

---

**TULANE JOURNAL OF LAW & SEXUALITY**
**A Review of Sexual Orientation and Gender Identity in the Law**


---

**VOLUME 34**
**2025**


---

# Liberty and Privacy After the (Partial) Decriminalization of Sodomy: A Content Analysis of How State Courts Apply *Lawrence* *v. Texas* in Criminal and Quasi-Criminal Contexts over Two Decades

Henry F. Fradella\*

*This study presents empirical analyses of criminal and quasi-criminal state court decisions applying the U.S. Supreme Court's landmark decision in Lawrence v. Texas. After tracing key historical and legal developments leading up to the Lawrence decision's decriminalization of sodomy on substantive due process grounds in 2003, the study employs both quantitative and qualitative content analyses of cases citing Lawrence over the nearly two decades since it was decided. Results indicate that judicial decisions rarely embraced broad readings of Lawrence in criminal cases. In fact, with the exception of a handful of cases invalidating laws or convictions for*

---

\* © 2025 Henry F. Fradella, J.D., Ph.D. B.A. in psychology, Clark University; M. Fors. Sci. and J.D., The George Washington University; Ph.D. in justice studies, Arizona State University. Professor, School of Criminology and Criminal Justice and affiliate professor, Sandra Day O'Connor College of Law, Arizona State University. Dr. Fradella's research focuses on substantive and procedural criminal law, the dynamics of legal decision-making, and the consequences of changes in legal processes. Dr. Fradella is the author or co-author of fourteen books, including PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (University of California Press, 2019), STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC (NYU Press, 2016), and MENTAL ILLNESS AND CRIME (Sage, 2015). His nearly 130 articles, book chapters, reviews, and scholarly commentaries have appeared in outlets such as the *American Journal of Criminal Law*, *Berkeley Journal of Criminal Law*, *Criminal Justice Policy Review*, *Criminal Law Bulletin*, *Criminology and Public Policy*, *Federal Courts Law Review*, *Journal of Contemporary Criminal Justice*, *Journal of Homosexuality*, *Tulane Journal of Law and Sexuality*, *Law and Psychology Review*, *New Criminal Law Review*, *Ohio State Journal of Criminal Law*, and numerous flagship law reviews.

The author thanks Gerald Eastwood for his excellent research assistance helping to code the nearly 500 cases in the sampling frame for this study, and (2) Dr. Danielle Wallace for her assistance with running and interpreting the logistic regressions reported in this study.

*fornication or adultery, Lawrence's long-term impact on criminal law has largely remained as limited as some commentators noted shortly after the case was decided.*

|      |                                                                    |    |
|------|--------------------------------------------------------------------|----|
| I.   | INTRODUCTION .....                                                 | 4  |
| II.  | METHODS .....                                                      | 5  |
|      | A. <i>Data Collection</i> .....                                    | 5  |
|      | B. <i>Data Coding and Analyses</i> .....                           | 6  |
|      | 1. Quantitative Coding and Analyses.....                           | 9  |
|      | a. Coding of Dependent Variables.....                              | 10 |
|      | b. Coding of Independent Variables .....                           | 12 |
|      | c. Analytic Strategy.....                                          | 14 |
|      | 2. Qualitative Coding and Analyses.....                            | 16 |
|      | a. Phase One: Preliminary Protocol Development...                  | 16 |
|      | b. Phase Two: Case Classification into Typology                    |    |
|      | Categories .....                                                   | 16 |
|      | c. Phase Three: Case Studies .....                                 | 17 |
|      | d. Inter-Rater Reliability .....                                   | 17 |
| III. | QUANTITATIVE RESULTS FOR ALL CASES .....                           | 18 |
|      | A. <i>Descriptive Statistics</i> .....                             | 18 |
|      | 1. The Cases .....                                                 | 18 |
|      | a. Depth of <i>Lawrence</i> Analysis.....                          | 19 |
|      | b. Treatment of <i>Lawrence</i> .....                              | 20 |
|      | c. Region and Regional Politics.....                               | 22 |
|      | 2. The Judges .....                                                | 24 |
|      | B. <i>Logistic Regression</i> .....                                | 25 |
| IV.  | MIXED-METHODS ANALYSES OF CASES BY CATEGORY .....                  | 27 |
|      | A. <i>Noncommercial Consensual Sex Offenses (n = 29, 13.6%</i>     |    |
|      | <i>of Criminal Cases, 9.4% of Total Cases)</i> .....               | 27 |
|      | 1. Sodomy and Solicitation to Engage in It.....                    | 29 |
|      | 2. The Criminal Regulation of Adultery and Fornication             | 32 |
|      | 3. The Civil Law Reach of Constitutionally Questionable            |    |
|      | Laws Criminalizing Adultery or Fornication.....                    | 34 |
|      | B. <i>Prostitution and Related Commercial Sex Offenses</i>         |    |
|      | <i>(n = 11, 5.1% of Criminal cases, 3.6% of Total Cases)</i> ..... | 35 |
|      | C. <i>Obscenity and Pornography (n = 12, 5.6% of Criminal</i>      |    |
|      | <i>Cases, 3.9% of Total Cases)</i> .....                           | 38 |
|      | 1. Child Pornography .....                                         | 41 |
|      | 2. Pornography Involving Adults .....                              | 42 |
|      | 3. Sale, Distribution, and Promotion of Adult-Oriented             |    |
|      | Materials.....                                                     | 43 |

2025]

## LIBERTY AND PRIVACY

3

|    |                                                                                                                   |     |
|----|-------------------------------------------------------------------------------------------------------------------|-----|
| D. | <i>Sexual Assault and Statutory Rape (n = 97, 45.5% of Criminal Cases, 31.6% of Total Cases)</i> .....            | 45  |
| 1. | Sexual Assaults Involving Force, Threats of Force, or Clear Nonconsent.....                                       | 48  |
| 2. | Sexual Assaults Testing the Limits of Consent Between Adults .....                                                | 52  |
| 3. | Statutory Factors Vitiating Consent .....                                                                         | 55  |
| a. | Youthful Age: The Capacity of Minors to Consent .....                                                             | 55  |
| b. | Statutory Rape Age-Gap Provisions .....                                                                           | 59  |
| c. | When the Capacity to Consent Is Limited.....                                                                      | 63  |
| 4. | Other Cases .....                                                                                                 | 69  |
| E. | <i>Privacy and Other Sex Crimes (n = 25, 11.7% of Criminal Cases, 8.1% of Total Cases)</i> .....                  | 70  |
| 1. | Bigamy .....                                                                                                      | 72  |
| a. | Laws Criminalizing Plural Marriage .....                                                                          | 73  |
| b. | Criminalizing Sex with Underage “Spouses” .....                                                                   | 74  |
| 2. | Incest .....                                                                                                      | 75  |
| a. | Incest Generally.....                                                                                             | 75  |
| b. | Incest When There Is Reasonable Doubt as to Consent for Other Sex Crimes .....                                    | 78  |
| 3. | Lewdness and Public Sexual Indecency .....                                                                        | 79  |
| 4. | Public Nudity/Indecent Exposure.....                                                                              | 83  |
| 5. | Voyeurism.....                                                                                                    | 88  |
| 6. | Revenge Porn.....                                                                                                 | 89  |
| 7. | Knowing Transmission of STIs .....                                                                                | 91  |
| F. | <i>Post-Conviction Claims Filed by Sex Offenders (n = 28, 13.1% of Criminal Cases, 9.1% of Total Cases)</i> ..... | 95  |
| 1. | Vacating Sex Offender Status for Applicable Persons .....                                                         | 99  |
| 2. | Conditions of Release Burdening Intimate Relationships.....                                                       | 103 |
| 3. | Other Restrictions on People with Sex Offense Convictions .....                                                   | 104 |
| G. | <i>Miscellaneous Types of Claims (n = 12; 5.6% of Criminal Cases, 3.9% of Total Cases)</i> .....                  | 106 |
| 1. | Arguments that <i>Lawrence</i> Invalidates the Constitutionality of Criminal Offenses Other than Sex Crimes ..... | 108 |
| 2. | Criminal Procedure Arguments Invoking <i>Lawrence</i> .....                                                       | 110 |

