ARTICLES

THE RIGHT TO DEFINE ONE'S OWN CONCEPT OF EXISTENCE: WHAT *LAWRENCE* CAN MEAN FOR INTERSEX AND TRANSGENDER PEOPLE

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INTRODUCTION

One of the remarkable contributions that scholarship can play in the development of legal doctrine is the construction of the meaning of a Supreme Court case. The roundtable, Living with Lawrence, which was hosted by the *Georgetown Journal of Gender and the Law* in 2005 and whose transcript of proceedings is reproduced in this volume, is part of that construction: what does the Supreme Court's opinion in *Lawrence v. Texas*[1] mean for the future of the lesbian, gay, bisexual and transgender (LGBT) movement?

The construction of a case, of course, entails not only an analysis of what the Court says in its opinion—for example, about liberty, substantive due process analysis, or morality—but also an analysis of the social preconditions necessary for the Court's result, the social movements the Court's opinion reflects, and the possibilities for the future that the opinion offers.

My part in the construction of the meaning of *Lawrence* goes towards possibilities for the future. As I attempted to do in brief during the roundtable discussion, I want to explore how the Court's reasoning in *Lawrence*, coupled

* Professor of Law, Georgetown University Law Center. Many thanks to Nan Hunter for reading this piece and helping me make it better and for supporting and challenging me generally; to Michael Boucai and Robin West, for some wonderful conversations; to Cheryl Chase, Mara Keisling, Lisa Mottet, Jennifer Levi, Shannon Minter, and Paisley Currah for making a difference in the lives of intersex and transgender people and for teaching me what I know in these areas; to Amy Simmerman and Alyssa Rayman-Read for research assistance beyond the call of duty; and to the editors of the *Georgetown Journal of Gender and the Law* in both 2005 and 2006 for caring about gender and sexuality and for supporting innovative roundtables and scholarship.

1. Lawrence v. Texas, 539 U.S. 558 (2003).

with a robust view of federal constitutional rights, could result in the expansion of personhood rights under our Constitution—such that intersex[2] and transgender[3] individuals would be able to feel safe, happy and fulfilled in our society.

My argument in this brief essay is that the liberty interest recognized by the court in *Lawrence*—the right "to define one's own concept of existence"[4]—is an interest that speaks directly to the efforts of intersex people to wrest control over the fate of their sex anatomy from concerned parents and physicians and to the efforts of transgender people to define their gender identity and expression. Moreover, I argue that the state's obligation—either under its guarantee to provide "equal protection" to its citizens or under its obligation to protect an individual's fundamental rights as a matter of substantive due process—requires the state to provide intersex and transgender people with the affirmative protection and social structures necessary for them to realize their efforts towards self-definition.

Even if one does not subscribe to the robust view of constitutional rights that I will present below, I believe the content of the liberty interest articulated by the majority in *Lawrence v. Texas* is still relevant. As a matter of "good government,"

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2. An intersex person is a person who is born with a disorder of sex development (DSD), which may include "anomalies of the sex chromosomes, the gonads, the reproductive ducts, and the genitalia." CONSORTIUM ON THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT, CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 2 (2006), http://www.dsdguidelines.org/files/clinical/clinical.pdf [hereinafter CLINICAL GUIDELINES]. In practice, this often means an individual who has ambiguous genitalia or who has genitalia that do not match the individual's sex chromosomes or internal reproductive organs. *See* Sarah Creighton & Catherine Minto, *Managing Intersex*, BMJ, Dec. 2001, at 1264-65 ("Intersex conditions consist of a blending or mix of the internal and external physical features usually classified as male or female—for example, an infant with ambiguous genitalia or a woman with XY chromosomes.").

3. Phyllis Frye and Katrina Rose, litigators in private practice, note that the term "transgender" once used to describe "a person who lives as a member of the sex opposite of that designated at birth but without undergoing genital surgery," while the term "transsexual" referred to "a person who desires to change bodily sex characteristics, irrespective of whether the person has undergone, or intends to undergo, corrective genital reconstruction surgery (CGRS), also referred to as sex reassignment surgery (SRS)." Phyllis Randolph Frye & Katrina Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 558-59 (2003), *reprinted in* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER & THE LAW 1421-22 (2d ed. 2004). Frye and Rose note that the term transgender "has become an umbrella term encompassing all forms of being at odds with 'traditional' concepts of gender." *Id.* at 558. I use the term "transgender" in this essay in its broadest sense, encompassing those who have changed their gender from the one assigned at birth through whatever means, as well as those who simply present in a manner not usually associated with the sex of their genitalia.

