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Donald E. Wilkes Jr.

University of Georgia School of Law, wilkes@uga.edu

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LAWRENCE v. TEXAS: AN HISTORIC HUMAN RIGHTS VICTORY

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Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

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

This majestic prose forms the opening paragraph of Justice Anthony Kennedy's majority opinion in *Lawrence v. Texas*, the epochal U. S. Supreme Court decision handed down last June 26 which invalidated as unconstitutional a Texas sodomy statute that criminalized private consensual sex acts committed by one adult with another adult of the same sex. In striking down the statute the Court overruled its 1986 *Bowers v. Hardwick* decision which, on the ground that there was no constitutional right to engage in homosexual sodomy, had upheld Georgia's sodomy statute in a case where the two parties to the same-sex act were consenting adults acting in private.

The *Lawrence* decision is one the most momentous pro-individual rights decisions ever adjudicated by Court, and joins the exalted ranks of the Court's other benchmark decisions advancing human rights, including *Brown v. Board of Education* (the 1954 school desegregation decision), *Roe v. Wade* (the 1973 abortion rights decision), and *West Virginia State Board of Education v. Barnette* (the 1943 decision upholding the right of Jehovah's Witnesses schoolchildren to refuse to salute the flag).

In addition to being a great and wonderful decision, *Lawrence* is a surprising one, coming as it does from a Court which has been veering to the right for several decades and nowadays is far more prone to constrict constitutional rights than expand them.

The *Lawrence v. Texas* decision cannot be adequately understood, or its immense significance grasped, unless it is viewed in historical context. Therefore, before turning to an examination of *Lawrence*, it will be helpful to explore the history of the crime of sodomy, and then scrutinize *Bowers v. Hardwick*, the decision *Lawrence* overturned.

Criminal Sodomy: English Background

Although the earliest recorded use of the word "sodomy" dates (according to the *Oxford English Dictionary*) to 1297, in England until the Reformation sodomy was not a civil crime but an ecclesiastical offense, triable only in the Church courts and punishable only with ecclesiastical sanctions. Never a common law crime, sodomy first became a statutory crime, triable in the secular courts and punishable with death, under an Act of Parliament passed during the reign of Henry VIII in 1533. The 1533 statute did not specify what sex acts sodomy consisted of, simply referring to the crime as "the detestable and abominable vice ... committed with mankind."

Under the statute, as construed by the English courts, the crime of sodomy did not include the oral-genital acts now called fellatio and cunnilingus, whether committed by partners of different sex or of the same sex. (In the OED the earliest recorded use of the words "fellatio" and "cunnilingus" is 1887.) Criminal sodomy was committed only when a male engaged in anal intercourse with another male or with a female, and only when there was not only penetration but also emission of semen. If the requisite sexual conduct occurred, the crime of sodomy was deemed to have been committed even if the conduct had involved consenting married adults acting in private.

In 1828 Parliament enacted a statute providing that emission would no longer be an element of sodomy and that the crime was complete as soon as penetration occurred, and in 1861 Parliament reduced the punishment for the offense to life imprisonment. It is not known how many persons convicted of sodomy in England prior to 1861 were actually put to death, but it appears certain that some executions did occur, including possibly one in the early 19th century. In 1885 Parliament enacted a criminal statute making the parties to an act of same-sex fellatio guilty of a misdemeanor (even when the conduct involved adults acting consensually and in private). Fellatio, when performed on a male by a female, and cunnilingus, whether performed by a male on a female or by a female on another female, were never criminalized in England. In 1967, Parliament repealed the 1885 statute and all sodomy statutes, thereby decriminalizing the private consensual sex acts of adults.

The history of the crime of sodomy in England permits us to draw several important conclusions. First, sodomy was never a common law crime there; sodomy was a statutory offense created in 1533. Second, the crime of sodomy in England did not include oral sex; nor did sodomy include any sex acts where both the parties to the act were female. Third, because the only sex act forbidden by the crime of sodomy in England was anal intercourse, which could be committed when the parties to the act were either a male and another male, or a male and a female, the crime appears to have been designed to prohibit nonprocreative sex acts rather than to punish the class of persons now called homosexuals. (The concept of a homosexual as a distinct category of person developed only in the second half of the 19th century, with the word "homosexual" appearing for the first time in a German pamphlet published in 1868. In the OED the earliest use of the word "homosexual" dates from 1892, when it was used as an adjective; its earliest use as a noun dates from 1912. The earliest use of "homosexuality" in the OED dates from 1912. Similarly, "heterosexual" as an adjective dates from 1892 and as a noun from 1920, and "heterosexuality" dates from 1900.)

