The court noted that the state's "primary justifications for the statute are 'morality based' . . . includ[ing] 'discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex.'"[316]

The battle over *Lawrence*'s meaning could not be more clearly framed than it is in the sex toy circuit split. The Eleventh Circuit explicitly upheld majoritarian morality as a basis for criminalization, citing *Hardwick* and Justice Scalia's *Lawrence* dissent, while the Fifth Circuit took the opposite view: "interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*. To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive."[317]

Morality alone, the court held, is not "a rational basis" for a criminal statute.[318] The court also rejected the state's alternative rationale—"the protection of minors and unwilling adults from exposure to sexual devices and their advertisement"—holding that the absolute ban was far too "heavy-handed" for there to be a "rational connection" between the statute and the stated goal.[319]

As noted above, the decision was two-to-one. The dissenting judge essentially adopted the reasoning of the Eleventh Circuit in *Williams*, finding that morality is a legitimate basis for a criminal statute that involves "public and commercial" conduct.[320] Like the court in *Williams*, the *Reliable Consultants* panel dissent relied upon

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[313] *Id.* at 744.
[314] *Id.*
[315] *Id.* at 745 n.32.
[316] *Id.* at 745.
[317] *Id.*
[318] *Id.*
[319] *Id.* at 746.
[320] *Id.* at 749 (Barksdale, J., dissenting).

Justice Scalia's *Lawrence* dissent to argue that the statute was constitutional.

Seven judges also dissented from the Fifth Circuit's denial of an en banc rehearing.[321] One of the dissenters took the *Williams* route, stating that "[i]t is not for lower courts, in our view, to leverage *Lawrence* into overriding all sorts of 'morals' laws in defiance of the democratic processes that produced them."[322] The other dissent is remarkable for its criticism of the highest court in the land. Directly confronting the *Lawrence* majority, the dissent stated that legislative judgments "*may and should express the moral judgment of the majority*."[323] Not surprisingly, this dissent cited and relied squarely on Justice Scalia's dissent in *Lawrence*. Majoritarian morality remains the preferred criminalization principle for many judges, despite *Lawrence*'s directive to the contrary.

The court in *Reliable Consultants* also applied the sexually-neutral assumptions that *Lawrence* requires. The Fifth Circuit rejected all the *Hardwick*-based rationalizations offered by the state. The court gave no weight to the "harm to society" arguments implicit in the state's framing of the issue, and thus recognized that all people have the right to obtain and use sex toys. The court declined to frame the issue in heteronormative terms, that is, it did not rely upon the premise that non-traditional sex may be deemed immoral and subject to criminalization; there is not a single dildo waved at us in the *Reliable Consultants* opinion.

Thus, the post-*Lawrence* sex wars continue. Of the two panel opinions in the sex toys cases, six federal circuit court judges have considered whether *Lawrence* invalidates criminal statutes that forbid the distribution of sex toys. Of those six, four judges voted to find that *Lawrence* did not apply to those statutes and, in the process, stated plainly that majoritarian morality remains a legitimate basis for criminalization, even after *Lawrence*. And seven more federal circuit

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[321] Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting from the denial of rehearing en banc); *id.* at 357 (Garza, J., dissenting from the denial of rehearing en banc); *id.* at 365 (Elrod, J., dissenting from the denial of rehearing en banc). Chief Judge Jones was joined by four other judges, and the other two dissenters wrote individually, for a total of seven dissenters. Oddly, Judge Barksdale, who dissented from the panel decision, did not dissent from the denial of the rehearing en banc.

[322] *Id.* at 356-57 (Jones, C.J., dissenting from the denial of rehearing en banc).

[323] *Id.* at 362 (Garza, J., dissenting from the denial of rehearing en banc) (citation omitted) (emphasis added).

court judges took the same view in their dissents from the denial of en banc rehearing in *Reliable Consultants*.