4. The passage reads in full:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence, 539 U.S. at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

an understanding of that liberty interest should infuse the work of state and federal legislators as they make law on behalf of their constituents who are intersex or transgendered.

In a symposium held just a few months after the *Lawrence* decision, Miranda McGowan correctly observed that advancements in the social assessment of a group historically precede the conferring of equality rights on such a group.[5] In that same symposium, William Eskridge provided a rich recounting of how the social assessment of homosexuality has changed over the past decades.[6]

My own view, reflected in my writings over the past decade, is that government often appropriately legislates on a shared social vision of morality and that changing the public's moral assessment of same-sex sexual activity is thus key to achieving true equality for LGBT people.[7] For some time, I have articulated this view as a requirement that the public must come to view homosexuality and heterosexuality as morally equivalent—that is, the public must believe that both straight sex and gay sex encompass equivalent moral "goods."[8] A more recent refinement of my view is that the public merely needs to believe that gay sex is morally neutral—that is, that there is nothing inherently immoral or wrong with two people of the same gender engaging in sexual conduct. That belief of moral neutrality must then be coupled with an affirmation that government has an obligation to advance what I term "statements of moral understanding." Four of those statements are the following: it is good for human beings in society to feel safe, to feel happy, to experience and give care, and to live a life of authenticity. These four statements of moral understanding, coupled with a belief in the moral neutrality of homosexual conduct, should then result in a society in which gay people are protected from discrimination in employment,

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5. Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1332-33 (2004).

6. William N. Eskridge, Jr., Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics, 88 MINN. L. REV. 1021 (2004).

7. As I noted in a recent piece:

> Justice Antonin Scalia berated the Court majority in *Lawrence v. Texas* for having 'signed on' to a 'homosexual agenda'—by which Justice Scalia meant an agenda 'directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.' Justice Scalia's formulation correctly articulates, to my mind, what should be one of the top priorities on the 'gay agenda.' But is it? Though challenging prevailing moral conceptions of homosexuality may well be implicit in our so-called 'agenda,' Justice Scalia would be wrong to suggest that, if such a tract literally existed today, it would focus on or even mention morality.

Chai R. Feldblum, *Gay is Good: The Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 140 (2005).

8. *See, e.g.*, Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation and Transgender*, 54 ME. L. REV. 159, 186-87 (2002) [hereinafter Feldblum, *Rectifying the Tilt*]; Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 1007 (1997); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 331 (1996).

provided access to civil marriage, permitted to adopt children, etc.[9]

I say this primarily to underscore that the legal analysis I present in this essay necessarily depends, for its fruition, on changes in society's moral assessments. That is, a societal majority needs to believe that individuals who adopt a gender identity or expression contrary to the gender assigned to them at birth, or who live with ambiguous genitalia or a disjuncture between their internal and external sex anatomy, are engaged in morally neutral behavior.

I remain quite optimistic about that outcome. The blossoming of organizations representing the rights of transgender and intersex individuals[10] and the greater visibility of transgender and intersex individuals in media coverage, literature, scholarship, and society in general[11] are essential prerequisites for members of the "mainstream" community to begin to feel greater ease with individuals who manifest any differences in gender or sex anatomy. These important elements are likely to grow, rather than diminish, in strength over the coming years.

If, at the same time, our political and judicial legal discourse could be constructed in a manner that allowed for an understanding of positive constitutional rights in general,[12] and for positive rights for transgender and intersex individuals in particular, the confluence of such a robust positive rights discourse with a changing social moral assessment of transgender and intersex people should result in a world in which such individuals will truly be able to define, for

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9. Obviously, there are other statements of moral understanding that are important for the creation of a good society. My argument is simply that government has an affirmative obligation to ensure these four moral understandings—that individuals in society should be able to feel safe, feel happy, receive and give care, and live a life of authenticity. I explore this argument, and its implications for religious people who believe homosexuality is sinful, in Chai R. Feldblum, *Moral Conflict: (Some) Religions and Gay Rights*, Beckett Foundation (forthcoming 2006). A more in-depth explication of this argument can be found in Chai Feldblum and Michael Boucai, *The Moral Values Project: Deploying Moral Discourse for Gay Equality* (work in progress). *See also* Morals Value Project: Gay is Good, www.moralvaluesproject.org. The work of Robin West has been a major influence on my thinking on these issues. *See, e.g.*, ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2005) (describing the need for government to affirmatively support the ability of individuals to give and receive care and to feel safe) [hereinafter WEST, RE-IMAGINING JUSTICE].