|    |                                                                            |     |
|----|----------------------------------------------------------------------------|-----|
| V. | CONCLUSION .....                                                           | 111 |
| A. | <i>Salient Findings from Qualitative Analyses of Case Categories</i> ..... | 112 |
| 1. | Laws Targeting Sodomy, Fornication, Adultery, and Prostitution .....       | 112 |
| 2. | Obscenity, Pornography, and the Sale of Adult-Oriented Materials .....     | 113 |
| 3. | Sexual Assault and Statutory Rape .....                                    | 114 |
| 4. | Privacy and Other Sex Crimes .....                                         | 115 |
| 5. | Post-Conviction Claims Filed by Sex Offenders .....                        | 115 |
| B. | <i>Final Thoughts</i> .....                                                | 116 |

# I. INTRODUCTION

In an article entitled, “How State Courts Apply *Lawrence v. Texas* in Civil Contexts: A Mixed-Methods Content Analysis of Two Decades of Cases,” I traced the history of sodomy laws and juxtaposed them against the development of substantive due process cases that ultimately led to their invalidation in 2003.<sup>1</sup> That article went on to examine how courts applied the landmark ruling in *Lawrence* in civil cases over a twenty-year period. In this article, I examine the long-term effects of *Lawrence* on criminal cases.

Narrowly read, the liberty interest announced in *Lawrence* is for consenting adults to engage in acts of oral or anal sex, regardless of their marital status or sexual orientation. But the broad language used in the text of the opinion suggests a far-reaching result. Beyond its immediate role decriminalizing certain sexual acts performed in private between consenting adults and its longer-term impact on marriage equality, the overarching aim of the present study is to examine the impact of *Lawrence* on state courts. To do so, this study seeks to answer the following research questions:

What are the specific categories of cases in which criminal defendants advance substantive arguments using *Lawrence*? Are they limited primarily to sex crimes cases, or do the cases present other types of questions?

How do courts apply *Lawrence* in criminal cases?

---

1. Henry F. Fradella, *How State Courts Apply Lawrence v. Texas in Civil Contexts: A Mixed-Methods Content Analysis of Two Decades of Cases*, 32 TUL. J.L. & SEXUALITY 1, 1-110 (2023).

2025]

## LIBERTY AND PRIVACY

5

What extra-legal factors, if any, are related to how judges construe *Lawrence*? Are there geographical differences across the country? Are there differences by the sex, race, or political party of the judge?

Part II summarizes the research methods used to answer these research questions.

## II. METHODS

### A. Data Collection

In the two parts of this study, I examined the final outcomes in all civil and criminal cases, both published and unpublished, in U.S. state courts that cited *Lawrence v. Texas*. I included all cases decided after the release of the decision in *Lawrence* in June of 2003 until December 31, 2021.<sup>2</sup> I obtained these cases using Westlaw by selecting the KeyCite “citing references” feature for *Lawrence* and limiting the results to state court decisions.<sup>3</sup> That process yielded a total of 441 cases. Of these, 264 (59.9%) involved criminal cases, all of which were read and coded by two researchers.<sup>4</sup> Twenty (4.5%) more were technically civil cases, but they were quasi-criminal in nature, dealing primarily with issues of criminal law or procedure and, therefore, are addressed in this study. These twenty cases included habeas petitions and other collateral attacks on criminal convictions; declaratory judgment actions seeking to invalidate criminal laws; challenges to the constitutionality of sex offender registries, classification determinations, or the specific restrictions placed on sex offenders; or some combination of these types of claims.<sup>5</sup>

2. The cut-off date was selected because we began data coding and analysis during the spring of 2022, a process that continued through the summer.

3. Because search results were limited to cases from U.S. state courts, this study does not analyze cases from tribal courts, U.S. commonwealths (Puerto Rico and the Northern Marianas Islands), and U.S. territories (Guam, American Samoa, and the U.S. Virgin Islands).

4. I reiterate my appreciation to my research assistant, Gerald Eastwood, for his excellent assistance in this time-consuming and often tedious process.

5. *In re A.P.*, 246 A.3d 399, 401 (Vt. 2020); *York v. Longlands Plantation*, 840 S.E.2d 544, 548 (S.C. 2020); *Johnson v. Dep’t of Just.*, 341 P.3d 1075, 1084 (Cal. 2015); 1568 *Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 329 (Ala. 2010) *Doe v. Sex Offender Registry Bd.*, 897 N.E.2d 992, 999 (Mass. 2008); *In re M.D.*, 757 N.W.2d 559 (N.D. 2008); *Martin v. Zihlerl*, 607 S.E.2d 367, 370 (Va. 2005); *In re W.M.*, 851 A.2d 431, 450-51 (D.C. 2004); *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 782 (Tex. App. 2021); *Ex parte Dehnert*, 605 S.W.3d 885, 892 (Tex. App. 2020); *Ex parte Metzger*, 610 S.W.3d 86, 103-04 (Tex. App. 2020); *McLaughlin v. Becerra*, No. B280529, 2018 WL 654556, at \*1 (Cal. Ct. App. Feb. 1, 2018); *Ex parte Bleimeyer*, No. 01-16-00838-CR, 2017 WL 586509, at \*1 (Tex. App. Feb. 14, 2017); *Keeney v. Fitch*, 458 S.W.3d 838 (Mo. Ct. App. 2015); *Merryfield v. Sullivan*, No. 111204, 2015 WL 326652, at \*1 (Kan. Ct. App. Jan. 16, 2015); *In re Commitment of Cleveland*, No. 09-12-00428-CV, 2014 WL 4364263, at \*7 (Tex. App. Sept. 4, 2014); *People v. Perez*, 961 N.Y.S.2d

Fifteen of 284 criminal and quasi-criminal cases were eliminated because they were duplicates of other cases, often because the case was decided at multiple levels of the court system's hierarchy.<sup>6</sup> After the removal of all such duplicates, 269 cases remained.