C. Other Crimes

As the sodomy and sex toys cases show, the battle over *Lawrence*'s value as criminal law precedent is ongoing. In many areas, courts faithfully applying *Lawrence* will be required to engage in a careful analysis of the asserted harms that justify the criminal statutes. Legislatures may well express moral disapproval by means other than criminal laws, but *Lawrence*'s holding is that morality cannot be the principal basis for criminal liability, and the attendant stigma and loss of liberty unique to such liability. However, failure to criminalize an act does not mean approval. It just means we cannot send someone to jail simply because we disapprove.[324]

Evaluating whether legislative attempts to enact criminal laws aimed at debatable harms depends on careful analysis unique to each law. Commentators and courts have already undertaken this analysis with respect to an array of "morals" crimes and "victimless" crimes.[325] The debate over sodomy laws and sex toys bans is outlined above; many other debates loom. Assessing the alleged harms will sometimes be a simple task, sometimes not, but the task itself is one that *Lawrence* demands.[326] As one commentator wrote, *Lawrence* "requires that [legislative] bodies think about something other than their own members' (or the majority of their constituents') views of what is 'right' or 'wrong.' Instead, the legislature will have to develop a rationale for acting that does not focus (at least dominantly) on such moral concerns."[327]

This process will occasionally be challenging for courts. But as noted above,[328] courts in criminal cases regularly assess whether the criminal conduct produced the harm alleged. Courts can assess legislative findings, and those who challenge criminal statutes can

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[324] *See* Eskridge, *supra* note 35, at 1065 ("[A] lot of disapproved conduct can be tolerated, especially if it does not hurt other people. Justice Kennedy's opinion in *Lawrence* treats homosexual conduct with careful respect, but also considerable moral distance.").

[325] *See id.* at 1082-90 (analyzing continued viability of various morals legislation under *Lawrence*).

[326] *See* Kenworthy Bilz & John M. Darley, *What's Wrong With Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1230-32 (2004) (describing empirical evaluations of harm).

[327] Allen, *supra* note 34, at 1065.

[328] *See supra* Part II(B).

present their own evidence. That is how litigation works. And this requirement advances us a great deal from where we were pre-*Lawrence*, providing us with a record and with at least the perception that a legislature has done the hard work to justify a criminal statute.[329]

This is not to deny that societies operate under broadly accepted moral principles concerning what is "right" and what is "wrong." But, in David Hume's words, "The rules of morality are not the conclusion of our reason."[330] And because those rules are not susceptible of reasoned analysis, they cannot be effectively evaluated by courts as "rational" bases for criminal laws.

Instead, we must look to the harm caused by the criminalized acts. Let us briefly consider some examples, focusing upon the sex crimes that Justice Scalia uses for the slippery slope argument in his *Lawrence* dissent. An easy case is fornication—intercourse between unmarried persons. Under *Lawrence*'s plain holding, a statute criminalizing such activity is unconstitutional, as one conservative state supreme court has already held.[331] Private, consensual, non-commercial sexual acts between adults produce no identifiable harm.

Prostitution, on the other hand, requires much more complex analysis. Feminist commentators have long debated whether prostitution causes harm to women, and there are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion.[332] To date, lower courts have upheld prostitution laws, but in so doing have often relied on *Lawrence*'s "limiting" language without engaging in

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[329] *See* Allen, *supra* note 34, at 1055 & n.34 (listing sources); Goldberg, *supra* note 11, at 1240 (requiring legislative findings "may constrain some of the bias that can otherwise permeate the adjudication process virtually unfettered"); Hunter, *supra* note 135, at 1112 (*Lawrence* demands evidence of "objectively harmful effects.").

[330] *See* Hayek, *supra* note 1, at 343.

[331] Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (invalidating state fornication law under *Lawrence*). This is the same court that upheld Virginia's sodomy statute, which criminalizes oral sex with a sixteen year old, even though intercourse with such a person is legal under state law. *See* McDonald v. Commonwealth, 630 S.E.2d 754, 757 (Va. Ct. App. 2006).