10. *See, e.g.* National Center for Transgender Equality, http://www.nctequality.org (last visited Mar. 3, 2006); Transgender Law and Policy Institute, http://www.transgenderlaw.org/ (last visited Mar. 3, 2006); National Transgender Advocacy Coalition, http://ntac.org/ (last visited Mar. 3, 2006); Intersex Society of North America, http://www.isna.org/ (last visited Mar. 3, 2006). These are just a few of the many organizations that exist to advance the rights of transgender and intersex individuals.

11. *See e.g.*, BOYS DON'T CRY (Fox Searchlight Pictures 1999) (movie depicting the life of Brandon Teena, a female-to-male transgendered boy who was brutally murdered); *TransGeneration* (Sundance Channel 2005) (television show about transgender college students); TRANSAMERICA (Weinstein Company 2005) (movie with a transgender protagonist); ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY (2000) (scholarship on the science and politics of transgender); JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED A GIRL (2000) (description of the life of David Reimer, the subject of the John/Joan case study developed by Dr. John Money); JEFFREY EUGENIDES, MIDDLESEX (2002) (novel with a transgender protagonist).

12. The positive rights I have in mind are those presented in a cogent and elegant fashion by Robin West in her book, RE-IMAGINING JUSTICE, *supra* note 9, at 92-102; see also *infra* Part II(B) for a description of these views.

themselves, their "own concept of existence, of meaning, of the universe, and of the mystery of human life."[13]

I. THE LIBERTY INTEREST RECOGNIZED IN *LAWRENCE*

"Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[14]

One can spend significant time writing articles on what "interest" exactly the Supreme Court recognized in *Lawrence* and what level of judicial scrutiny the Court expects lower courts to apply to such an interest.[15] Ordinarily, I would have found such discussions bordering on the absurd, given the clarity with which Justice Kennedy situated his discussion of the liberty interest burdened by Texas' sodomy law in the context of a litany of cases recognizing a substantive due process right of privacy justifying strict scrutiny.[16] Nevertheless, although the *Lawrence* majority recognized a right to sexual intimacy, it refrained from expressly identifying the right as "fundamental." Indeed, the majority ultimately invalidated the Texas sodomy law for not being based on a "legitimate state interest"—the classic formulation for a rational basis test.[17] In light of the fact that Justice Scalia, in dissent, pounced on those facts to create a reading of the majority opinion as not recognizing a fundamental right to engage in certain

13. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

14. *Id.* at 562.

15. Indeed, several commentators have done so. *See, e.g.*, Gloria Bluestone, *Going to the Chapel and We're Going to Get Married; But Will the State Recognize the Marriage? The Constitutionality of State Marriage Laws After* Lawrence v. Texas, 10 TEX. J. C.L. & C.R. 189 (2005) (supporting Justice Scalia's argument that Lawrence "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned"); Jeffrey M. Goldman, *Protecting Gays from the Government's Crosshairs: A Reevaluation of the Ninth Circuit's Treatment of Gays Under the Federal Constitution's Equal Protection Clause Following* Lawrence v. Texas, 39 U.S.F. L. REV. 617 (2005) (arguing for the treatment of gay sex as a fundamental right and, therefore, treating gays as a suspect class); Donald Beschle, Lawrence *Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 DRAKE L. REV. 231 (2005) (discussing the "breakdown of the familiar dichotomy between constitutional claims deserving strict scrutiny and those entitled only to low-level review" in order to shift the "focus of analysis from trying to weigh the importance of the right asserted by the individual to the strength of the government's justification for the challenged statute"); Jeffrey A. Williams, *Re-Orienting the Sex Discrimination Argument for Gay Rights After* Lawrence v. Texas, 14 COLUM. J. GENDER & L. 131 (2005) (arguing that heightened equal protection scrutiny is appropriately applied to laws using gender-based classifications to discriminate against gay people); Kirstin Andreasen, Lawrence v. Texas: *One Small Step for Gay Rights; One Giant Leap for Liberty*, 14 J. CONTEMP. LEGAL ISSUES 73 (2004) (arguing that gay sex is not a constitutionally protected "fundamental right").

