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### Liberty after Lawrence

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# Liberty After *Lawrence*

CASS R. SUNSTEIN\*

## I. INTRODUCTION

In its stunning decision in *Lawrence v. Texas*,<sup>1</sup> the Supreme Court appeared to rule that the Due Process Clause grants a general right to engage in consensual sexual activity. In its critical passage, the Court wrote:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their 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. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>2</sup>

Appalled by this passage, Justice Scalia urged that the Court had embraced a general liberty principle, one that would have extremely large implications. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" can be upheld "only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision."<sup>3</sup>

Before *Lawrence*, there was no general right to engage in consensual sexual activity. The Court's cases involving sexuality and reproduction<sup>4</sup> could be read quite narrowly to say only that the state may not punish or discourage sexual activity through the particular means of reducing people's ability to avoid unwanted children. And before *Lawrence*, the Court had given strong signals that constitutional protection would be defined by reference to tradition, an idea that

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>2</sup> *Id.* at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)) (internal citation omitted).

<sup>3</sup> *Id.* at 590 (Scalia, J., dissenting).

<sup>4</sup> See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

would refuse to give protection for much sexual activity.<sup>5</sup> With the abandonment of tradition, does *Lawrence* have the implications that Justice Scalia prophesies? After all, the Court's opinion is opaque, with many different strands.<sup>6</sup> But the Court has now made it clear that the reach of the liberty interest extends well beyond what tradition supports, and at a minimum, *Lawrence* raises new questions about laws regulating prostitution, incest, sexual harassment, and adultery. In addition, the Court's extension of substantive due process beyond the domain of tradition makes it harder to defend, as against due process attack, the government's refusal to recognize same-sex marriages. The *Lawrence* decision also throws into doubt state practices that do not involve the criminal law but that base employment decisions, in whole or in part, on disfavored activities of employees, including not only homosexual behavior, but also fornication and adultery.

This Article comes in four parts. Part II explores two possible readings of *Lawrence*. The first is based on autonomy, whereas the second emphasizes a distinctively American version of the idea of desuetude. I suggest that the second reading is quite plausible and has considerable appeal. Part III discusses sexual freedom in general. My conclusion here is that commercial and coercive sexual practices are regulable, but that where third party interests are not at stake, legal restrictions are drawn into sharp doubt by *Lawrence*. In making this claim, I attempt to sort out the role of the autonomy and desuetude rationales for the Court's decision. Part IV explores the right to marry. I suggest that despite appearances, the Court's due process ruling does not jeopardize restrictions on that right, which, I argue, covers marriages between one woman and one man. If gays and lesbians are to obtain the right to marry, the Equal Protection Clause is the proper route; but federal courts should greatly hesitate in this domain. Part V investigates employment practices. I conclude that in general, *Lawrence* forbids employers to discriminate against people because they have engaged in constitutionally protected activity.

A final note before we begin: I do not attempt to evaluate *Lawrence* here. I am not comfortable with the *Lawrence* opinion, partly because of its opacity, partly because of its breadth and ambition, and partly because of its use of the idea of substantive due process. In my view, a quite different line of argument, focusing on the equal protection question, would have been better.<sup>7</sup> There can be no doubt that the Court was motivated, at least in part, by an understanding of the palpable injustice of criminal prosecution of gays and lesbians. But it is possible to understand *Lawrence* in a way that does not greatly stretch the Court beyond its

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<sup>5</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997).

<sup>6</sup> See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 29.

<sup>7</sup> See *id.* at 31–32.

appropriate role and that does not lead to implausible or peculiar results. My central goal here is to see how this task might be accomplished.

## II. AUTONOMY OR DESUETUDE?

There is no question that *Lawrence* revives the idea of substantive due process. Previous cases had suggested that the Court would be extremely reluctant to invoke that idea to strike down legislation.<sup>8</sup> In fact, the Court had gone so far as to suggest that legislation would not be invalidated unless it ran afoul of longstanding traditions—as bans on same-sex sodomy certainly do not. But in *Lawrence*, such traditions were no barrier at all. After exploring the nation's complex history, the Court said, “we think that our laws and traditions in the past half century are of most relevance here.”<sup>9</sup> Hence the Court stressed an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>10</sup>

The most obvious reading of *Lawrence*, rooted in the sentence just quoted, would be that the Constitution gives presumptive protection to consensual sexual conduct, at least so long as it is noncommercial. Call this the autonomy reading of the opinion, which might well be taken as its dominant strand.<sup>11</sup> But the Court did not simply announce that the Constitution protects sexual conduct as such; it did not make the implausible suggestion that from its inception, the Due Process Clause was properly read to provide such protection. Instead the Court stressed an “emerging recognition,” which it located in a number of places. First, the Model Penal Code did not endorse criminal penalties on consensual sexual activities conducted in private, and several states specifically changed their laws in response to the Model Penal Code.<sup>12</sup> Second, fewer than half the states, twenty-four, outlawed sodomy even in 1986, and the statutory prohibition went largely unenforced even in those states.<sup>13</sup> Third, the practices of Western nations have been increasingly opposed to the criminal punishment of homosexual conduct. Britain repealed its law forbidding homosexual conduct in 1967,<sup>14</sup> and the European Court of Human Rights concluded that laws banning consensual homosexual conduct are invalid under the European Convention on Human

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<sup>8</sup> See *Glucksburg*, 521 U.S. at 720–22, 728 (holding that there is no fundamental right to assistance in committing suicide).

<sup>9</sup> *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

<sup>10</sup> *Id.* at 572.

<sup>11</sup> On desuetude and autonomy in *Lawrence*, more details might be found in Sunstein, *supra* note 6, at 48–60.

<sup>12</sup> *Lawrence*, 539 U.S. at 572.

<sup>13</sup> *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986)).

<sup>14</sup> *Id.* at 572–73 (citing Sexual Offences Act, 1967, c. 60, § 1 (Eng.)).