[332] *See* Christopher R. Murray, Comment, *Grappling with "Solicitation": The Need for Statutory Reform in North Carolina after* Lawrence v. Texas, 14 DUKE. J. GENDER L. & POL'Y 681, 686 (2007). Prostitution also creates documented risks to public health. *See* Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 89 (1998). *But see* Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 134-37 (2009) (arguing that the harm from criminalization exceeds the harm from the crime itself).

any serious analysis.[333] But it is serious analysis that *Lawrence* requires, as a handful of lower court judges have recognized.[334]

Incest is another crime that has received substantial attention after *Lawrence*. There are many varieties of the crime called "incest," and each variety should be subjected to its own harm analysis. The typical harm justification for incest rests on the risks of genetic abnormalities and of coercion and abuse. But some forms of incest, such as incest between first cousins, adopted children, in-laws, and uncles and nieces, may not raise substantial risks of harm, and indeed are not crimes in many states.[335] Nonetheless, studies show that most people have an instinctive negative response to incest, even where the risks of harm are not present.[336] Such responses, long common among substantial majorities with respect to interracial marriage and homosexual activity, should not suffice.[337] Other forms of legitimate

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[333] *See, e.g.*, State v. Romano, 155 P.3d 1102, 1111 (Haw. 2007); United States v. Thompson, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006). *But see Romano*, 155 P.3d at 1119 (Levinson, J., dissenting) (prostitution laws not justified under *Lawrence*).

[334] *Compare Romano*, 155 P.3d at 1119 (Levinson, J., dissenting) (Under *Lawrence*, "the state may not exercise its police power to criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not."), *with* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746 (5th Cir. 2008) ("[T]here are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion.").

[335] *See* Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1562-66 (2005); McDonnell, *supra* note 161, at 337 (summarizing state incest laws). *See also* Israel v. Allen, 577 P.2d 762, 764-65 (Colo. 1978) (striking down prohibition of marriage between adoptive siblings because of lack of risk of genetic abnormalities); Benton v. State, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring) (engaging in harm analysis).

[336] *See* Cahill, *supra* note 335, at 1572 ("[I]ncest is a source of disgust or repugnance even when it does not result in harm, genetic or otherwise."); *id.* at 1574-75 (psychological studies show instinctive negative emotional reaction to incestuous relationships). For an analysis of the responses of liberals and conservatives to various kinds of sexual acts, see Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191 (2001). Although liberals were more likely to approve of same-sex sexual relations, both liberals and conservatives disapproved of incestuous sexual relations. *Id.* at 202.

[337] Incest has often historically been discussed in tandem with miscegenation, *see* Cahill, *supra* note 335, at 1590-91, and same-sex relationships, *id.* at 1601-02 (citing JUDITH BUTLER, ANTIGONE'S CLAIM: KINSHIP BETWEEN LIFE AND DEATH 70 (2000)).

harm may exist, including the risk of coercion and abuse,[338] but *Lawrence* requires that these harms be documented in order to justify a criminal statute.

Perhaps the most complex harm-criminalization issues arise in connection with obscenity and pornography. The harm to children from participation in the production of child pornography is straightforward, but the harm with respect to adult pornography is hotly contested. The debate over whether there is harm to those who participate in the production of pornography, or to women who are the victims of pornography-induced violence, has been ongoing for decades. Such harm may exist. But to sustain an obscenity statute, a state must justify the criminalized activity as harmful.[339] This issue has begun to play out in the courts, with one federal district court dismissing an obscenity indictment, and stating that, "after *Lawrence*, the government can no longer rely on the advancement of a moral code[,] *i.e.*, preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest."[340]

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[338] *See* Eskridge, *supra* note 35, at 1090 ("The harm of adult incest seems speculative but plausible: If close relatives (cousins) or people raised together (siblings by affinity) could engage in sex once they became adults, the family as a sexually 'safe' place would be undermined.").

[339] *See* Allen, *supra* note 34, at 1049 (arguing that the morality-based underpinnings of federal obscenity jurisprudence should be revaluated after *Lawrence*). The literature on the alleged harm from pornography is voluminous. For some recent examples, see Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 678 (2008) (analyzing evidence that pornography causes harm to women); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1665 (2005) (evaluating results of laboratory studies suggesting that men become more violent towards women after watching violent pornography). *See also* Fionnuala Ní Aoláin, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies*, 35 QUEEN'S L.J. 219, 219 (2009). The bare argument that pornography causes harm to society in general, like the argument that homosexual acts undermine "family values," should not suffice under *Lawrence*. Of course, bans on obscenity and pornography also raise First Amendment issues. This article does not address those issues but focuses solely on criminalization theory through the prism of the harm principle.