Criminal Sodomy in America until 1986

In America, as in England, sodomy is not a common law crime, and is deemed a punishable offense only when it is statutorily authorized.

Most of the 13 American colonies adopted criminal sodomy laws which, like the 1533 English statute, punished only anal intercourse (whether committed by two males or by a male and a female) and carried the death penalty. During colonial times there appear to have been around 20 sodomy prosecutions and perhaps 6 executions for sodomy. All the executions were in the 17th century, except for one (in Georgia) which occurred in 1743.

In 1791, when the Federal Bill of Rights was ratified, at least 12 of the 14 states had a criminal sodomy law carrying the death penalty. By 1826, although a felony in most states, sodomy remained punishable by death in only 2 states, North Carolina and South Carolina, which eliminated capital punishment for sodomy in 1869 and 1873 respectively. There were no executions for sodomy in any state in the 19th century.

In 1868, the year the Fourteenth Amendment was ratified, 32 of the 37 states had a criminal sodomy law.

What sex acts did these state sodomy laws punish? With a few minor exceptions, before 1879 American criminal sodomy laws did not punish any sex act except anal intercourse (whether committed by two males or by a male and a female). Then, in 1879, the Pennsylvania legislature amended its sodomy statute by adding oral-genital acts (i.e., fellatio and cunnilingus) to the sex acts defined as sodomy, and over the next 52 years the legislatures of at least 22 more states also amended their sodomy laws so as to make these forms of oral sex punishable as acts of sodomy. In addition, between 1897 and 1925 at least 13 other states (including Georgia) judicially expanded their sodomy laws by court decisions which reinterpreted these laws to forbid fellatio and cunnilingus as well as anal intercourse. Thus, by 1931 about two-thirds of the states had significantly enlarged the crime of sodomy. Whereas before 1879 sodomy laws generally proscribed anal intercourse alone, by 1931 about 36 states deemed oral-genital acts also to be prohibited by criminal sodomy laws.

In terms of laws on the books, the crime of sodomy arguably reached its zenith in America in 1960, when sodomy laws existed in all 50 states. Generally, these laws applied irrespective of whether the parties to the prohibited sex act were of different sex or of the same sex. With a few exceptions, these laws authorized punishment without regard to whether the parties to the forbidden sex act were married or were consenting adults acting in private. Almost all these laws were felonies, with many authorizing lengthy terms of imprisonment.

But whatever the contents of the sodomy laws that have been on the books at one time or another, it must be remembered that at least since the 19th century sodomy laws in America generally have not been enforced against consenting adults acting in private. The overwhelming majority of known American sodomy prosecutions have involved nonconsensual acts, acts involving minors, or acts committed in public. Between 1880 and 1995 there were only 203 criminal prosecutions for consensual adult sodomy in the official reports of the decisions of state courts.

One of the earliest signals that criminal sodomy laws, insofar as they punished the consensual acts of adults, were headed for legislative decline occurred in 1950, when New York became the first state to make consensual sodomy a misdemeanor. In 1961, when it revised its criminal code and repealed its previous sodomy statute, Illinois became the first state to decriminalize the private, consensual sex acts of adults. By 1975, 12 more states had repealed their consensual sodomy laws, and (in a sign that judicial support for continuing the criminalization of consensual sodomy was waning) in 3 other states sodomy laws authorizing punishment of consensual acts were partially invalidated by courts. Between 1975 and 1981, 11 additional states abrogated their consensual sodomy laws by statute or state judicial decision. Furthermore, by 1981, in 12

of the states in which consensual sodomy remained a crime the offense had been reduced to a misdemeanor. Between 1960 and 1981 there was, in short, a revolution in sodomy laws. Statutes criminalizing consensual sodomy “fell like flies,” in the words of law professor William N. Eskridge, Jr. In 1960, all 50 states had laws punishing consensual sodomy, with almost all treating it as a felony. By 1981, only 26 states still criminalized consensual sodomy, and in 12 of these states consensual sodomy was now a misdemeanor. “In less than a generation,” writes Professor Eskridge, “almost four-fifths of the states declassified consensual sodomy as felony. This was remarkable.”