Rights.<sup>15</sup> Fourth, only thirteen states now forbid such conduct, and of these just four have laws that discriminate only against homosexual conduct.<sup>16</sup> “In those [s]tates where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”<sup>17</sup>

By pointing to changing social values and the “pattern of nonenforcement,” the Court offered an important signal. It suggested that it was not issuing a simple autonomy ruling, but was also pointing to a distinctive American-style version of the old idea of desuetude. According to that idea, certain laws lapse, and no longer can be invoked, if they have fallen into near-complete nonenforcement. It would be possible to understand *Griswold v. Connecticut*<sup>18</sup> in just this way.<sup>19</sup> Connecticut’s prohibition on the use of contraceptives within marriage was hopelessly anachronistic, as measured by the beliefs and practices of Connecticut itself. The Court’s decision could be understood as influenced by the fact that the prohibition was rarely used against married couples who used contraceptives—simply because the people of Connecticut would not stand for prosecutions. On this view, *Griswold* was not a simple “substantive due process” case; it was based on a recognition that the Connecticut law was out of step with existing public convictions, as measured by the actual use of the criminal law. In fact, many of the defining privacy cases can be understood in just these terms; *Lawrence* is their jurisprudential sibling.

A desuetude reading of the Court’s opinion has several advantages. First, it roots the *Lawrence* outcome in a form of procedural rather than substantive due process. This is an advantage because the idea of “substantive due process” has uncertain constitutional legitimacy; indeed, it seems like a contradiction in terms. The Due Process Clause is not naturally taken as a license to federal judges to strike down legislation that intrudes on liberty with insufficient justification. To be sure, substantive due process has become an entrenched part of constitutional law. But its questionable constitutional basis imposes a continuing shadow over its use by the Supreme Court. By contrast, the problem of desuetude is genuinely procedural in character. If a law is enforced rarely or not at all, then people lack fair notice that they may be subject to the criminal law. In Texas, gay people engaged in sexual relations were hardly on notice that they might be arrested. Whatever the law on the books, enforcement practices suggested that the citizens of Texas were not going to be prosecuted for consensual homosexual activity.

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<sup>15</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)). The use of materials from other nations, for the interpretation of the United States Constitution, raises many complexities, which I cannot explore here.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>19</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 155 (1962).

And when a law is infrequently enforced, there is a serious risk of arbitrary or invidious exercise of discretion.

An objection to use of a law showing a “pattern of nonenforcement” therefore invokes values conventionally associated with the Rule of Law.<sup>20</sup> In fact, a law that has fallen into desuetude belongs in the same family as a law that is unconstitutionally vague, where fair notice and arbitrary exercise of discretion are the central problems. I suggest that *Lawrence* belongs in the same category as the Court’s leading vagueness cases, *Papachristou v. City of Jacksonville*<sup>21</sup> and *Chicago v. Morales*,<sup>22</sup> where invalidation followed from an emphasis on the risks that come from laws at whose meaning citizens can only guess.

There is a further point. A simple substantive due process holding is legitimately challenged on democratic grounds. It overrules the views of citizens and their elected representatives, carving out a domain of liberty into which government may not enter. By contrast, a desuetude ruling strikes down prosecutions in the name of democratic judgments. The core problem is that prosecutions are so palpably inconsistent with such judgments that they may be brought rarely if at all. When the *Lawrence* Court referred to the pattern of nonenforcement, it was pointing to the fact that actual practice suggested that the citizens of Texas would not tolerate active use of the prohibition on same-sex sodomy.<sup>23</sup>

I do not deny that ideas about autonomy played a central role in the *Lawrence* opinion. The Court did not embrace a general prohibition on the use of laws that are rarely enforced—a prohibition that would be hard to justify.<sup>24</sup> And it would hardly be implausible to read the Court as holding that the state may not, as a general rule, interfere with consensual sexual activity. But I suggest that what made *Lawrence* possible was the growing social consensus that the criminal law is not properly invoked to prevent same-sex sodomy—a consensus reflected not only in the mounting reluctance of states to criminalize that activity, but also in the infrequency of enforcement of the relevant laws in those very states that do have prohibitions on the books. A desuetude reading fits with much of what the Court said in *Lawrence*; it makes far better sense than a reading that stresses autonomy alone.

Let us turn, in this light, to what *Lawrence* actually means.

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<sup>20</sup> See LON FULLER, THE MORALITY OF LAW 49–91 (1964); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 102–06 (1996).

<sup>21</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>22</sup> *Chicago v. Morales*, 527 U.S. 41, 55–58 (1999).

<sup>23</sup> *Lawrence v. Texas*, 539 U.S. 558, 569–70, 572 (2003).

<sup>24</sup> On some of the complexities here, see Sunstein, *supra* note 6, at 51–52.

### III. SEX

Justice Scalia urged that *Lawrence* decrees an end to all “morals” legislation,<sup>25</sup> and in the aftermath of the decision, it is natural to wonder about the constitutionality of laws forbidding sexual harassment, prostitution, adultery, fornication, obscenity, polygamy, and incest. Before *Lawrence*, such laws seemed quite secure. But after *Lawrence*, it would be possible to contend that many statutory restrictions impose unconstitutional barriers to consensual sexual activity.

#### A. Coercion

Does *Lawrence* raise questions about laws forbidding incest and sexual harassment? The simplest answer points to coercion. In such cases, the predicate for *Lawrence* on any reading of the case—consent—is absent. The Court had no occasion to draw careful lines between coercive and consensual sex. Often the line is clear. And if consensual sex is not involved, there is no fundamental right that would require the state to provide a compelling justification. For the same reason, the state has a perfectly legitimate, even compelling, reason to impose a restriction. In cases of sexual harassment, coercion of one or another sort is generally involved,<sup>26</sup> and hence a legal ban is perfectly acceptable. The same is true for the vast majority of cases involving incest, which involve minors unable to give legal consent.<sup>27</sup> The interest in preventing coerced sex is sufficient. We can understand this conclusion under either an autonomy or desuetude rationale. Autonomy finds its limits where the relevant acts are not consensual. And current social attitudes, as reflected in the use of the criminal and civil law, do not accept coercive sex.