[340] United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150, 161 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006). The court of appeals reversed, not because it disagreed with the district court's analysis, but because binding Supreme Court precedent authorizes the criminalization of obscenity. *See* Allen, *supra* note 34, at 1062 n.69.

There may even be some conflict between *Lawrence*'s focus on the sexual autonomy of gays and lesbians and federal obscenity jurisprudence.[341] And there is likely conflict between *Lawrence* and child pornography statutes that define such pornography to encompass persons under the age of eighteen in states where the age of sexual consent is sixteen or seventeen.[342] All these issues require judicial analysis under a *Lawrence*-based criminalization scheme.

Many other crimes raise similar issues, including group marriage,[343] adultery,[344] narcotics possession,[345] nude dancing and public nudity,[346] consensual sado-masochism,[347] and public sex,[348] among others. As one commentator succinctly put it, "[I]f the conduct the statute targets is not a harm at all, there is no offense definition a legislature could select that would justify its prohibition."[349] The point here is that, before we send someone to jail for a proscribed act, the

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[341] *See* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1395 (2008) (observing that "gays and lesbians have been folded into the constitutionally unprotected category of obscenity" and arguing that *Lawrence* can be used to correct this development).

[342] State v. Senters, 699 N.W.2d 810, 817-18 (Neb. 2005) (boyfriend convicted of child pornography for videotaping himself having sex with 17-year-old girlfriend for private use in state where the age of consent was statute was 16). *See also* United States v. Bach, 400 F.3d 622, 627-29 (8th Cir. 2005).

[343] For a discussion of harm-based arguments concerning bigamy and polygamy laws, and *Lawrence*-based challenges to those laws, see Jacob Richards, Comment, *Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims*, 98 CAL. L. REV. 197, 223-229 (2010).

[344] Eskridge, *supra* note 35, at 1084-85 (assessing continued viability of adultery laws post-*Lawrence*).

[345] *See* Ravin v. State, 537 P.2d 494, 511 (Alaska 1975) (no rational basis for criminalizing possession of marijuana in the home); Alexandre, *supra* note 332, at 105 (arguing that the harm from criminalization exceeds the harm from the crime itself).

[346] *See* Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 376 (2000) ("Public nudity may not appear to inflict any identifiable harm, but it may inflict a more diffuse harm, for example, the erosion of social practices of respect for bodily integrity.").

[347] *See* Kelly Egan, *Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex*, 70 ALB. L. REV. 1615, 1639-41 (2007) (criminalizing sadomasochistic sex expresses moral disapproval of "deviant" sexuality, and infringes on the constitutional right to sexual privacy). Of course, under a paternalistic approach, such a law might be justified under a harm-to-self principle.

[348] *See, e.g.*, Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy after* Lawrence v. Texas, 54 DEPAUL L. REV. 671, 682-86 (2005).

[349] Finkelstein, *supra* note 346, at 377.

state must be required to prove that the type of act produces actual harm.

In most cases, the harm principle should not prove difficult to apply and should lead to principled results. As noted above, however, there are some acts where the "harm" may be difficult to identify even though people across the political spectrum will find those acts highly repugnant. Incest is probably the clearest example of such acts. But as this paper repeatedly notes, we are talking about *criminal laws*—about sending people to jail for their acts. It is one thing for society to disapprove of behavior; it is another for society to imprison people for their behavior. To do the latter, our society should be able to operate under an objective standard, not a subjective, morality-based standard subject to majority whim.

CONCLUSION

In *Lawrence*, the United States Supreme Court adopted a straightforward approach to criminalization. The Court stated repeatedly that majoritarian morality will no longer justify the decision to send a person to jail. The majoritarian morality approach is based upon unacceptable and unworkable premises—that either religious principles or simple majority votes govern our society's decision to render acts criminal. Neither religion nor referendum provides us with a rational, identifiable basis for our criminal laws, and neither protects us from the dangers that arise when popular sentiment is our guiding criminalization principle.

For legislatures and courts, the task ahead is to apply *Lawrence*'s harm principle: identify the alleged harm and analyze the asserted proof of that harm. When engaging in this effort, *Lawrence* also requires legislatures and courts to apply neutral sexnorms—normative principles that do not value heterosexuality above other forms of sexuality. Meaningful application of *Lawrence*'s substantive criminal law will hardly spawn a "massive disruption of the current social order." Instead, courts will evaluate the alleged harms from criminal laws through a sexually neutral lens and strike down those laws that do not conform to the standards that *Lawrence* requires.