### B. Data Coding and Analyses

Each of the 269 cases was analyzed using both quantitative and ethnographic content analysis.<sup>7</sup> Content analysis, broadly speaking, is "a formal system for doing something we all do informally rather frequently—draw conclusions from observations of content."<sup>8</sup> In contrast to informal observations, however, content analysis uses a systematic set of procedures "for making replicable and valid inferences from data to their context."<sup>9</sup> Quantitative content analysis involves an *a priori* design in which the manifest content of source material (here, judicial opinions) is coded for the presence or absence of predefined variables—or even the degrees to which those variables are manifest—and then those data are analyzed.<sup>10</sup> The approach is particularly useful for measuring the frequency and extent to which key variables are related.<sup>11</sup> This approach also offers the benefits of allowing for hypothesis testing and easy

51, 52 (Sup. Ct. App. Div. 2013); *Guerra v. Lombardi*, 336 S.W.3d 167, 171 (Mo. Ct. App. 2011); *Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1096 (La. Ct. App.), *writ denied*, 916 So. 2d 1062 (2005); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at \*1 (N.C. Super. Ct. Aug. 25, 2006).

6. *State v. Hunt*, 722 S.E.2d 484 (N.C. 2012); *Toghill v. Commonwealth*, No. 2230-12-2, 2014 WL 545728 (Va. Ct. App. Feb. 11, 2014); *State v. Hunt*, 710 S.E.2d 339 (N.C. Ct. App. 2011); *Fleming v. State*, 376 S.W.3d 854 (Tex. App. 2012); *People v. Hollins*, No. 2-10-0051, 2011 WL 10109587 (Ill. App. Ct. June 27, 2011); *Commonwealth v. Carey*, 947 N.E.2d 1124 (Mass. App. Ct. 2011); *Fleming v. State*, 323 S.W.3d 540 (Tex. App. 2010); *State v. Coman*, 214 P.3d 1198 (Kan. Ct. App. 2009); *State v. Limon*, No. 96,013, 2007 WL 1042154 (Kan. Ct. App. 2007); *People v. Scott*, 54 Cal. Rptr. 3d 674 (Cal. Ct. App. 2007); *In re R.L.C.*, 635 S.E.2d 1 (N.C. Ct. App. 2006); *McDonald v. Commonwealth*, 630 S.E.2d 754 (Va. Ct. App. 2006); *State v. Lowe*, No. 2004CA00292, 2005 WL 1983964 (Ohio Ct. App. Aug. 15, 2005); *People v. Hofsheier*, 11 Cal. Rptr. 3d 762 (Cal. Ct. App. 2004); *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

7. DAVID L. ALTHEIDE & CHRISTOPHER J. SCHNEIDER, *QUALITATIVE MEDIA ANALYSIS* (2d ed. 2013) (detailing the phases of qualitative content analysis); KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* (2d ed. 2017).

8. Guido Hermann Stempel, III, *Content Analysis*, in *MASS COMMUNICATION RESEARCH AND THEORY* 209 (Guido Hermann Stempel, David Hugh Weaver & G. Cleveland Wilhoit eds., 2003).

9. KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 21 (1980).

10. NEUENDORF, *supra* note 7, at 18.

11. *Id.* at 96-119 (discussing variable coding); *Id.* at 121-62 (discussing variable measurement).

replicability.<sup>12</sup> By contrast, ethnographic content analysis is inductive; it is particularly appropriate when multiple cases are reviewed in an attempt to discover emergent patterns and differing emphases among and between the cases.<sup>13</sup> The present study employs both of these types of content analysis to provide comprehensive and rich insights into how state courts have applied *Lawrence* in criminal cases.

Of the 269 distinct state court cases, two researchers agreed that fifty-six should be excluded because, even though these cases cited *Lawrence*, they did so for reasons that had nothing to do with any of the research questions. Eight cases cited *Lawrence* as an example of a criminal law that had been invalidated by the courts.<sup>14</sup> Eight cases cited *Lawrence* as an example of a situation under *Teague v. Lane* in which “a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”<sup>15</sup> Twelve cases cited *Lawrence* for general Fourteenth Amendment principles, such as applicable standards of review, even though other cases could have been cited instead.<sup>16</sup>

12. *Id.* at 19-20.

13. ALTHEIDE & SCHNEIDER, *supra* note 7, at 12-13.

14. Hunsucker v. Fallin, 408 P.3d 599, 628 (Okla. 2017); *Ex parte* Chance, No. WR-81,136-01, 2014 WL 1796648, at \*4 (Tex. Crim. App. May 7, 2014) (Keller, P.J., dissenting); Herrington v. United States, 6 A.3d 1237, 1244 (D.C. 2010); *Ex parte* Masonheimer, 220 S.W.3d 494, 515 (Tex. Crim. App. 2007); State v. T.M., No. 35957-3-III, 2019 WL 5838086, at \*9 (Wash. Ct. App. 2019); People v. Smith, 89 N.E.3d 960, 967 (Ill. Ct. App. 2017); Ibenyenwa v. State, 367 S.W.3d 420, 427 (Tex. App. 2012) (Dauphinot, J., concurring in part and dissenting in part); Karenev v. State, 281 S.W.3d 428, 440 (Tex. Crim. App. 2009); Commonwealth v. Coleman, 854 A.2d 978, 983 (Pa. Super. Ct. 2004), *appeal granted in part, decision vacated in part*, 874 A.2d 1150 (Pa. 2005).

15. 489 U.S. 288, 311 (1989) (internal citations omitted). The cases citing *Lawrence* as a *Teague*-eligible example include *Commonwealth v. Reid*, 235 A.3d 1124, 1181-82 (Pa. 2020); *In re* N.G., 115 N.E.3d 102 (Ill. 2018); *Commonwealth v. Olson*, 218 A.3d 863, 871 (Pa. 2019); *Schwartz v. State*, 361 P.3d 1161, 1186 (Haw. 2015); *Bush v. State*, 428 S.W.3d 1, 17 (Tenn. 2014); *Shrove v. State*, 329 So.3d 93, 99 (Ala. Crim. App. 2020); *Sayles v. State*, No. E2018-00141-CCA-R3-PC, 2019 WL 1417873, at \*7 (Tenn. Crim. App. Mar. 28, 2019); *Kemmer v. State*, No. A04-1913, 2005 WL 2277253, at \*3 (Minn. Ct. App. Sept. 20, 2005).

16. See also *State v. Webb*, 144 So.3d 971, 977-78 (La. 2014); *Raynor v. State*, 99 A.3d 753, 772 (Md. 2014); *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005); *Montoy v. State*, 120 P.3d 306, 317 (Kan. 2005); *In re* Detention of Cubbage, 671 N.W.2d 442, 447 (Iowa 2003); *People v. Noyan*, 181 Cal. Rptr. 3d 601, 610 (Ct. App. 2014); *People v. Martinez*, No. H033918, 2009 WL 3777413, at \*8 (Cal. Ct. App. Nov. 12, 2009); *People v. Delacy*, 122 Cal. Rptr. 3d 216, 231 (Ct. App. 2011); *People v. Rotroff*, 100 Cal. Rptr. 3d 558, 569 (Ct. App. 2009), *review granted and opinion superseded* *People v. Rotroff*, 223 P.3d 1 (Cal. 2010).