But harder cases are imaginable. Suppose, for example, that under a public university’s sexual harassment policy, a teacher and a graduate student are banned from having a consensual relationship, even though the teacher is not, and will not be, in a supervisory position over the student. Or let us even suppose that the teacher has, or might have, a supervisory role, but that both of those involved claim that the relationship is fully consensual. Here the distinction between coercive and consensual sex is not so transparent. In a sense, the relationship is indeed consensual; but the existence of a potential supervisory role, and in any case the disparity in power between those involved, could give rise to a plausible claim of coercion. Or suppose that the incestuous relations are between adults—first cousins, let us say. Here a claim of coercion may or may not be plausible;

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<sup>25</sup> *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

<sup>26</sup> See, e.g., *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63 (1992).

<sup>27</sup> See, e.g., *Richardson v. State*, 353 S.E.2d 342, 343–44 (Ga. 1987); *Commonwealth v. Arnold*, 514 A.2d 890, 891–92 (Pa. Super. Ct. 1986).

everything depends on the nature of the relationship. If an “as applied” challenge were made, these cases would be genuinely difficult after *Lawrence*. If real consent is found in either case, a fundamental right might well be involved. At the very least, an autonomy reading of *Lawrence* seems to raise serious questions about the prohibitions; and it is not clear that existing social convictions disapprove of incestuous relations between adults. What could be said in defense of the restriction?

Begin with sexual harassment. A possible defense of a broad sexual harassment prohibition is that it provides a way of reducing risks of coercion and introducing clarity for all. Coercion is always a possibility in relations between students and teachers or employees and employers. In establishing a policy, the question is whether to adopt a rule that will forbid all cases of coercion while also forbidding a few relationships that are arguably or certainly not coercive—or instead to adopt a narrower rule that will make it possible for some coercion to occur. In my view, educational institutions and employers have a strong justification for choosing the former route. At the very least, it is reasonable for them to adopt flat bans on apparently consensual relations; this option is among those that sensible institutions might select. It would be implausible to say that existing social attitudes condemn a rule-bound option, or that views toward sexual harassment, in the close cases, have now become substantially accepting.

In the case of the ban on incest among adults, the strongest grounds would be to eliminate certain psychological pressures and protect any children who might result from medical risk.<sup>28</sup> But in imaginable applications, this argument would be weak, simply because adults are involved, children are not contemplated, and all relevant risks are low. Even if a ban on incest is generally acceptable, it might be questionable in cases involving, say, criminal prohibitions on relationships between first cousins. This is certainly so under the autonomy rationale and perhaps under a desuetude rationale as well: Prosecutions are rarely brought in cases of this kind. The general points are the simplest. Coercive relationships are not protected. But in some cases, reasonable people can dispute whether coercion is present.

## B. Commerce

Under *Lawrence*, commercial sex is to be treated less protectively than noncommercial sex.<sup>29</sup> It follows that in the case of prostitution, the defining

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<sup>28</sup> See, e.g., *In re Tiffany Nicole M.*, 571 N.W.2d 872, 876–79 (Wis. Ct. App. 1997). But see *In re Termination of Parental Rights to Zachary B.*, 662 N.W.2d 360 (Wis. Ct. App. 2003).

<sup>29</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).



example of commercial sex, a fundamental right is not involved.<sup>30</sup> To this extent, Justice Scalia's complaint seems to overreach. As *Lawrence* was written, the outcome is easy, but the analysis is not. Why the sharp distinction between commercial and noncommercial sex? Why are sexual relations unprotected, or less protected, if dollars are exchanged? Books, after all, are protected, whether they are given away or sold. If sexual activity receives special constitutional protection under *Lawrence*, such activity might well qualify for protection even if commercial, so long as it is consensual.

Part of the analysis here might be rooted in desuetude: There is no pattern of nonenforcement with respect to prostitution. On the contrary, arrests and prosecutions are common. As a constitutional matter, perhaps commercial sex should not be treated more protectively than any other kind of commercial interaction, now subject to rational basis review.<sup>31</sup> But if sexual relationships have a special constitutional status, this distinction is far from obvious; return to the First Amendment analogy, where commercial sales of books receive full protection. Under the autonomy rationale, the more basic claim might be that special constitutional status attaches to sexual intimacy, not to sexual relationships, and that intimacy in the relevant sense is not involved when sex is exchanged for cash.<sup>32</sup> Hence no fundamental right is involved. But this argument has many problems. Countless sexual relationships, including many that fall within the category protected by *Lawrence*, do not involve emotional intimacy. Undoubtedly some commercial relationships involve such intimacy. In any case, the *Lawrence* Court does not make intimacy a precondition for constitutional protection. But perhaps the Court can be said to be suggesting that noncommercial sex involves intimacy frequently enough to justify protection of the overall class, whereas the opposite is true of sex-for-money.

But what justification does the state have for forbidding prostitution? It is probably sufficient here to point to the adverse effects of prostitution on the lives of prostitutes; the risk of exploitation and worse is real and serious.<sup>33</sup> Of course some of the risk stems from the very fact that prostitution is unlawful. Perhaps the extent of exploitation would be decreased if prostitution were lawful. But this is an issue on which reasonable people can differ, and so long as rational basis review is involved, the state has sufficient justifications. Nor does *Lawrence* disallow moral justifications for regulating prostitution, justifications pointing to

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<sup>30</sup> See, e.g., *J.B.K., Inc. v. Caron*, 600 F.2d 710, 711 (8th Cir. 1979); *Morgan v. Detroit*, 389 F. Supp. 922, 926 (E.D. Mich. 1975); *State v. Allen*, 424 A.2d 651, 654-55 (Conn. Super. Ct. 1980); *Blyther v. United States*, 577 A.2d 1154, 1156-58 (D.C. 1990).

<sup>31</sup> See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

<sup>32</sup> See *Commonwealth v. Walter*, 446 N.E.2d 707, 710 (Mass. 1983); *State v. Price*, 446 N.W.2d 813, 818 (Iowa 1976).

<sup>33</sup> See, e.g., *People v. Mason*, 642 P.2d 8, 12 (Colo. 1982); *People v. Johnson*, 376 N.E.2d 381, 386 (Ill. App. Ct. 1978).

the potentially corrosive effects of prostitution on sexuality and sex equality.<sup>34</sup> It is not easy to cabin the social effects of prostitution; if it were widespread and legitimate, it might well contribute to the sexual subordination of women.