In 1969, with consensual sodomy laws on a downward ramp, a trend began in some states to decriminalize consensual sodomy only to the extent it did not involve same-sex sexual conduct. Although sodomy laws traditionally have punished the forbidden sex acts regardless of whether they were committed by partners of different sex or of the same sex, between 1969 and 1990 a total of 10 states—Arkansas, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas—adopted sodomy laws that decriminalized consensual sodomy when committed by partners of different sex but retained criminal punishment for consensual sodomy when it occurred between same-sex partners. Motivated by ill-will toward gays, these laws were intended to harm an unpopular minority despised by the political forces pushing the legislation. Nevada repealed its same-sex sodomy law in 1993, and state courts invalidated the same-sex sodomy laws in Arkansas, Kentucky, Maryland, Montana, and Tennessee. The Texas law the U. S. Supreme Court declared unconstitutional in *Lawrence v. Texas* was a same-sex sodomy statute.

By 1986, the year the U. S. Supreme Court in *Bowers v. Hardwick* held sodomy laws to be constitutional insofar as they might apply to same-sex acts, the number of states criminalizing sodomy committed by consenting adults in private had fallen to 25. Between 1986 and 2002, 3 more states repealed their consensual sodomy laws, and in 8 other states (including Georgia) consensual sodomy laws were invalidated by state courts. At the time *Lawrence v. Texas* overruled *Bowers v. Hardwick*, therefore, only 14 states still punished consensual sodomy. In 10 of these states—Alabama, Florida, Idaho, Louisiana, Michigan, Mississippi, North Carolina, South Carolina, Utah, and Virginia—the sodomy crime extended to acts committed by partners of different sex as well as acts committed by partners of the same sex. In the remaining four states—Kansas, Missouri, Oklahoma, and Texas—the sodomy laws applied only to same-sex acts.

What are some of the conclusions to be drawn from the history of the crime of sodomy in America? First, until late in the 19th century, American sodomy laws, like those in England, punished only anal intercourse, whether committed by two males or by a male and a female. Oral sex, and sex acts between women, were not within the ambit of sodomy laws. Oral sex became punishable under American sodomy laws only during the period stretching from 1879 to 1931. Second, sodomy statutes targeting homosexuals—that is, sodomy laws which criminalize certain sex acts when committed by partners of the same sex but not when the partners are of different sex—have not been around for a long time, but are a recent development, with the first such statute having been enacted in 1969.

The history of criminal sodomy in Georgia is set forth in the Appendix.

The *Bowers v. Hardwick* Decision

Around 8 a.m. on Aug. 3, 1982, 27-year old Michael Hardwick, a gay man with (in the words of journalist Moni Basu) “runway model good looks” was arrested in his own bedroom in his Atlanta apartment on sodomy charges for engaging in consensual fellatio with an adult male lover. A policeman, who had quietly entered the apartment to serve Hardwick with an outstanding arrest warrant for public consumption of beer, walked over to the partially opened bedroom door and espied Hardwick and the other male engaged in the sex act. (Unknown to the arresting officer, the warrant was invalid because three weeks earlier the public drinking charge had been disposed of when Hardwick went to court, pleaded guilty, and paid a small fine.) In a magazine interview Hardwick later related what happened to him at the jail: “There was somebody to get me out within an hour, but it would end up taking him 12 hours to get me out. The cops kept putting me on different levels of the Atlanta jail. Every time they put me on a different level, they would let them know I was in there for sodomy. They made jokes about putting me in the bullpen ... I kept thinking I was going to get gang [raped], and I was scared to death. Because they were letting everyone know that ... here's some fresh meat.”

After the Fulton County district attorney decided not to prosecute and the sodomy charge was dropped, Hardwick filed a lawsuit in federal district court attacking the validity of the Georgia sodomy statute on federal constitutional grounds, and naming then state attorney general Michael Bowers as defendant. The statute, Hardwick maintained, was in conflict with the right to privacy the federal courts have held to be secured by the single most important federal constitutional limitation on the exercise of the coercive powers of the states—the Due Process Clause of the Fourteenth Amendment. The district court dismissed the case, but the U. S. Court of Appeals for the Eleventh Circuit reversed the dismissal and remanded the case to the district court, holding that the statute infringed upon fundamental constitutional rights and should be invalidated unless the state of Georgia could prove the statute was justified by compelling interests. The attorney general appealed to the U. S. Supreme Court, and on June 30, 1986, that Court delivered its decision in *Bowers v. Hardwick*, which reversed the Court of Appeals and upheld the validity of the Georgia sodomy statute to the extent it prohibited same-sex acts.