In addition to mere mention of Fourteenth Amendment standards of review, this category also includes cases that simply reference—but do not apply—the fact that, at the time a case was decided, due process protected the right to privacy as it relates to “personal decisions relating to

Nineteen cases merely quoted from *Lawrence* that although stare decisis is important, it is not “an inexorable command”; these cases did not, however, rely on *Lawrence* in any way that is relevant to this study’s research questions.<sup>17</sup> And nine cases cited *Lawrence* for “one-off” reasons that were not repeated in a significant number of other cases. Such citations include using *Lawrence* as an example of (1) a case that relied on social science research,<sup>18</sup> (2) the importance of being represented by counsel in misdemeanor proceedings,<sup>19</sup> (3) how appellate rulings on state constitutions provisions have impacted subsequent U.S. Supreme Court decisions,<sup>20</sup> (4) courts having noted that sex offender registration requirements are not trivial collateral consequences of sex crime convictions,<sup>21</sup> (5) a victimless crime,<sup>22</sup> (6) the impropriety of a dismissal with prejudice when a police officer is late to court in a case where there

---

marriage, procreation, contraception, family relationships, child rearing, and education.” *People v. Calderon*, No. H030215, 2007 WL 1683576, at \*6 (Cal. Ct. App. June 12, 2007) (upholding the admission of inculpatory statements a father made to a social worker about his sexual abuse of a toddler); *see also* *State v. Odell*, 293 P.3d 168 (Kan. Ct. App. 2013) (citing *Lawrence* as an example of a substantive due process decision in a case raising both procedural and substantive due process concerns for failing to have provided correctional officer with written notice of prohibited conduct that would give rise to potential criminal liability); *People v. Gonzales*, 120 Cal. Rptr. 3d 911, 927 (Ct. App. 2011) (listing, in an informational privacy dispute involving the release of psychotherapy records, the ways in which courts have applied the right to privacy), *rev’d*, 296 P.3d 945 (Cal. 2013).

17. *See Matter of Commitment of C.S.*, 940 N.W.2d 875, 895 (Wis. 2020) (Bradley, J., dissenting); *State v. Lynch*, 885 N.W.2d 89, 104 (Wisc. 2016); *State v. Peeler*, 140 A.3d 811, 876 (Conn. 2016); *State v. Witt*, 126 A.3d 850, 868 (N.J. 2015); *State v. Swick*, 279 P.3d 747, 754 (N.M. 2012); *People v. Feezel*, 783 N.W.2d 67, 84 (Mich. 2010); *People v. Petrenko*, 931 N.E.2d 1198, 1212 (Ill. 2010); *State v. Bodyke*, 933 N.E.2d 753, 762 (Ohio 2010); *State v. Pena-Flores*, 965 A.2d 114, 140 (N.J. 2009), *abrogated by* *State v. Witt*, 126 A.3d 850 (N.J. 2015); *State v. Lawrence*, 920 A.2d 236, 265 (Conn. 2007); *State v. Brown*, 919 A.2d 107, 118 (N.J. 2007); *Matheney v. Commonwealth*, 191 S.W.3d 599, 625 (Ky. 2006); *State v. Marsh*, 102 P.3d 445, 463 (Kan. 2004), *rev’d and remanded*, 548 U.S. 163 (2006); *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004); *State v. Brown*, 156 S.W.3d 722, 731 (2004); *Durden v. State*, 290 S.W.3d 413, 423 (Tex. App. 2009); *Hammon v. State*, 809 N.E.2d 945, 950 n.2 (Ind. Ct. App. 2004), *vacated*, 829 N.E.2d 444 (Ind. 2005), *rev’d and remanded sub nom. Davis v. Washington*, 547 U.S. 813 (2006).

18. *State v. Brown*, 945 N.W.2d 584, 606 n.7, *cert. denied*, 141 S. Ct. 881 (2020) (Dallet, J., dissenting); *State v. Roberson*, 935 N.W.2d 813, 834 n.18 (Wis. 2009) (Dallet, J., dissenting); *State v. Trammell*, 928 N.W.2d 564, 586 (Wis. 2019) (Dallet, J., concurring).

19. *State v. Young*, 863 N.W.2d 249, 280 (Iowa 2015) (citing *Lawrence* as an example supporting the assertion that “the history of our jurisprudence is rife with very complicated and important legal questions arising in the context of misdemeanor prosecutions. . .”).

20. *State v. Baldon*, 829 N.W.2d 785, 819 (Iowa 2013) (noting that a Georgia Supreme Court ruling contributed to the *Lawrence*’s overruling of *Bowers*).

21. *Barnes v. State*, 31 A.3d 203, 211 (Md. 2011).

22. *State v. Matthews*, No. M2010-02601-CCA-R3CD, 2011 WL 3798873, at \*5 (Tenn. Crim. App. Aug. 26, 2011).



2025]

## LIBERTY AND PRIVACY

9

had been no prior continuances,<sup>23</sup> and (7) a criminal statute with a history of nonenforcement.<sup>24</sup>

### 1. Quantitative Coding and Analyses

After the removal of the irrelevant cases, the number of relevant state court criminal and quasi-criminal cases stood at 213. These cases relied on *Lawrence* for a substantive reason—meaning that one party to the litigation sought to have a court apply *Lawrence* to the facts of the case at bar or, alternatively, that a court felt *Lawrence*’s holding or rationale provided meaningful guidance to deciding that case. Each of these judicial opinions was coded for manifest content for all of the variables presented in Table 1.

Table 1: Study Variables

| VARIABLE<br>NAME      | DESCRIPTION                                                                                                                                                                                                          |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Dependent Variables   |                                                                                                                                                                                                                      |
| <i>Outcome</i>        | Dichotomous variable indicating resolution of a criminal or quasi-criminal case in favor of (1) prosecution, or (2) defense                                                                                          |
| <i>Treatment</i>      | Trichotomous variable: (1) neutral, (2) narrow/limiting, (3) broad/expansive                                                                                                                                         |
| Independent Variables |                                                                                                                                                                                                                      |
| <i>Case Type</i>      | Civil or criminal                                                                                                                                                                                                    |
| <i>Depth</i>          | Dichotomous variable indicating the depth of treatment <i>Lawrence</i> received as being either (1) mentioned in passing, or (2) key to case                                                                         |
| <i>Party</i>          | Dummy categories were created to indicate whether the judge writing each opinion (1) ran for office in a nonpartisan election, either ran for a partisan office or was appointed by a (2) democrat or (3) republican |

23. State v. Toll, No. 95,713, 2007 WL 519040, at \*1 (Kan. Ct. App. Feb. 16, 2007) (reversing dismissal in a case where the defendant was charged with sodomy, but the decision had nothing to do with the crime, but rather a determination that a dismissal with prejudice was an abuse of discretion because the trial court did not consider any less severe means of sanctioning the prosecution, “like granting a continuance with a warning, or dismissing the case without prejudice”).