I am not taking a position on the complex and disputed question whether and how prostitution should be outlawed. My suggestion is only that under rational basis review, restrictions on prostitution are easily defensible. The ban on the sale of obscenity should be understood in similar terms;<sup>35</sup> the use of obscenity raises different issues.<sup>36</sup> The simplest point is that to the extent that *Lawrence* rested on the absence of enforcement of laws forbidding sodomy, that point is wholly inapplicable to the case of commercial sex.

### *C. Neither Coercion Nor Commerce*

For government, the most serious problems, post-*Lawrence*, come in cases challenging restrictions on genuinely consensual and noncommercial practices. Begin with what might seem an intermediate case: bans on sexual devices.<sup>37</sup> Following the previous discussion, we should distinguish here between sale on the one hand and use on the other. Perhaps the state could ban the sale itself, urging that it is attempting to regulate a commercial enterprise, and that it is permitted to do so in light of the commercial-noncommercial distinction just made. But even this is not entirely clear. The constitutional protection given to the use of contraceptives was rapidly extended to the sale of contraceptives.<sup>38</sup> And if a ban on the sale of contraceptives cannot be justified, it is not clear, after *Lawrence*, how the state can justify a ban on the sale of sexual devices. Before *Lawrence*, it might have been said that the privacy cases did not protect sexual activity as such, but merely banned the state from punishing that activity through the indirect and discriminatory means of risking unwanted pregnancy. But *Lawrence* forbids this narrow reading of the cases.

Could the state make it a crime for people to *use* such devices? The right to do so might well fall within the category of fundamental interests. If we are

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<sup>34</sup> See *Bell v. United States*, 349 U.S. 81, 84 (1955) (Minton, J., dissenting); *People v. Warren*, 535 N.W.2d 173, 177 (Mich. 1995) (Levin, J., dissenting); *State v. Wright*, 561 A.2d 659, 662 (N.J. Super. Ct. App. Div. 1989).

<sup>35</sup> See, e.g., *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 58–59 (1973).

<sup>36</sup> The use can be banned by reference to moral objections. *Miller v. California*, 413 U.S. 15, 23–25, 36–37 (1973). Still, the use of obscenity within the home is protected. *Stanley v. Georgia*, 394 U.S. 557, 565, 568 (1969). A different and, in my view, better analysis would point to actual harms. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 127–213 (1987); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595–602.

<sup>37</sup> See, e.g., *Williams v. Pryor*, 240 F.3d 944, 956 (11th Cir. 2001); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 997–98 (7th Cir. 2002) (remanding for consideration of whether a ban on sexual devices violated a fundamental right to privacy).

<sup>38</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687–88 (1977).

speaking of autonomy as such, that conclusion seems clearly correct. If desuetude is the proper analysis, the issue is more complex. It is not clear that social attitudes have dramatically shifted, as they have in the context of sexual orientation; but prosecutions for use are at least rare, and sales are generally permitted. In any case, what is the state's justification for banning either sale or use? It is easy to imagine an as-applied challenge, in which a married couple attacks a ban on either the sale or the use of sexual devices with reference to *Griswold* itself.<sup>39</sup> The difference is that in *Griswold*, the ban on use of contraceptives was an effort to prevent non-procreative sex, whereas in the hypothetical case, the state is banning devices that are designed to increase sexual pleasure. But why, exactly, would it seek to do that? Is there something wrong with certain sources of sexual pleasure within constitutionally protected relationships? Perhaps the answer would be affirmative if real harms were involved, as for example through some sadomasochistic practices. Almost certainly the state could justify a prohibition on the public display of such devices. But we are not now speaking of these questions. At first glance, individuals have a fundamental interest here, and the state seems to lack a legitimate basis for intruding on that interest.

If there were laws forbidding masturbation, *Lawrence* would indeed raise extremely serious questions about them on grounds of either autonomy or desuetude. But there are no such laws.<sup>40</sup> What about laws forbidding fornication, understood to mean non-adulterous sex outside of marriage?<sup>41</sup> On autonomy grounds, *Lawrence* creates serious doubts, simply because coercion and commerce are not present. In any case, there seems to be an emerging social belief that fornication is not a proper basis for criminal punishment.<sup>42</sup> And with respect to consenting adults, it is not easy to produce a legitimate ground for interfering with non-adulterous sex.<sup>43</sup>

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<sup>39</sup> See *Williams*, 240 F.3d at 952–53 (suggesting that an as-applied challenge is plausible).

<sup>40</sup> *Lawrence* raises no questions about laws forbidding public masturbation. The most plausible objection would be that mere offense is not a legitimate basis for regulating noncoercive sex; and indeed Justice Scalia seems to read the Court's opinion to have that implication. *Lawrence v. Texas*, 539 U.S. 558, 590 (Scalia, J., dissenting). But the Court's rejection of the moral basis of the ban on sodomy should not be taken to forbid governments from protecting people from unwanted viewing of other people's sex lives.

<sup>41</sup> See, e.g., *Jarrett v. Jarrett*, 449 U.S. 927, 929 n.2 (Brennan, J., dissenting) (citing Ill. Rev. Stat. ch. 38, § 11-8 (1977)) (noting that denial of child custody based on divorced mother's apparent violation of fornication statute through cohabitation with a single man likely violated the Fourteenth Amendment).

<sup>42</sup> See, e.g., *id.*; *In re J.M.*, 575 S.E.2d 441, 444 (Ga. 2003) (holding Georgia's interest in protecting minors was not applicable to fornication of two minors past the age of consent); *State v. Saunders*, 381 A.2d 333, 339 (N.J. 1977) (overturning fornication statute as a violation of constitutionally protected right to privacy).

<sup>43</sup> Admittedly, rational basis review might be satisfied if, for example, the state urged that it was attempting to reduce the risks of unwanted pregnancy and venereal disease. But after *Lawrence*, rational basis review is unlikely to be applied here.