The Court's majority opinion, written by Justice Byron White, phrased the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” In deciding this issue in the negative, the Court began by narrowly construing and limiting to their facts its previous decisions protecting the constitutional right to privacy. Then the Court examined the history of criminal sodomy laws. A survey of history, the Court thought, showed that such laws “have ancient roots” and demonstrated that any claim of the existence of a federal constitutional right to commit sodomy was “at best, facetious.” Next, the Court suggested that a holding that there was a constitutional right to commit homosexual sodomy in private might pave the way to a holding that there was a similar right in the home to commit “adultery, incest, and other sexual crimes.” Finally, the Court decided that even if, as Hardwick claimed, there was no basis for the sodomy statute except “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable,” this was no ground for invalidating the statute. However, the Court also announced that it was expressing no opinion on the constitutionality of the statute as applied to heterosexual acts of sodomy.

Justice White's opinion for the Court disrespected homosexuals. In the words of journalist David G. Savage, the opinion "displayed the scornful tone of a locker-room conversation." Chief Justice Warren Burger's concurring opinion was even worse. Quoting William Blackstone, the noted 18th century English legal scholar, Burger described sodomy as "the infamous crime against nature," "a disgrace to human nature," and "a crime not fit to be named." Burger added: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." In another concurring opinion, Justice Lewis Powell expressed astonishment that the Georgia sodomy statute "authorizes a court to imprison a person for up to 20 years for a single, private, consensual act of sodomy."

In overview, *Bowers v. Hardwick* was undeniably a judicial deformity. Even labeled "Dred Scott Revisited" by one respected legal historian, *Bowers* was almost universally condemned by American legal scholars. As Professor Eskridge notes: "[R]espected academic commentators, most of them nongay, have strongly criticized [Bowers] as manipulative, ignorant and inefficient, violent, historically inaccurate, mysogynistic, authoritarian, and contrary to precedent."

The life span of *Bowers v. Hardwick* was only 17 years.

The *Lawrence v. Texas* Decision

Around 11 p.m. on Sept. 17, 1998, sheriff's deputies in Harris County, Texas, were summoned to an apartment complex by a resident, Roger David Nance, who met the deputies in the parking lot and told them that there had been a weapons disturbance and that an armed man was in an upstairs apartment. When the officers entered the unit they found no armed man. But they did observe there two adult men engaging in consensual anal intercourse. One was the apartment's tenant, 55-year old John Geddes Lawrence, and the other was Tyron Garner, 31. The two men were instantly arrested on a charge of violating the Texas sodomy statute. The statute, as revised in 1995, made it a misdemeanor punishable by a \$500 fine to engage "in deviate sexual intercourse with another individual of the same sex," and defined such intercourse as "any contact between any part of the genitals of one person and the mouth or anus of another person." Lawrence and Garner spent the night in jail and then were released on bail.

Nance, who appears to have had a personality conflict with Lawrence and Garner, later admitted that he had lied to the deputies. He pleaded no contest to a charge of filing a false police report, and served 15 days in jail.

Admitting that "I'm not sure if I agree with government regulating private sex acts between consenting adults," the local district attorney nonetheless refused to dismiss the sodomy charges against Lawrence and Garner because he believed it was his job to enforce the law. "If they want a good case to throw out this law, they may have their opportunity," he said. "We plan to go forward."

Reserving their right to challenge the constitutionality of the sodomy statute on appeal, Lawrence and Garner pleaded no contest and were fined \$200. They then appealed to the Texas Court of Appeals, which on Mar. 15, 2001, with two judges dissenting, upheld the validity of the

statute and affirmed the convictions. On Dec. 2, 2002, the U. S. Supreme Court granted the petition of Lawrence and Garner requesting the Court to hear the case, which was now entitled *Lawrence v. Texas*.