24. State v. Johnson, 425 S.W.3d 542, 553 (Tex. App. 2014), *aff’d*, 475 S.W.3d 860 (Tex. Crim. App. 2015) (noting that “a lack of challenged convictions (or arrests for that matter)” did not necessarily “disprove that the statute’s scope has had a chilling effect on individuals’ decisions to engage in what is known as constitutionally protected conduct”).

|                                   |                                                                                                                                                                                                                                                                                                                     |
|-----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Race</i>                       | Dummy categories were created to indicate the race and ethnicity of the judge writing an opinion: (1) Non-Hispanic White, (2) Asian/Pacific Islander, (3) African-American/Black, (4) Hispanic/Latino, and (5) Native American                                                                                      |
| <i>Census Region and Division</i> | Dummy categories were created for the geographical region of the country based on U.S. Census regions: (1) Northeast, <sup>25</sup> (2) Midwest, <sup>26</sup> (3) South, <sup>27</sup> and (4) West <sup>28</sup>                                                                                                  |
| <i>State Political Identity</i>   | Dummy categories were created for the “color” of a state based on the candidate for whom the state voted in the 2008, 2012, 2016, and 2020 presidential elections: (1) deep red, <sup>29</sup> (2) light red, <sup>30</sup> (3) purple, <sup>31</sup> (4) light blue, <sup>32</sup> and (5) deep blue <sup>33</sup> |
| <i>Sex</i>                        | Dummy categories were created for the sex of the judge writing an opinion: (1) male or (2) female <sup>34</sup>                                                                                                                                                                                                     |

#### a. Coding of Dependent Variables

The outcome variable refers to the outcome of a case—namely whether an opinion ruled in favor of one party or the other. In criminal

25. The Northeast includes New England (CT, MA, ME, NH, RI, and VT) and the Mid-Atlantic (NJ, NY, and PA). *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us\\_regdiv.pdf](https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf) [<https://perma.cc/LT7J-EUE8>] [hereinafter *Census Regions*] (last visited June 13, 2022), at 1.

26. The Midwest includes the East North Central division (IL, IN, MI, OH, and WI) and the West North Central division (IA, KS, MN, MO, NE, ND, and SD). *Id.* at 1.

27. The South includes the South Atlantic division (DC, DE, FL, GA, MD, NC, SC, VA, and WV), the East South Central division (AL, MS, KY, and TN), and the West South Central division (AR, LA, OK, and TX). *Id.* at 1.

28. The West include the Mountain division (AZ, CO, ID, MT, NV, NM, UT, and WY) and the Pacific division (AK, CA, HI, OR, and WA). *Id.* at 1.

29. AK, AL, AR, ID, KS, KY, LA, MO, MS, MT, ND, NE, OK, SC, SC, TN, TX, UT, WV, and WY.

30. AZ, GA, IN, and NC.

31. FL, IA, and OH.

32. MI, PA, and WI.

33. CA, CO, CT, DC, DE, HI, IL, MA, MD, ME, MN, NH, NJ, NM, NV, NY, OR, RI, VA, VT, and WA.

34. I respectfully acknowledge that this coding scheme has the potential to erase nonbinary and intersex people. But as far as I could tell, none of the judges writing any of the opinions analyzed in the current study identified as either. The Victory Fund, an LGBTQ+ political advocacy organization, reports that the first nonbinary person ever elected to judicial office in the United States did not occur until November of 2021 and that person did not author any of the opinions in the current study. *See Xander Orenstein Is First Non-Binary Person Elected to a Judicial Position in the United States*, VICTORY FUND (Nov. 2, 2021), <https://victoryfund.org/news/xander-orenstein-is-first-non-binary-person-elected-to-a-judicial-position-in-the-united-states/> [<https://perma.cc/NWR5-TH8J>]. Additionally, I could identify no news source reporting that an openly nonbinary person had been appointed to judicial office.

2025]

## LIBERTY AND PRIVACY

11

cases, the data are evident from the text of the cases themselves. Although the same is true in civil cases, it is unclear what an outcome in favor of the plaintiff or defense means, depending on who filed the cause of action and what they were seeking. For instance, in collateral attacks on criminal convictions or declaratory judgment actions seeking the invalidation of criminal laws, the plaintiff is someone who was or could be a defendant in a criminal case and an outcome in favor of such a plaintiff has the effect of an outcome for a criminal defendant in direct appeal. Accordingly, the outcome in all such civil cases that are quasi-criminal in nature are coded such that an outcome that favors the state (i.e., defendants in actions by prisoners collaterally attacking their convictions) are coded as wins for the prosecution and outcomes that favor plaintiffs/petitioners challenging a criminal conviction or the constitutionality of criminal laws are coded as defense victories.

In contrast to criminal and quasi-criminal cases where the outcomes clearly benefit the state or a criminal defendant, the technical outcome of civil cases that do not involve questions of criminal law or procedure do not indicate much. For instance, the plaintiffs in some of the civil cases sought the expansion of civil rights in ways that benefited LGBTQ+ people—often by arguing for broad or expansive interpretations of *Lawrence*. But in family law disputes, the plaintiff is whoever filed first, some of whom sought narrow constructions of *Lawrence*. Thus, the coding for the outcome of civil cases is meaningless; the treatment variable is far more salient in such cases than which party prevailed.

As for treatment, cases were coded in one of three ways. Cases were coded as having a “narrow” treatment of *Lawrence* if a judicial opinion narrowly construed *Lawrence* such that it either (1) was unwilling to extend *Lawrence* to protect claims of liberty or privacy rights, (2) criticized or disregarded *Lawrence*, or (3) distinguished *Lawrence* to render it inapplicable to claims of liberty or privacy rights. Cases were coded as having “broad” treatment of *Lawrence* if a judicial opinion expansively interpreted *Lawrence* to protect liberty or privacy rights. Finally, cases coded as “neutral” either (1) involved a straightforward application of *Lawrence*’s specifically articulated exclusions from its central holding—such as alleged claims of sexual privacy involving minors, nonconsensual acts, commercial sex, or sex acts in public—or (2) were those in which *Lawrence* was cited or briefly discussed, but not relied upon in any outcome-determinative manner.

### b. Coding of Independent Variables

Some of this coding, including whether the case was a civil or criminal one, was accomplished simply by reading the cases. The jurisdiction in which a case was decided is also evident from a judicial decision and was coded, as applicable, using the corresponding region of the country as defined by the U.S. Census Bureau.<sup>35</sup>

As for the depth variable, cases discussing *Lawrence* in ways not central to the holding were coded as “mentioned in passing.” By contrast, cases involving decisions in which *Lawrence* was central to the decision at issue were coded as “key to case.” To ensure the reliability of this coding scheme, my research assistant and I coded these cases independently. Moreover, we verified our own coding against the depth indicator in Westlaw’s KeyCite feature. In KeyCite, one star indicates a case was mentioned, usually in a string citation; two stars means a case was discussed in a few sentences, but usually not more than a full paragraph; three stars indicates a case was substantively discussed for more than a paragraph, but less than a page; and four stars means a case was examined in depth, usually for more than a full page of printed text.<sup>36</sup> All of the cases we coded as “key to case” were coded in KeyCite with two, three, or four stars.<sup>37</sup> All of the cases we removed as irrelevant had

35. *Census Regions*, *supra* note 25, at 1.

36. WESTLAW, GUIDE TO LAW REVIEW RESEARCH 20 (2007), <http://lscontent.westlaw.com/images/banner/documentation/LawReviewResearchGuide.pdf> [<https://perma.cc/5LSH-95AX>].