16. *Lawrence*, 539 U.S. at 564-66 (starting with Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), moving to Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972), and culminating with Roe v. Wade, 410 U.S. 113 (1973) and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

17. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578.

forms of intimate sexual conduct,[18] and given that certain courts, at least, have been led astray by the absence of the explicit words "fundamental right" and "strict scrutiny,"[19] scholarly efforts to analyze the majority's opinion in *Lawrence*—for what interest was recognized and what level of scrutiny it deserves—continue to be worthwhile.

As a practical matter, however, I believe Professor Nan Hunter correctly assesses the direction of the Court in *Lawrence* as essentially consolidating and accepting the approach set forth by Justice Souter in his concurrence in *Washington v. Glucksberg*,[20] under which courts are required to assess "the relative 'weights' or dignities of the contending interests."[21] Largely because I agree with Hunter's assessment, I am not overly concerned in this essay with making the case that the interest recognized in *Lawrence* is a "fundamental right" that, when burdened by the government, requires application of strict scrutiny by the courts. I will take it as the given I believe it should be that the majority in *Lawrence* rested its decision on an understanding of the substantive contours of something called a "liberty interest," which is protected by the Due Process Clause of the federal Constitution, and which is highly important to protect when analyzing the validity of governmental action.

What I am more interested in, therefore, is how we can best understand the contours of this liberty interest and what those contours might tell us about the affirmative protections that intersex and transgender people could and should demand from the state.

The majority in *Lawrence* starts its analysis of the right at issue by telling us the following:

> The laws involved in *Bowers* [*v. Hardwick*] and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal

18. "Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" *Id.* at 586 (Scalia, J., dissenting) (internal citations omitted) (emphasis in original).

19. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Serv., 358 F.3d 804 (11th Cir. 2004) (upholding Florida's statutory ban on adoption by gay couples), *reh'g en banc denied*, Lofton v. Sec'y of the Dep't of Children & Family Serv., 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, Lofton v. Sec'y of the Dep't of Children & Family Serv., 543 U.S. 1081 (2005); Standhardt v. Super. Ct. of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003); *see also* State v. Limon, 83 P.3d 229 (Kan. App. 2004) (upholding higher penalty for same-sex conduct than for opposite-sex conduct). This holding was subsequently reversed in State v. Limon, 122 P.3d 22 (Kan. 2005).

20. 521 U.S. 702, 752-89 (1997) (Souter, J., concurring).

21. *Id.* at 767; *see* Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1121 (2004).

> 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.[22]

As an initial matter, therefore, the liberty interest at issue in *Lawrence* concerns a person's ability to choose an important personal relationship—in this case, a relationship characterized by sexual conduct—without fear of criminal prosecution.

The fact that many members of the public might consider such sexual conduct to be morally problematic is clearly acknowledged by the majority in *Lawrence*:

> It must be acknowledged, of course, that . . . for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.[23]

Despite the presence of such sincere convictions, the Court postulates that they are not relevant to the question before it:

> These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[24]

The majority in *Lawrence* ultimately appears to conclude that it is not permissible to criminalize a practice solely because a governing majority traditionally views that practice as immoral.[25] But as a practical matter, the Court spends significant energy considering whether Chief Justice Burger's assertion in his *Hardwick* concurrence—that "[c]ondemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards"[26]—is in fact substantiated. Thus, it

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22. *Lawrence*, 539 U.S. at 567.

23. *Id.* at 571.

24. *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

25. While the Court does not answer the question in the negative right after it poses it, it does quote with approval—at the end of its opinion—Justice Stevens' statement in his dissent in *Hardwick* that: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 577.