The most difficult cases involve laws forbidding adultery.<sup>44</sup> We could imagine actual adultery prosecutions;<sup>45</sup> we could also imagine cases in which government takes adverse employment action against those involved in adulterous relationships.<sup>46</sup> Here, as in other contexts, it would be possible to urge that a consensual relationship is involved, one with which the state may not interfere on purely moral grounds. On the other hand, it is possible to justify prohibitions on adultery by reference to harms to third parties: children, in many cases, and the betrayed spouse, in many more cases. The adultery laws can be seen as an effort to protect the marital relationship, involving persons and interests, including those of children, that are harmed if adultery occurs.<sup>47</sup> Marriage can be and often is understood as an exchange of commitments, which have individual and social value; and a prohibition on adultery, moral and legal, operates in the service of those commitments. For these reasons, adultery cases might be seen as outside of the domain of *Lawrence* altogether. If rational basis review is involved, prohibitions on adultery should certainly be acceptable—except, perhaps, in cases in which the married couple has agreed to non-exclusivity (in which case criminal prosecution would be especially surprising).

One difficulty here is that in the context of adultery, criminal prosecutions are extremely unusual, at least as rare as criminal prosecutions for sodomy. There is a good argument that criminal prosecutions, in this context, are inconsistent with emerging social values—a point that *Lawrence* takes seriously.<sup>48</sup> This is not because adultery is thought to be morally acceptable; it is not. (Here there is a difference with same-sex relations, which are increasingly believed to be acceptable.) It is because adultery is not thought to be a proper basis for the use of the criminal law. Perhaps it could be said that *Lawrence* turned at least in part on the Court's evident desire to ensure against practices that would "demean[] the lives of homosexual persons."<sup>49</sup> It is much less plausible to say that the Court should take special steps to ensure against practices that would "demean the lives of" adulterers. But in the end, it is not so easy to distinguish an adultery prosecution from the sodomy prosecution forbidden in *Lawrence*.<sup>50</sup> On desuetude

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<sup>44</sup> See *Marcum v. McWhorter*, 308 F.3d 635, 642 (6th Cir. 2002).

<sup>45</sup> See *Commonwealth v. Stowell*, 449 N.E.2d 357, 358 (Mass. 1983).

<sup>46</sup> See *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1469 (D. Utah 1995); *City of Sherman v. Henry*, 928 S.W.2d 464, 465–66 (Tex. 1996).

<sup>47</sup> See *Oliverson*, 875 F. Supp. at 1484.

<sup>48</sup> See Sunstein, *supra* note 6.

<sup>49</sup> *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

<sup>50</sup> Employment discrimination by the state against adulterers raises further complexities. On a standard analysis, protection against criminal prosecution, if it exists, is conclusive on the issue of public employment, forbidding discrimination against people who have engaged in constitutionally protected activity. One exception would apply when the government can invoke distinctive employment-related grounds for the discrimination. A public university's admissions office need not hire, as director of admissions, people who speak out in favor of race

grounds, the two problems are very close. On grounds of autonomy, the only distinction is that third-party interests are at stake in adultery cases.

#### IV. MARRIAGE

Under *Lawrence*, must states recognize same-sex marriages? This is undoubtedly the most controversial issue raised by the Court's decision. Most Americans do not want gays and lesbians to be prosecuted for sexual activity. But most also do not want to allow marriages between people of the same sex.

At first glance, *Lawrence* has nothing at all to do with same-sex marriage. It involved sodomy prosecutions, brought under anachronistic laws, and the due process challenge to those prosecutions need not draw into doubt the longstanding practice of defining marriage to involve one man and one woman. In any case, the most natural challenge to laws rejecting such marriages is rooted in the Equal Protection Clause; and *Lawrence* said nothing about the Equal Protection Clause. Indeed, the Court might well have issued a due process ruling, and avoided the Equal Protection Clause, precisely because it sought to avoid the marriage issue. To the extent that the Court was emphasizing an emerging social judgment against the practice under attack, its decision does not touch prohibitions on same-sex marriage—and will not do so unless and until such prohibitions seem as outmoded as bans on homosexual sodomy do today. Existing legal practice suggests strong opposition to same-sex marriage,<sup>51</sup> and polling evidence suggests that most Americans support existing practice.<sup>52</sup>

But under current constitutional law, the issue cannot be disposed of so readily. Hence the Court's effort to avoid the same-sex marriage issue was not entirely successful. Because the Court made it clear that a successful due process challenge need not be rooted in tradition, such a challenge might well be made to prohibitions on same-sex marriage under existing law. Several cases have indicated that there is a constitutional "right to marry" under the Due Process

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discrimination; perhaps discrimination against adulterers can, in some contexts, be similarly justified. In any case, everything turns on the reason for a due process ruling. If adultery prosecutions were banned on the basis of a rationale tied to the illegitimacy of using the criminal law, perhaps civil disabilities, as through employment discrimination, would be permissible. I explore related issues below.

<sup>51</sup> As of this writing, the only decision to require official recognition of same-sex marriages is *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003), a decision that rested on the state constitution. Most state courts have ruled otherwise. *See, e.g., Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. 2003). Civil unions are a different matter, but they hardly can claim even strong minority support.

<sup>52</sup> See the summary, Baptist Press, *New Poll Shows Generation Gap in Opposition to Same Sex Marriage* (July 22, 2003) at <http://www.bpnews.org/bpnews.asp?ID=16337> (last visited Sept. 1, 2004).

Clause. In *Loving v. Virginia*<sup>53</sup> (probably the best-named case in all of constitutional law), the Court struck down a ban on racial intermarriage on two grounds. The first is the familiar equal protection ground, seeing that ban as a form of racial discrimination. But in a separate ruling, the Court also held that the ban violated the Due Process Clause. In the Court's words, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>54</sup> It added that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>55</sup> The *Loving* Court's due process ruling was not free from ambiguity; the problem of racial discrimination played a large role. But subsequent cases confirm that the right to marry counts as fundamental for due process purposes—and is sufficient by itself to take the analysis into the domain of heightened scrutiny.