A journalist who watched the attorneys' oral arguments in Lawrence at the Supreme Court on Mar. 26, 2003, wrote an article the next day entitled "At High Court, Antigay Case Looks Weak." The article discloses that the attorney representing Lawrence and Garner "had a relatively easy time in front of the justices." The prosecuting attorney representing Texas, on the other hand, "seemed overwhelmed by intense questioning even from justices who appeared sympathetic to the state's case.... [The prosecutor] had a difficult time articulating a rationale for the law beyond Texas' right to set moral standards." Three times during the oral arguments the prosecutor, in response to questions from the justices, was forced to give the answer every lawyer dreads saying in front of a judge: "I don't know." On June 26, 2003, the Court reversed the sodomy convictions of Lawrence and Garner.

The issue before the Court, Justice Kennedy announced early in his majority opinion, was "the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." Then, overruling *Bowers v. Hardwick*, the Court held that Lawrence and Garner "were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Lawrence and Garner, the Court added, "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

The Court gave several reasons for concluding that "*Bowers* was not correct when it was decided, and it is not correct today ... and [it] should be and now is overruled."

First, in phrasing the issue in that case as whether homosexuals had a fundamental right to engage in sodomy, *Bowers* had "fail[ed] to appreciate the extent of the liberty at stake. To say that the issue ... was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is simply about the right to have sexual intercourse... [Sodomy] statutes ... seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."

Second, the Court noted that *Bowers* was in several respects founded on doubtful or overstated historical premises. For example, contrary to what *Bowers* implied, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.... [Sodomy laws] traditionally criminaliz[ed] certain relations between men and women and between men and men.... [T]he concept of the homosexual as a distinct category of person did not emerge until the 19th century."

(Legal scholars and historians have been even more critical of the *Bowers* version of history. As Prof. Eskridge notes, the sodomy laws in effect in 1791 or 1868, which *Bowers* cited to prove the "ancient roots" of criminalizing homosexual sodomy, were not restricted to same-sex acts

and did not punish oral sex at all. Indeed, in even using the anachronistic term “homosexual sodomy” when surveying the history of sodomy laws the *Bowers* Court became mired in an approach which law professor Janet E. Halley calls an “historiographical embarrassment.” For, as law professor Anne B. Goldstein points out, “the Justices [joining in Justice White's *Bowers* opinion] seemed to have assumed that ‘homosexuality has been an invariant reality, outside of history. In fact, however, ... ‘homosexuality’ is a cultural and historical artifact. No attitude toward ‘homosexuals’ or ‘homosexuality’ can really be identified before the mid-nineteenth century because the concept did not exist then.” Furthermore, the *Bowers* historical assertion that sodomy was a common law crime faces, in the strong words of Prof. Halley, “[s]evere difficulties.”)

Third, the Court recognized the deleterious effects statutes punishing consensual sodomy have on the civil rights of gay persons. “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.”

Fourth, several Supreme Court decisions handed down after *Bowers v. Hardwick*, most notably *Romer v. Evans*, had sapped the foundations of *Bowers*. In *Romer*, decided in 1996, the Court held unconstitutional a Colorado initiative state constitutional amendment which deprived only one class of individuals—persons who were “homosexual[s], lesbians, or bisexuals” by “orientation, conduct, practices, or relationships”—of the protections of state antidiscrimination laws. If it is unconstitutional to enact a legal provision that denies people who engage in homosexual conduct the benefits of antidiscrimination laws, how can it be constitutional to criminalize the private, consensual sexual conduct of homosexuals?

Fifth, *Bowers v. Hardwick* had underestimated the scope of the right to privacy, secured by due process, that existed when *Bowers* was decided. The precedential decisions that *Bowers* interpreted so restrictively “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”

Justice Antonin Scalia filed a scathing dissenting opinion in *Lawrence*, in which he was joined by Chief Justice William Rehnquist and Justice Clarence Thomas. (These same three justices also had dissented in *Romer v. Evans*.) Justice Scalia predicted that the overruling of *Bowers v. Hardwick* will produce “a massive disruption of the current social order;” accused the majority of “sign[ing] on to the so-called homosexual agenda” and “tak[ing] sides in the culture war;” and claimed that “what Texas has done is well within the range of traditional democratic action.” These are exactly the type of arguments one would expect from these three justices, who almost always side with government when a citizen presents a judicial claim that his or her rights were violated. What can be said about three justices who think it monstrous to overrule *Bowers v. Hardwick* but zealously strive to overrule *Roe v. Wade*?