37. The coding system in this study differs from KeyCite’s because it does not rely on the number of lines in a judicial opinion, but rather the centrality of *Lawrence* to the disposition of a subsequent case. For example, *Jacobson v. State*, No. 63293, 2013 WL 7167806 (Nev. Nov. 13, 2013), is a very short decision—so much so that the slip opinion fits on a single page. The entirety of the court’s rationale consists of a single paragraph. Hence, KeyCite awards only two stars in its depth rating as relating to *Lawrence*. Yet, *Lawrence* was outcome determinative and, therefore, coded as “key to case”:

Appellant argues that he is innocent because “it is unconstitutional to prohibit sexual conduct between prisoners” . . . under *Lawrence*. . . . We disagree. *Lawrence* did not concern the sexual conduct of prisoners. A prisoner’s constitutional rights are limited by the fact of incarceration and by valid penological objectives, including deterrence of crime, prisoner rehabilitation, and institutional security.

*Id.* at \*1; *see also, e.g.*, *People v. Perez*, 961 N.Y.S.2d 51, 52 (Sup. Ct. App. Div. 2013) (similarly refusing to extend *Lawrence* to the prison setting in a matter of just two sentences); *State v. Jones*, No. 95,558, 2007 WL 656367, at \*1 (Kan. Ct. App. Mar. 2, 2007) (dispensing with a constitutional attack on a rape statute by citing *Lawrence* and saying it was “clearly not applicable here” because unlike the case at bar, *Lawrence* “involved consensual activity by adults”); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006) (declaring a fornication statute unconstitutional under *Lawrence* in a single sentence).

one or two stars in KeyCite, except for one.<sup>38</sup> And all of the cases coded as “mentioned in passing” had either two or three stars in KeyCite.<sup>39</sup>

The state political identity variable represents the “color” of a state based on the part of the candidate for whom the state’s Electoral College votes were cast in the 2008, 2012, 2016, and 2020 presidential elections. States where the Republican candidate won four times are coded as “deep red”) and those in which the Republican candidate won three times are coded as “light red). The “purple” states were won by each party twice in the past four elections; The “light blue” states are those won by a Democratic candidate three times, and the Democrat won in “deep blue” state in all of the past four elections.

The name of the judge or justice writing an opinion is evident in most cases, but demographic information about those judicial officers are not. For instance, the race, sex, and political affiliation of judges are not contained within judicial opinions. Such data were obtained by consulting the websites for the courts on which each state court judge or justice sits or sat,<sup>40</sup> as well as Ballotpedia’s database on state court judges.<sup>41</sup> On the rare occasion that the salient demographic information about a particular

38. That one exception is *State v. Peeler*, 140 A.3d 811 (Conn. 2016), a per curiam decision by the Supreme Court of Connecticut that reversed a death sentence. A concurring justice wrote about when a case should be overruled despite the principle of stare decisis. That justice noted that stare decisis does not “explain why we should be restrained from overruling a case that was demonstrably wrong when decided, has not engendered any reliance, and imposes significant costs on society simply because a justice who decided it has been replaced.” *Id.* at 876. The concurring opinion then cited *Lawrence*’s overruling of *Bowers* as an example. *Id.* Given the length of this part of the opinion, KeyCite classified *Peeler* as warranting three stars for its depth of discussion about *Lawrence*. By contrast, my research assistant and I both classified *Peeler* as irrelevant because nothing about *Lawrence*’s holding was applied in the *Peeler* case and, therefore, *Peeler* does not help answer any of the research questions in the present study. See also, e.g., *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1268 (Ohio 2003) (citing *Lawrence* for its “trifold stare decisis test”).

39. In KeyCite, three stars simply indicates a paragraph or two of discussion. That does not automatically indicate, however, that the discussion of *Lawrence* was central to a case’s holding. It is that criterion—being the linchpin of a court’s rationale for its decision—that warrants being coded as “key to case” in the present study.

40. For instance, the website for the Supreme Court of New Mexico contains a page listing the current justices with hyperlinks to pages presenting photos and biographies for each sitting justice. *Current Supreme Court Justices*, N.M. CTS., <https://supremecourt.nmcourts.gov/supreme-court/supreme-court-justices/current-supreme-court-justices/> [<https://perma.cc/BV8W-X259>] (last visited June 13, 2022). That website also contains a similar database for former justices on the court. *Supreme Court, Former Supreme Court Justices*, N.M. CTS., <https://supremecourt.nmcourts.gov/supreme-court/supreme-court-justices/former-supreme-court-justices/> [<https://perma.cc/LU6D-266J>] (last visited June 13, 2022).

41. *Courts and Judges by State*, BALLOTPEDIA, [https://ballotpedia.org/Courts\\_and\\_judges\\_by\\_state](https://ballotpedia.org/Courts_and_judges_by_state) [<https://perma.cc/C4GJ-YFAK>] (last visited June 13, 2022).

judge could not be gleaned from one of these two sources, Google searches were used to track down the information as needed. These methods are reliable ways of obtaining judges' or justices' biographies, including their sex, political party affiliation, and education. The same, however, cannot be said about the race and ethnicity of any judge. Sometimes that information is provided in judicial biographies; other times, it needed to be obtained from news sources;<sup>42</sup> and still other times, determinations about this demographic characteristic needed to be determined from names and photos.<sup>43</sup>

Finally, when judicial candidates ran for office via partisan elections, I coded their political party affiliation as reported by Ballotpedia as either "Democrat" or "Republican"; nonpartisan candidates are coded as "other." When judicial officers were appointed to the bench, I coded for the political affiliation of the appointing entity, typically a governor.

### c. Analytic Strategy

The ethnographic content analysis, described more fully in the next section, is used to qualitatively address the first two research questions. The third research question, however, poses an empirical question regarding the relationship between extra-legal factors and the use of *Lawrence*. I use both bivariate and multivariate analyses to determine whether there are significant differences between case outcomes and the categorical independent variables. Specifically, I used Pearson's chi-square tests to analyze if there are any significant differences between the

---

42. For instance, neither BallotPedia nor the California Supreme Court website state that Associate Justice Patricia Guerreo is Latina. See *Patricia Guerrero*, BALLOTPEDIA, [https://ballotpedia.org/Patricia\\_Guerrero](https://ballotpedia.org/Patricia_Guerrero) []; *Patricia Guerrero, Associate Justice*, CAL. CTS., <https://www.courts.ca.gov/38044.htm> [<https://perma.cc/5F85-LA89>]. However, a Google search for Justice Guerreo revealed her ethnic heritage. E.g., *Governor Newsom Swears in Justice Patricia Guerrero to California Supreme Court, the First Latina to Serve on State's Highest Court*, CAL. OFF. OF GOVERNOR, <https://www.gov.ca.gov/2022/03/28/governor-newsom-swears-in-justice-patricia-guerrero-to-california-supreme-court-the-first-latina-to-serve-on-states-highest-court/> [<https://perma.cc/E3UD-D2Z9>].