In *Zablocki v. Redhail*,<sup>56</sup> the Court struck down a Wisconsin law forbidding people under child support obligations to remarry unless they had obtained a judicial determination that they had met those obligations and that their children were not likely to become public charges.<sup>57</sup> The Court insisted that "the right to marry is of fundamental importance for all individuals,"<sup>58</sup> and that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."<sup>59</sup> The Court said that it would uphold "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship."<sup>60</sup> But any direct and substantial interference with the right to marry would be strictly scrutinized. In a concurring opinion, Justice Stevens underlined the point, urging that the Constitution would cast serious doubt on any "classification which determines who may lawfully enter into the marriage relationship."<sup>61</sup> In *Turner v. Safley*,<sup>62</sup> the Court followed and extended *Zablocki*, striking down a prison regulation that prohibited inmates from marrying unless there were "compelling reasons" for them to do so.<sup>63</sup>

In this light, a prohibition on same-sex marriage is not entirely easy to defend in the aftermath of *Lawrence*. Under the Court's decisions, a fundamental right might well seem to be involved, at least if the autonomy rationale is emphasized

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<sup>53</sup> *Loving v. Virginia*, 388 U.S. 1 (1968).

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

<sup>56</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>57</sup> *Id.* at 377.

<sup>58</sup> *Id.* at 384.

<sup>59</sup> *Id.* at 386.

<sup>60</sup> *Id.* at 386–87 (citing *Califano v. Jobst*, 434 U.S. 47, 48 n.12 (1977)).

<sup>61</sup> *Id.* at 404 (Stevens, J., concurring).

<sup>62</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>63</sup> *Id.* at 96–99.

(as the marriage cases themselves seem to do). The important point here is that *Lawrence* cuts the ground out from under the simplest constitutional defense of the prohibition on same-sex marriage, to the effect that the prohibition is justified simply by reference to tradition. And if a fundamental right is involved, it is one with which the state can interfere only by pointing to a countervailing interest that is not merely legitimate but also compelling.

In the context of same-sex marriage, what might that interest be? What sorts of social harms would follow from recognizing marriages between people of the same sex? It is conventional to argue that the refusal to recognize same-sex marriage is a way of protecting the marital institution itself. If same-sex marriages were permitted, perhaps marriage itself would be endangered, at least in its traditional form. But aside from simple semantic arguments, this is very puzzling; how do same-sex marriages threaten the institution of marriage? Extending the right to enter into marriage would not seem to endanger traditional marriages—unless it were thought that significant numbers of heterosexuals would forego traditional marriages if gay and lesbian marriages were permitted. This is a difficult causal argument, to say the least.

Perhaps the state can legitimately reserve the idea of marriage to men and women for expressive reasons. Perhaps the state can urge that it does not want to give the same expressive support to same-sex unions as to opposite-sex unions. Perhaps it does not want to “endorse” such unions or to suggest that they are appropriate or legitimate or have a standing similar to that of traditional marriage. But why not? Why should states refuse to endorse such unions? Compare the case of adultery, where defense of traditional marriage and expressive condemnation are far easier to understand. As compared to a ban on same-sex marriages, a prohibition on adultery seems simple to justify. Such a prohibition is likely, in numerous cases, to protect one or even both spouses, and to protect children besides. If, as I have suggested, *Lawrence* draws prohibitions on adultery into some doubt, it would seem to raise serious questions about prohibitions on same-sex marriage, which have a far weaker foundation in the goal of protecting traditional marriage.

But *Lawrence* involved criminal punishment, as a denial of the benefits of marriage does not, and perhaps criminal punishment is special. Perhaps such punishment is quite different from, and to be assessed far more skeptically than, a statute that confers the benefits of marriage to some but not to all. Perhaps *Lawrence* forbids the state from using the heavy artillery of the criminal law—but without raising questions about civil rights and civil duties. It would not be at all implausible to say that the *Lawrence* Court was responsive to the assortment of disabilities associated with criminal punishment—a set of disabilities that might be thought unique. In fact, both the autonomy and desuetude rationales can be invoked in support of this position. Perhaps the desuetude argument is limited to criminal prosecution, applying only to efforts to use the criminal law against people notwithstanding a general pattern of nonenforcement. And perhaps the

autonomy rationale applies only, or most strongly, when the government attempts to invoke the criminal law against those who have engaged in consensual sex.

These arguments are coherent as readings of *Lawrence* itself. The problem is that *Loving*, *Zablocki*, and *Turner* themselves raise questions for this kind of distinction. None involved a criminal prohibition. All applied careful judicial scrutiny to laws saying that certain people could not enter into the marital relationship. The problem for those who want to defend the ban on same-sex marriage is not *Lawrence* by itself, but the trilogy of marriage cases, understood in light of *Lawrence*'s refusal to understand tradition as the basis for due process rights.

Perhaps we could read the three cases more narrowly.<sup>64</sup> Notwithstanding the Court's rhetoric, it is quite doubtful that the Court really meant to raise serious questions about *all* state laws dictating who may enter into a marital relationship. People are not permitted to marry dogs or cats or cars or sunny days. They are banned from marrying their parents or their aunts. They cannot marry two people, or three, or twenty. Must these restrictions be justified by showing that they are the least restrictive means of achieving a compelling state interest? If so, at least some of them would be in serious trouble. Perhaps the ban on incestuous marriages could be defended by pointing to the risk of coercion and the danger to any children who would result. But as we have seen, it is easy to imagine some cases in which any such defense would be weak—as, for example, where the would-be spouses are both adults and do not plan to have children. Perhaps bans on polygamy could be defended by pointing to the risk of exploitation, especially of the women involved. It is easy to imagine a claim that if polygamy is permitted, women will be subordinated as a result. But we might doubt whether *Loving* and *Zablocki* should be read to require a careful judicial inquiry into that question.

A possible opinion would urge that by deeming the right to marry fundamental, the Court did not mean to suggest that it would strictly scrutinize any law that departed from the traditional idea that a marriage is between (one) woman and (one) man. It meant only to say that when a man and a woman, not members of the same family, seek to marry, the state must have exceedingly good reasons for putting significant barriers in their path. This rationale has the advantage of fitting with the results in *Loving*, *Zablocki*, and *Turner*. It has the further advantage of not drawing into question bans on polygamous or incestuous marriages, or marriages between people and cats. But it does have a problem: it seems somewhat arbitrary. Why, exactly, should the right to marry be limited in

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<sup>64</sup> See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. (forthcoming 2005). It would also be possible to deny that the right to marry has a constitutional status—to urge that *Loving*, *Zablocki*, and *Turner* were really equal protection cases. This view would have some appeal, especially to skeptics about substantive due process, but it does not fit with current law.



this way? Why, in any case, should the definition be such as to allow the state not to recognize same-sex marriages?