Lawrence and Privacy Rights for All Americans

The respectful language regarding gay persons in Justice Kennedy's opinion in *Lawrence v. Texas* contrasts sharply with the coldness toward homosexuals that pervades Justice White's opinion in *Bowers v. Hardwick*, an opinion which Prof. Eskridge justly characterizes as an

example of "legal homophobia" with "a bad odor." The types of constitutional claims that Justice White deemed "facetious" are not only taken very seriously but actually vindicated by Justice Kennedy. Over and over again Justice Kennedy's compassionate words remind us of the essential humanity of gays and the dangers of the blind bigotry that condemns them for their sexual orientation. *Bowers*, Justice Kennedy recognizes with exquisite sensitivity, "demeans the lives of homosexual persons."

Lawrence v. Texas is for homosexual Americans what *Brown v. Board of Education* was for black Americans—a watershed case that promises to end long-standing injustices committed in the name of the law. "On June 26, the U. S. Supreme Court closed the door on an era of intolerance and ushered in a new era of respect and equal treatment for gay Americans," says Ruth Harlow, Legal Director of Lambda Legal, the gay rights civil liberties organization which successfully litigated *Lawrence*. "This historic civil rights victory recognizes that love, sexuality and family play the same role in gay people's lives as they do for everyone else."

But *Lawrence* is a civil liberties victory, not just for gays or those who engage in same-sex acts, but for all Americans. *Lawrence* protects the privacy of all Americans, for under its sweeping language the Texas sodomy statute would have been equally unconstitutional even if, rather than criminalizing same-sex acts alone, it had criminalized both same-sex and different-sex acts. *Lawrence*, therefore, in barring the state from employing a bedroom police that spies through key holes at the private consensual acts of adults, secures for Americans, homosexual and heterosexual alike, what Justice Kennedy calls "a realm of personal liberty which the government may not enter." Furthermore, as legal commentator Andrew Cohen has observed, *Lawrence* "created [a] broad new 'privacy' space that future litigants, gay or not, will be able to maneuver in as they try to limit federal and state action."

Sadly, Michael Hardwick did not live to see the demise of *Bowers v. Hardwick*. From a newspaper article published three days after *Lawrence v. Texas*, we learn that Hardwick, devastated by his loss in *Bowers v. Hardwick*, moved to Miami, Florida and became a reclusive artist and designer, dying in obscurity there at age 32 in 1991. We also learn from the article that after she heard the news about the *Lawrence* decision Hardwick's sister was "bubbling with joy over the court's ruling." "This is so great, isn't it?" she is reported as saying. "My brother would have been so pleased."

The reaction of the American people to *Lawrence* has been strongly favorable. Most newspaper editorials backed the decision, and public opinion surveys show that a large majority of Americans, believing that consensual sexual relations between adults ought not to be subject to the criminal sanction, have a positive view of *Lawrence*.

The response to *Lawrence* of right-wing politicians and organizations and the religious right (many of whom filed amicus briefs in the Supreme Court in support of the Texas sodomy statute) is a reminder of their authoritarian, anti-human rights proclivities. As former congressman and law professor Tom Campbell points out, "the Republican leadership in Congress reacted in almost unanimous condemnation of the ruling." Sen. Rick Santorum issued a statement that *Lawrence* "effectively decrees the end of all moral legislation." William Devlin, founder of the Urban Family Council, a "faith-based" advocacy organization, announced that *Lawrence* is "a

bad decision for America, a bad decision for children and a bad decision for families. It's bad public policy and it's also against nature." Spokespersons for Phyllis Schlafly's Eagle Forum railed deliriously that the decision "tramples state power ... leaves America wide open for a further plunge backward into Sodom and Gomorrah ... threaten[s] the very existence of our civilization and its basic institutions ... [manifests] a scorch and burn policy ... relies on a generalized, nonspecific 'right to privacy' which has no constitutional nor historical ground ... [and is] sophomoric." In a letter posted on Christian Broadcast Network's website the Rev. Pat Robertson said that the Supreme Court "has opened the door to homosexual marriage, bigamy, legalized prostitution, and even incest."

Some frenzied frothing frenetic fundamentalist fanatics have even urged, not only that *Lawrence v. Texas* be overruled, but that we bring back the death penalty for sodomy!