43. This is a limitation of the study. As other researchers have acknowledged, "'eyeballing' race is far from ideal, given there are considerable differences in skin tone between—and within—White, Latino, and Black communities." Danielle Slakoff & Pauline K. Brennan, *White, Black, and Latina Female Victims in U.S. News: A Multivariate and Intersectional Analysis of Story Differences*, 13 RACE & JUST. 155 (2020); see also Aliya Saperstein, *Double-Checking the Race Box: Examining Inconsistency Between Survey Measures of Observed and Self-Reported Race*, 85 SOC. FORCES 57 (2006). To address this methodological concern, I followed the lead of Slakoff and Brennan in that whenever photographs were used to determine race, a second coder verified the coding. The two coders agreed each time, resulting in 100% inter-rater reliability for this variable.

treatment of *Lawrence* and factors such as the geographic region in which the case was decided and judicial officers' demographic characteristics. The chi-square test of independence is used to examine if two categorical variables are truly independent of each other.<sup>44</sup> Where applicable, I report the probabilities for statistically significant relationships using Fisher Exact tests<sup>45</sup> and I also report Cramer's V statistics to assess the strength of such associations.<sup>46</sup>

Bivariate analyses do not provide the same level of insight as multivariate analyses. That is because multivariate analyses can examine several variables at the same time to see if one or more of them predict a certain outcome.<sup>47</sup> Thus, to examine what factors might predict how judges treat *Lawrence*, I employ logistic regression. Regression is a statistical procedure that assesses whether independent variables—such as the geographical region of the country or a judicial officer's race, sex, and political party affiliation—are associated with some outcome (i.e., the dependent variable).<sup>48</sup> Regression analyses can identify which

44. See ALAN AGRESTI, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS 36-41 (3d ed. 2019); *Using Chi-Square Statistic in Research*, STAT. SOLS., <https://www.statisticssolutions.com/using-chi-square-statistic-in-research/> [<https://perma.cc/9Q3Q-8WEK>].

45. The Fisher Exact test serves the same purpose as chi-squares, but is more appropriate with sample sizes less than 1,000 or when 20% of expected frequencies in cross-tabulation cells are less than or equal to five (which occurred in some chi-squares). See Matthias Döring, *Testing Independence: Chi-Squared vs Fisher's Exact Test*, DATA SCI. BLOG (Oct. 17, 2018), [https://www.datascienceblog.net/post/statistical\\_test/contingency\\_table\\_tests/](https://www.datascienceblog.net/post/statistical_test/contingency_table_tests/) [<https://perma.cc/C36Q-4WG8>]. Because this study analyzed fewer than 1,000 cases, both the chi-square and Fisher's Exact statistics are reported as confirmatory of each other.

46. *Nominal Variable Association*, STAT. SOLS., <https://www.statisticssolutions.com/free-resources/directory-of-statistical-analyses/nominal-variable-association/> [<https://perma.cc/9R2Y-C5J6>] (last visited Aug. 19, 2022). Note that Cramer's V, rather than a Phi coefficient, was used because the latter is used only for two-by-two tables, whereas Cramer's V is appropriate for tables of that size and larger, such as many of those reported in Part III. *Id.*

Cramer's V results range from 0.00 to 1.00. Some authorities make three divisions for interpreting the strength of associations values. *Id.* (describing values less than 0.10 as weak, 0.10 to 0.30 as moderate, and 0.31 or higher as strong). Other sources refine interpretation across five levels with values less than 0.05 indicating a very weak relationship; values between 0.05 and 0.10 indicating weak associations; values between 0.10 and 0.15 representing moderate associations; values between 0.15 and 0.25 indicating strong associations; and values of 0.25 or higher indicating very strong relationships. Haldun Akoglu, *User's Guide to Correlation Coefficients*, 18 TURK. J. EMERGENCY MED. 91, 92 tbl.2 (2018).

47. See generally Joshua Bush, *The Difference Between Bivariate & Multivariate Analyses*, SCIENCING (June 4, 2018), <https://sciencing.com/difference-between-bivariate-multivariate-analyses-8667797.html> [<https://perma.cc/7BKR-LFZ8>].

48. *What Is Linear Regression?*, STAT. SOLS. [hereinafter *Regression*], <https://www.statisticssolutions.com/free-resources/directory-of-statistical-analyses/what-is-linear-regression/> [<https://perma.cc/3FYP-NK2K>] (last visited June 13, 2022).

independent variables “are significant predictors of the outcome variable” and the degree to which they do so as “indicated by the magnitude and sign of the beta estimates.”<sup>49</sup> When all of the independent variables are categorical in nature, as is the case in this study, and the dependent variable is also categorical, logistic regression is the appropriate type of regression analysis.<sup>50</sup>

## 2. Qualitative Coding and Analyses

Consistent with the research method as set forth by Altheide and Schneider, the qualitative portion of this research project focuses on narrative data in which both categorical and unique data were obtained from each case studied.<sup>51</sup> The content analysis was conducted in three phases, the completion of which allowed for the creation of a typology based on the patterns that emerged during the analyses of cases.

### a. Phase One: Preliminary Protocol Development

The first phase of the qualitative content analysis involved two researchers independently reviewing forty cases in an attempt to discern distinctive patterns in ways that courts were applying *Lawrence*. This allowed each of the researchers to develop a preliminary protocol containing categories against which other cases could be assessed. Importantly, this phase involves a collaborative, discursive process to identify categories that capture the richness of narrative descriptions without any predefined categories.<sup>52</sup> Then, after independently identifying emergent themes, two researchers compared their own assessments of the forty cases and then harmonized their conceptualizations so that cases presenting similar themes could be more reliably coded as falling within a particular category.

### b. Phase Two: Case Classification into Typology Categories

The second phase of the content analysis involved two researchers independently coding all 307 relevant cases in a manner responsive to the first research question concerning the different ways in which courts

---

49. *Id.*

50. *Id.*; see also AGRESTI, *supra* note 44, at 89-102; *What Is Logistic Regression?*, STAT. SOLS. [hereinafter *Logistic Regression*], <https://www.statisticssolutions.com/free-resources/directory-of-statistical-analyses/what-is-logistic-regression/> [<https://perma.cc/UC6Z-FEJ2>] (last visited June 13, 2022).

51. ALTHEIDE & SCHNEIDER, *supra* note 7, at 23-73.

52. *Id.* at 44-45.



apply *Lawrence*. Consistent with the methodology of qualitative content analysis as set forth by Altheide and Schneider, cases were compared for similarities in the ways in which *Lawrence* was used in the case. When a particular case fell within one of the themes developed as part of the preliminary data analysis protocol, it was added to the previously identified category. By contrast, when a case presented a substantially different use of *Lawrence*, a new category was created, thereby allowing for the emergence of central themes that are explored in detail in the results and discussion sections of this Article.

c. Phase Three: Case Studies

In the third and final phase of the content analysis, I compared and contrasted the cases within each of the categories that emerged in phase two. To answer the third research question, I sought to make generalizations not only about the ways that litigants sought to use *Lawrence*, but also about how courts ultimately ruled on such attempts.

d. Inter-Rater Reliability

During the first phase, the two coders reached 77.5% agreement, which exceeds the typical threshold of 75% agreement required in the social sciences.<sup>53</sup> We met, talked through our different approaches to coding, and then proceeded to code the cases independently during phase two. That allowed us to increase our inter-rater reliability, largely as a function of having solidified our themes. Specifically, both researchers coded all but nine (2.9%) of the 307 cases identically during the second phase of coding, yielding an impressively high concurrence rate of 97.1%, which exceeds the level of agreement typically required in medical sciences.<sup>54</sup> A third person then reviewed and independently coded each of the nine cases on which the two other researchers disagreed. In essence, that researcher's coding served as a tie-breaking vote on the coding of those cases. That person's tie-breaking vote is how the final nine cases were ultimately coded.