APPENDIX
SELECTED CRIMINAL CASES FINDING *LAWRENCE* INAPPLICABLE WITHOUT ENGAGING IN HARM ANALYSIS

ADULTERY

1. *Avery*; *United States v.*, 2005 WL 453135, at *2 (N-M. Ct. Crim. App. Feb. 28, 2005).
2. *Gamez*; *United States v.*, 2005 WL 743052, at *2 (A.F. Ct. Crim. App. Mar. 13, 2005).
3. *Johns*; *United States v.*, 2007 WL 2300965, at *3 (A.F. Ct. Crim. App. May 25, 2007).
4. *Orellana*; *United States v.*, 62 M.J. 595, 598 (2005).
5. *Velazquez*; *United States v.*, 2007 WL 2340612, at *6 (N-M. Ct. Crim. App. 2007).

BIGAMY & POLYGAMY

1. *Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1333-34 (D. Utah 2005) (polygamy), *vacated*, 500 F.3d 1099 (10th Cir. 2007).
2. *Holm*; *State v.*, 137 P.3d 726, 743-44 (Utah 2006) (distinguishing *Lawrence* because of the state's interest in enforcing legal rights such as dissolution).

CONSENSUAL SEXUAL ACTIVITY - BETWEEN MINORS

1. *Downin*; *People v.*, 828 N.E.2d 341, 378 (Ill. Ct. App. 2005)
2. *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007).

CONSENSUAL SEXUAL ACTIVITY – SPECIAL RELATIONSHIPS

1. *Berkovsky v. State*, 209 S.W.3d 252, 253 (Tex. App. 2006) (teacher – student).
2. *Bussmann*; *State v.*, 741 N.W.2d 79, 85 (Minn. 2007) (clergy – parishioner).
3. *Clinkenbeard*; *State v.*, 123 P.3d 872, 879 (Wash. Ct. App. 2005) (teacher – student).
4. *Ex parte Morales*, 212 S.W.3d 483, 487 (Tex. App. 2007) (same).

5. *McClelland*; *United States v.*, 2006 WL 228927, at *3 (N-M. Ct. Crim. App. Jan. 24, 2006) (therapist – patient).
6. *Mogler*; *State v.*, 719 N.W.2d 201, 207 (Minn. App. 2006) (police officer – citizen).
7. *Talbert v. State*, 239 S.W.3d 504, 511 (Ark. 2006) (minister – church member).

CONSENSUAL SEXUAL ACTIVITY – STATUTORY RAPE STATUTES

1. *Banker*; *United States v.*, 63 M.J. 657, 660-61 (A.F. Ct. Crim. App. 2006).
2. *Browning*; *State v.*, 629 S.E.2d 299, 303-05 (N.C. Ct. App. 2006).
3. *Clark*; *State v.*, 588 S.E.2d 66, 68-69 (N.C. Ct. App. 2003).
4. *Fischer*; *State v.*, 199 P.3d 663, 671 (Ariz. App. 2008).
5. *Holmes*; *State v.*, 920 A.2d 632, 635 (N.H. 2007).
6. *Maxwell v. State*, 895 A2d 327, 336 n.7 (Md. Ct. Spec. App. 2006).
7. *McDonald v. Commonwealth*, 630 S.E.2d 754, 755 (Va. Ct. App. 2006).
8. *McDonald v. Johnson*, 2009 WL 3254444, at *5-6 (E.D. Va. Oct. 9, 2009).
9. *Moore*; *State v.*, 606 S.E.2d 127, 131 (N.C. Ct. App. 2004).
10. *Wilson*; *United States v.*, 66 M.J. 39, 41 (C.A.A.F. 2008).

INCEST

1. *Beard v. State*, 2005 WL 1334378, at *2 (Tenn. Crim. App. Jun. 7, 2005).
2. *Brady v. Collins*, 2010 WL 1741113, at *14 (N.D. Ohio April 29, 2010).
3. *Freeman*; *State v.*, 801 N.E.2d 906, 909 (Ohio App. 7th Dist. 2003).
4. *Lowe*; *State v.*, 861 N.E.2d 512, 517 (Ohio 2007).
5. *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005).
6. *Muth v. Wisconsin*, 2003 WL 24272406, at *3 (E.D. Wis. Oct. 03, 2003).
7. *Scott*; *People v.*, 68 Cal. Rptr. 3d 592, 595 (Ct. App. 2007).