26. *Id.* at 571 (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring)).

certainly seems important to the Court to undermine the assertion that homosexual conduct is viewed by the governing majority as immoral—an enterprise that should have been wholly irrelevant had pure beliefs about morality been inappropriate in the shaping of a criminal code.[27]

In its analysis of Chief Justice Burger's assertion, the Court observes that "our laws and traditions in the past half century are of most relevance here," and that "[t]hese references 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."[28] Moreover, the fact that the European Court of Human Rights had held that laws proscribing homosexual sodomy are invalid under the European Convention on Human Rights was "at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[29]

What seemed most compelling to the *Lawrence* majority, however, is how the Supreme Court characterized the liberty interest in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[30] As the Court notes:

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27. I find it interesting that the majority in *Lawrence* never—in its *own* words—announces a rule that a majority's views on immoral conduct can never be enforced on society via the criminal law. As noted above, the only time the Court aligns itself with a strict rendition of such a rule is when it reaffirms that *Bowers v. Hardwick* was wrongly decided by quoting at some length from Justice Stevens' dissent in that case. The full quotation appears in this context:

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers*, Justice Stevens came to these conclusions:
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> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.
>
> Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

Id. at 577-78 (internal citations omitted). At a minimum, I think it is possible that some members of the majority believe they have announced a softer version of the rule—that is, that a legislature may not constitutionally enact a solely "morals-based" legislation *if* it collides with a valid liberty interest on the part of some members of society. As the Court itself put the holding in the case: "The Texas statute furthers no legitimate state interest which can *justify* its intrusion into the personal and private life of the individual." *Id.* at 578 (emphasis added). This approach would also be consistent with Justice Souter's concurrence in Washington v. Glucksberg, 521 U.S. 702 (1997).

28. *Lawrence*, 539 U.S. at 571-72. The Court noted: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

29. *Id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)). The Court also took note of the fact that many states have decriminalized sodomy or have simply failed to enforce their sodomy laws. *Id.*

30. 505 U.S. 833 (1992).

> In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
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> > These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
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> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.[31]

The Court could easily have ended its analysis right there. At its core, what the Court decided was that "at the heart of liberty is the right to define one's own concept of existence"—and that the sexual intimacy which is so important to heterosexual individuals in defining themselves in a relationship is equally important to homosexual individuals.[32]

But the Court went on to explain that another case of "principal relevance," which throws doubt on the holding of *Hardwick*, is *Romer v. Evans*.[33] In that case, the Court explained, it had invalidated an amendment to Colorado's Constitution that singled out homosexuals, lesbians, or bisexuals and deprived them of protection under state antidiscrimination laws. Its conclusions in *Romer v. Evans* were "that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental

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31. *Lawrence*, 539 U.S. at 573-74 (quoting *Casey*, 505 U.S. at 851) (internal citations omitted).

32. I believe that an unstated, but necessary foundation to this analysis, is a belief that homosexuality is morally neutral. For example, the majority also notes that the "continuance [of *Bowers*] as precedent demeans the lives of homosexual persons." *Id.* at 575. It is hard to believe that the majority would have felt the same way about a precedent that demeaned the lives of pedophiles or those who engage in incest. It is simply hard to avoid the conclusion that the belief that homosexuality is morally neutral is a necessary and logical precondition for the majority's analysis—even though it remains unstated as an explicit matter in the opinion.

33. *Id.* at 574 (citing Romer v. Evans, 517 U.S. 620 (1996)).

purpose."[34]

Although the *Lawrence* Court found *Romer* to be relevant, its reasoning was not based on the belief that the Texas sodomy law should similarly be invalidated on equal protection grounds, as Justice O'Connor chose to do in her concurrence.[35] Rather, as the Court explained, it was because:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. 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 in the private spheres.[36]

In other words, protecting the liberty interest to "defin[e] one's own existence" through sexual intimacy, is important in order to fully protect the equality and the dignity of the people engaged in that protected liberty activity. This interweaving of autonomy and dignity interests makes intuitive sense. We are constituted by the actions that define our sense of self, and we are subsequently affected by how society treats us based on those constitutive actions. This interweaving of autonomy and dignity is also essential, I believe, to understanding the claim that intersex and transgender individuals, in pursuit of their liberty interests, can legitimately make of our government.

34. *Id.* (citing *Romer*, 517 U.S. at 634).
35. *Id.* at 579-85 (O'Connor, J., concurring).
36. *Id.* at 575.