These are not easy questions to answer. The best response would combine institutional considerations, involving the limitations of the federal courts, with an appreciation of the difference between the Due Process Clause and the Equal Protection Clause. Above all, the institutional considerations involve the need for judicial humility. Strict scrutiny would put courts in an exceedingly difficult position, for it is not so easy to produce compelling justifications for forbidding consensual relations that one or more people would like to call "marriage." If three people would like to marry, it is not simple to produce strong justifications for forbidding them to do so, at least if we are in the domain of heightened scrutiny. Of course one or another person might be exploited; of course children might be harmed. But in the abstract, these are somewhat speculative concerns, and they might be addressed through means short of a ban. And it is simply implausible to think that courts would or should say that the state must allow marriages among small groups or for that matter large ones. The slippery slope problem here is serious. And if desuetude is at least a part of the explanation for *Lawrence*, then we can add that the ban on same-sex marriages has not, yet, fallen into desuetude, and hence the federal courts should be reluctant to invoke *Lawrence* in order to invalidate them.

In any event, the cases involving sex and reproduction, now broadened by *Lawrence*, involve the imposition of particular kinds of disabilities on those who have engaged in certain kinds of private conduct. Read in terms of autonomy, those cases embrace a narrow form of John Stuart Mill's position in *On Liberty*,<sup>65</sup> requiring "harm to others" before permitting government to ban consensual sexual conduct.<sup>66</sup> And the state could not punish the relevant conduct by saying, for example, that those who have engaged in certain sexual acts are not permitted to marry one another. In fact, the protection of marriage, at least in *Zablocki*, seems to rest partly on the understanding that before *Lawrence*, marriage was the only status in which certain sex acts could lawfully occur: If the acts themselves can lawfully take place only within the marital form, then there is particular reason to protect the marital form. But now that those acts are protected by *Lawrence*, it seems most sensible to treat the relevant cases as protecting them from intrusion by the state and as having little or nothing to do with a right of access to the institution of marriage. Here the Due Process Clause seems beside the point.

If certain people are told that they cannot marry, the real objection lies not in due process, but in a possible violation of the Equal Protection Clause. The concern, in short, is that the state is discriminating against people not permitted

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<sup>65</sup> JOHN STUART MILL, *ON LIBERTY* (Curran V. Shields ed., Liberal Arts Press 1956) (1859).

<sup>66</sup> *Id.* at 98.

access to the marital relationship—not in the suggestion that there is a right to marry as such. I am suggesting that except for the defining cases of one woman and one man, there is no such right; outside of those cases, the objection, if there is one, is in a constitutionally unacceptable form of discrimination. And usually that objection will be weak. When people are forbidden from marrying their cats, or from marrying two or three people, the equal protection objection is weak. A rational basis is all that the state is required to show and a rational basis is something that the state has.

Do bans on same-sex marriage violate the Equal Protection Clause? I cannot discuss that issue in detail here.<sup>67</sup> In principle, I believe that it is very hard to defend this form of discrimination against gays and lesbians in constitutionally acceptable terms. For federal courts, the real problem is institutional, though it has nothing to do with slippery slopes. It involves instead appropriate judicial modesty in the face of strong public convictions, and in particular, the distinctive judicial virtue of prudence. As Alexander Bickel has emphasized, the point is highly relevant to constitutional law, especially in the area of social reform.<sup>68</sup> As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint. Constitutional rights might therefore be systematically “underenforced” by the judiciary for good institutional reasons.<sup>69</sup> Those reasons have to do with the courts' limited fact-finding capacity, their weak democratic pedigree, their limited legitimacy, and their likely ineffectiveness as frequent instigators of social reform. There are good prudential reasons for courts to hesitate in this context, in part because the issue of same-sex marriage is under intense discussion at the local, state, and national levels, and there are many possibilities, ranging from diverse forms of civil unions to ordinary marriage. As in the context of abortion, it would be most unfortunate if the Supreme Court were to settle the issue at this early stage.

Some platitudes are worth repeating: A central advantage of a federal system is that it permits a wide range of experiments; a central disadvantage of centralized rules is that they foreclose such experiments. In the context of criminal punishments for consensual activity, experiments are best avoided. But in the context of marriage, a degree of judicial caution and democratic flexibility is highly desirable. This point connects nicely with the suggestion that the *Lawrence* decision was rooted in a kind of American-style version of desuetude. When a law has lost support in public convictions, judicial invalidation is least damaging to democratic goals and to the Court's own institutional position. At least at this stage, the ban on same-sex marriage stands on much firmer footing. I emphasize my belief that in principle, such a ban raises serious equal protection concerns;

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<sup>67</sup> See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* 192–93 (2001).

<sup>68</sup> See BICKEL, *supra* note 19, at 111–98.

<sup>69</sup> Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978).

my objection to a ruling from the federal judiciary has everything to do with its properly limited role in the constitutional structure.

## V. EMPLOYMENT

May a public employer discharge or punish an employee because of his sexual activities or his sexual orientation? Before *Lawrence*, the lower courts were divided on the issue.<sup>70</sup> The logic of *Bowers* supported the decisions upholding such discharges, at least against due process challenges. It was possible to urge that because homosexual activity is not protected by the Constitution, government employees are permitted to discriminate against those who engage in that activity. At first glance, however, *Lawrence* resolves that question the other way. A public employer is not permitted to discharge an employee because she has exercised a constitutional right (an oversimplification to which I shall return). If an employee has converted to Catholicism, or voted for a Republican, she may not be adversely affected for that reason. So too if an employee has exercised a right protected by the Due Process Clause. A state may not refuse to hire a secretary who has used contraception or had an abortion. Under *Lawrence*, government may not refuse to hire people who have engaged in same-sex relations. It could be argued that a criminal punishment is worse than a civil disability and hence that the prohibition on criminal prosecution does not entail an equivalent prohibition on adverse employment actions. But the examples just described should be sufficient response to that argument.