OBSCENITY/ PORNOGRAPHY

1. *Bach*; *United States v.*, 400 F.3d 622, 628 (8th Cir. 2005).
2. *Coil*; *United States v.*, 442 F.3d 912, 917 (5th Cir. 2006).
3. *Christian*; *United States v.*, 63 M.J. 714, 716 (A.F. Ct. Crim. App. 2006).
4. *Ex parte Dave*, 220 S.W.3d 154, 159 (Tex. App. 2007).
5. *Extreme Assocs. Inc.*; *United States v.*, 431 F.3d 150, 161 (3d Cir. 2005).
6. *Handley*, *United States v.*, 564 F. Supp. 2d 996, 1008 (S.D. Iowa 2008).
7. *Morales-de Jesus*; *United States v.*, 372 F.3d 6, 18 (1st Cir. 2004).
8. *Peterson*; *United States v.*, 294 F. Supp. 2d 797, 803 (D. S.C. 2003).
9. *Ragsdale*; *United States v.*, 426 F.3d 765, 785 n.9 (5th Cir. 2005).
10. *Sherr*; *United States v.*, 400 F. Supp. 2d 843, 850 (D. Md. 2005).
11. *Shreck*; *United States v.*, 2006 WL 2945368, at *1 (N.D. Okla. Oct. 13, 2006).
12. *Stagliano*; *United States v.*, 693 F. Supp. 2d 25, 37-38 (D.D.C. 2010).
13. *Varkonyi v. State*, 276 S.W.3d 27, 38 (Tex. App. 2008).
14. *Whorley*; *United States v.*, 386 F. Supp. 2d 693, 695 n.1 (E.D. Va. 2005).

PROSTITUTION

1. *Freitag*; *State v.*, 130 P.3d 544, 545-6 (Ariz. 2006).
2. *Palfrey*; *United States v.*, 499 F. Supp. 2d 34, 41 (D.D.C. 2007).
3. *Pope*; *State v.*, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005).
4. *Romano*; *State v.*, 155 P.3d 1102, 1117 (Haw. 2007).
5. *Singson v. Commonwealth*, 621 S.E.2d 682, 687-88 (Va. App. 2005).
6. *Thomas*; *State v.*, 891 So.2d 1233, 1237 (La. 2005).
7. *Thompson*; *United States v.*, 458 F. Supp. 2d 730, 731-32 (N.D. Ind. 2006).

8. *Williams*; *People v.*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004).

SALE OF SEXUAL DEVICES

1. *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 337 (Ala. 2010).
2. *Acosta*; *State v.*, 2005 WL 2095290, at *1 (Tex. App. May 22, 2005).
3. *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004).
4. *Williams v. King*, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006), *aff'd sub. nom.*, *Williams v. Morgan*, 478 F.3d 1316. (11th Cir. 2007).

SODOMY/CRIMES AGAINST NATURE

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2. *Christian*; *United States v.*, 63 M.J. 714, 716 (A.F. Ct. Crim. App. 2006).
3. *Cook*; *State v.*, 192 P.3d 1085, 1086 (Idaho Ct. App. 2008).
4. *Mauk v. Goorich*, No. CV 109-057, 2009 WL 2914056, at *2 (S.D. Ga. Sept. 10, 2009).
5. *Jaeger*; *United States v.*, 2006 WL 3895069, at *3 (A.F. Ct. Crim. App. Dec 14, 2006).
6. *Krause*; *People v.*, 2007 WL 1152688, at *6 (Cal. Ct. App. Apr. 19, 2007).
7. *Machado*; *United States v.*, 2006 WL 1512106, *1 (A.F. Ct. Crim. App. May 31, 2006).
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9. *Myers*; *United States v.*, 2005 WL 318709, at *2 (N-M. Ct. Crim. App. Feb. 10, 2005).
10. *North Carolina v. Oakley*, 605 S.E.2d 215, 218 (N.C. 2004).
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