APPENDIX

Criminal Sodomy in Georgia

In 1998, five years before *Lawrence v. Texas*, the Georgia Supreme Court, relying on the Georgia Constitution, held the Georgia sodomy statute unconstitutional to the extent it punished sex acts of adults committed consensually, privately, and noncommercially. When *Lawrence* was decided, therefore, Georgians were already protected from being subjected to the type of ordeal John Geddes Lawrence and Tyron Garner went through in Texas when their intimate sex acts came to the attention of law enforcement authorities. Thus, Georgians now have two separate, independent sources of protection against being arrested, prosecuted, or punished for consensual sodomy—one under the United States Constitution, the other under the state constitution.

The history of the crime of sodomy in Georgia is as fascinating as it is obscure.

It is extremely doubtful that sodomy was a statutory crime in colonial Georgia. There were, however, two criminal prosecutions for sodomy in Georgia prior to 1776. The first occurred in 1734 when a man in Ebenezer, a theocratic settlement, was sentenced to and received 300 lashes after his conviction "for sodomy and inciting of others." The second was in 1743 in Fort Frederica when an Irish "surgeon and apothecary" was executed for sodomy, apparently after a trial in a military tribunal.

It was not until 1817 that the Georgia legislature enacted a criminal sodomy statute. Under the statute, which did not define what sex acts amounted to sodomy, the penalty on conviction was life imprisonment, and this remained the punishment for sodomy in Georgia until 1949 when it was lowered to 10 years imprisonment. In 1833 the legislature passed a new sodomy statute which defined the crime as "carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman," and this statutory definition of sodomy remained in effect in Georgia until 1968. The criminal liability imposed by the sodomy crime applied irrespective of whether the particular crime involved the private consensual acts of adults or married couples.

Prior to 1904 criminal sodomy in Georgia was limited to anal intercourse. Between 1904 and 1938 the Georgia appellate courts judicially expanded the crime of sodomy by holding that it extended not only to anal intercourse but also to fellatio when committed by a male on another male or by a female on a male, and to cunnilingus when committed by a male on a female. In 1939, however, the Georgia Supreme Court held that where both the parties to the act were females, cunnilingus did not violate the sodomy statute. Nearly a quarter century later, in 1963, that same court, overruling several precedents, held that the sodomy statute did not apply to cunnilingus performed by a male on a female, reasoning that “there is no apparent reason why the legislature would have intended to punish a man and a woman for doing the same act which would not be punishable if done by two women.”

In 1968, the Georgia General Assembly enacted a new sodomy statute which vastly enlarged the crime by prohibiting “perform[ing] or submit[ting] to any sexual act involving the sex organs of one person and the mouth or anus of another” person, without regard to the sex of the two parties to the act, and irrespective of whether the sex act involved consenting adults acting in private. Married persons were not exempt from the reach of the new statute, and the penalty for sodomy was increased from 10 to 20 years imprisonment. (This was the statute upheld, to the extent it punished consensual private acts committed by homosexual adults, in *Bowers v. Hardwick* in 1986.) In 1968, the legislature also enacted a statute creating a new misdemeanor, solicitation to commit sodomy, which criminalized requesting another person to engage in sodomy. The last time the Georgia Supreme Court upheld a conviction for sodomy committed by two adults acting consensually was in 1995; the last time the Georgia Court of Appeals affirmed such a conviction was in 1983. The Georgia Supreme Court upheld a conviction for soliciting sodomy as recently as 1996, in a case arising out of a police vice squad undercover operation in which officers in street clothes would approach and engage in conversation with men at highway rest stops.

After existing for 181 years in this state, consensual sodomy ceased for all practical purposes being a criminal offense in Georgia on Nov. 23, 1998 when in *Powell v. State*, 270 Ga. 327, the Georgia Supreme Court, based on the right to privacy secured by the Bill of Rights in the Georgia Constitution, struck down the 1968 Georgia sodomy statute insofar as it criminalized consensual, noncommercial sex acts committed by adults in private. The *Powell* decision expressly reaffirmed the continuing validity of various other Georgia sex offense crimes, punishing nonconsensual sex acts, sex acts involving minors, or sex acts committed publicly or in exchange for money. However, *Powell* presumably means that the crime of solicitation to commit sodomy is, like sodomy itself, unconstitutional when it is committed consensually, privately, noncommercially, and among adults.