Most cases of adverse employment action, prompted by homosexual activity, are easy after *Lawrence*. But there are some possible responses. One would emphasize the reading I have emphasized here: *Lawrence* can be seen to have turned not simply on a finding of a fundamental right, but also and perhaps more importantly on the Court's conclusion that the Texas law was no longer supported by public convictions. If desuetude is involved, then perhaps employment discrimination is permitted even if criminal prosecution is not. This argument is not at all implausible or incoherent. If we emphasize the idea of desuetude, then a moral judgment might be permissible in the employment context even if it cannot be invoked as a basis for criminal prosecution. But for the particular purpose of employment action, this approach reads *Lawrence* a bit too finely. The Court did find a fundamental interest, whatever its precise reason for doing so; and if so, states may not refuse to hire people who have engaged in the relevant behavior. In

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<sup>70</sup> See *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (holding that homosexuals are not a protected class under Title VII); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 145–48 (N.D. Tex. 1981) (holding that a police department could refuse to hire a gay activist because of doubts about his character). Compare *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998) (finding no rational basis for a decision not to renew the contract of a homosexual teacher); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) (to the same effect).

fact, the notion of desuetude might even be enlisted on behalf of this conclusion. The commitments that underlie sanctions against same-sex relations no longer command enough support to justify use of the criminal law. If so, significant civil burdens might well be unacceptable too.

Another response would emphasize that the government sometimes may indeed refuse to hire people for engaging in constitutionally protected activity. The President is permitted to discharge or to fail to employ, as Secretary of State, someone who has publicly criticized his policies; so too, a public university is allowed not to hire, or even to fire, an admissions officer who has said that women should not go to college, or that it is best for African-Americans to attend vocational school. In such cases, the university can claim, plausibly, that it is not trying to censor anyone, or to punish them for exercising constitutional right, but instead to accomplish the substantive task that it has set for itself.<sup>71</sup> Might discrimination against gays and lesbians be similarly justified? This is not entirely unimaginable, but it is hard to see. Unless the state is to capitulate to private prejudice, as it is generally forbidden from doing,<sup>72</sup> it cannot easily invoke a distinct, employment-related reason to discriminate on the basis of sexual orientation. Why, exactly, would employment-related justifications argue against employment of a gay police officer, secretary, or town official? The analogy to the legitimate cases discussed above is very weak.

It also follows that the “don’t ask, don’t tell” policy, in the military setting, is under new pressure. It is no longer possible to defend that policy simply by citing *Bowers*. If the policy is to be upheld, it is because courts should give great deference to military judgments, applying a form of rational basis review to them. I believe that federal courts are not likely to interfere with military judgments here, and that there is exceedingly good reason for a general posture of deference to such judgments. In principle, however, it is extremely difficult to defend “don’t ask, don’t tell” against constitutional challenge, and this appears to be one of the exceedingly rare settings in which judicial interference with military judgments would be justified.<sup>73</sup>

## VI. CONCLUSION

What is the reach of *Lawrence*? The discussion has gone briskly over a considerable amount of territory. For those who find tabular summaries useful, consider the following:

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<sup>71</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), for the basic framework.

<sup>72</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>73</sup> For an argument to this effect before *Lawrence* was decided, see CASS R. SUNSTEIN, *supra* note 67, at 189–92.

	Valid	Invalid	Probably valid	Probably invalid
Sexual harassment	X (coercive)			
Prostitution	X (commercial)			
Incest			X (coercive; but some hard issues in imaginable applications)	
Adultery				X (but perhaps defensible by reference to harms to third parties)
Fornication		X		
Use of sexual devices		X		
Polygamy	X			
Employment discrimination against gays and lesbians		X (except for military)	X (military)	
Bans on same-sex marriage				

Whether we emphasize autonomy or desuetude, restrictions on sex that is nonconsensual or commercial are surely valid. By contrast, laws forbidding fornication, defined as extramarital but non-adulterous sex, are surely invalid. The Constitution probably forbids government from punishing, either criminally or civilly, those who have used sexual devices. The state is almost certainly banned from discriminating against those who have engaged in homosexual conduct, at least outside of certain specialized contexts (most notably the military). In some applications, bans on incest and adultery could be subject to serious constitutional challenge. The idea of autonomy supports such challenges in imaginable applications; so too with the idea of desuetude.

The hardest cases involve the failure to recognize same-sex marriages. If *Lawrence* is put together with *Loving* and *Zablocki*, it might seem clear that the government would have to produce a compelling justification for refusing to recognize such marriages, and compelling justifications are not easy to find. *Lawrence* makes it impossible to justify current practice merely by reference to tradition. I have argued, however, that there is no general right to marry, and that

the Court's due process decisions are best read to apply only to cases in which the state forbids marriages between one man and a woman.

A ban on same-sex marriages raises serious equal protection issues. I believe that outside the courtroom, the equal protection objection is convincing, but that federal courts should hesitate to rule to that effect. The reason has to do with the properly limited role of the Supreme Court in American government. The ban on same-sex sodomy could legitimately be said to be out-of-touch with existing public convictions, as reflected in a pattern of nonenforcement; the same cannot now be said of a ban on same-sex marriage.

More generally, I have suggested that *Lawrence* rested on a mixture of ideas about autonomy and ideas about desuetude. I have also suggested that a desuetude reading has significant advantages. It suggests that the Court's ruling can claim a basis in procedural commitments associated with the rule of law, including predictability, fair notice, and the avoidance of arbitrary or invidious behavior by the police. It suggests that the Court's decision does not go in the face of public convictions; on the contrary, it draws strength from them. I have not contended that desuetude provides all of the story. But it is clear that *Lawrence* was made possible only by changes in public values. The Court's members live in society, and they are inevitably affected by what society thinks—a fact to which *Lawrence* itself attests. The fate of liberty after *Lawrence* will depend not mostly on the commitments of judges, but more fundamentally on the evolving beliefs of the nation's citizenry.