---

53. See, e.g., *Inter-Rater Reliability IRR: Definition, Calculation*, STAT. HOW TO (July 17, 2016), <https://www.statisticshowto.com/inter-rater-reliability/> [<https://perma.cc/RG46-XFSH>].

54. *Id.* (reporting that medicine typically expects 90% or higher levels of inter-rater reliability).

### III. QUANTITATIVE RESULTS FOR ALL CASES

#### A. *Descriptive Statistics*

##### 1. The Cases

More than two-thirds of the cases were either criminal ( $n = 195$ , 94.1%) or quasi-criminal in nature ( $n = 18$ , 5.9%), while the remainder were civil disputes ( $n = 94$ , 30.6%). Comparably few ( $n = 26$ , 8.5%) decisions were issued by trial courts; the balance represented decisions from intermediate appellate courts ( $n = 191$ , 62.2%) and state high courts of last resort ( $n = 90$ , 29.3%).

The cases fell into one of nine primary themes that emerged during the qualitative analysis of the data. They include, in alphabetical order, (1) business operations and employment law; (2) family law; (3) LGBTQ+ civil rights; (4) noncommercial consensual sex crimes (e.g., adultery, fornication, and sodomy); (5) obscenity and pornography; (6) other types of sexual privacy claims (e.g., bigamy, incest, lewdness, indecent exposure, voyeurism, revenge porn, knowing transmission of sexually-transmitted infections); (7) post-conviction claims filed by sex offenders; (8) prostitution and related commercial sex offenses; and (9) sexual assault and statutory rape.<sup>55</sup> In addition to these nine substantive categories, a miscellaneous category presents cases that used *Lawrence* in a way that differed from one of the other categories that emerged during data analysis. Figure 1 illustrates the number of cases in each category along with the corresponding percentage of the 307 total cases.

---

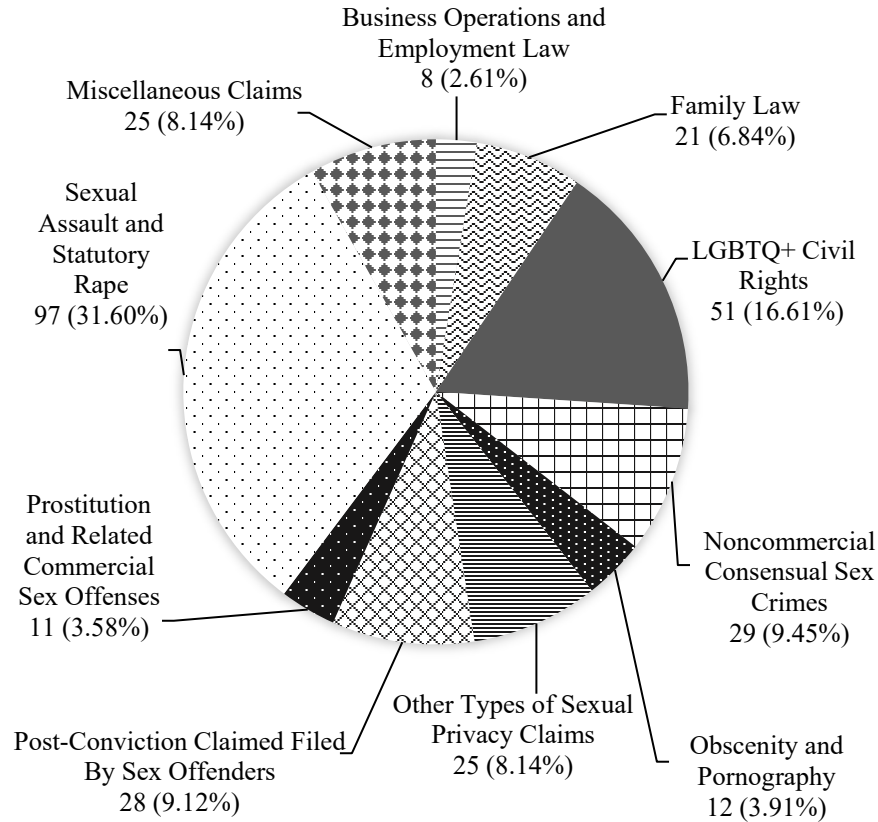
55. The first three categories of cases presented civil law claims that were analyzed in a previous study published in this journal. See Fradella, *supra* note 1, *passim*.

2025]

## LIBERTY AND PRIVACY

19

Figure 1: Category Frequencies

a. Depth of *Lawrence* Analysis

Overall, judges cited *Lawrence* in passing in 169 (55.50%) of the cases. *Lawrence* was key to case outcomes in 138 (45.0%) of the cases. Perhaps unsurprisingly, since *Lawrence* was a criminal case, it was more likely to be key to the outcome in criminal cases than it was in civil cases ( $\chi^2_{(1, 307)} = 22.971$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.274). Table 2 illustrates a cross tabulation of the depth of analysis across the case categories, illustrating that *Lawrence* was more likely to be key to a case outcome, to a statistically significant degree, in noncommercial consensual sex crimes (adultery, fornication, and sodomy), other criminal cases involving claims of sexual privacy, and sexual assault cases than any other type of claim, including those centering around LGBTQ+ civil rights.

Table 2: Cross Tabulation of Depth by Category

| Case Category                                    | Depth of Analysis           |                    |                 |
|--------------------------------------------------|-----------------------------|--------------------|-----------------|
|                                                  | <i>Mentioned in Passing</i> | <i>Key to Case</i> | <i>Total</i>    |
| Business Operations and Employment Law           | 7<br>(2.3%)                 | 3<br>(1.0%)        | 10<br>(3.3%)    |
| Family Law                                       | 20<br>(6.5%)                | 2<br>(0.7%)        | 22<br>(7.2%)    |
| LGBTQ+ Civil Rights                              | 35<br>(11.4%)               | 14<br>(4.6%)       | 49<br>(16.0%)   |
| Noncommercial Consensual Sex Crimes              | 12<br>(3.9%)                | 17<br>(5.5%)       | 29<br>(9.4%)    |
| Obscenity and Pornography                        | 5<br>(1.6%)                 | 7<br>(2.3%)        | 12<br>(3.9%)    |
| Other Claims of Sexual Privacy                   | 9<br>(2.9%)                 | 16<br>(5.2%)       | 25<br>(8.1%)    |
| Post-Conviction Claims Filed by Sex Offenders    | 20<br>(6.5%)                | 8<br>(2.6%)        | 28<br>(9.1%)    |
| Prostitution and Related Commercial Sex Offenses | 4<br>(1.3%)                 | 7<br>(2.3%)        | 11<br>(3.6%)    |
| Sexual Assault and Statutory Rape                | 37<br>(12.1%)               | 60<br>(19.5%)      | 97<br>(31.6%)   |
| Miscellaneous Claims                             | 20<br>(6.5%)                | 4<br>(1.3%)        | 24<br>(7.8%)    |
| <b>Total</b>                                     | 169<br>(55.0%)              | 138<br>(45.0%)     | 307<br>(100.0%) |

$\chi^2_{(9, 307)} = 47.992$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.395

b. Treatment of *Lawrence*

Courts applied *Lawrence* straightforwardly in just over half of all cases ( $n = 163$ , 53.1%). As Table 3 shows, when judges interpreted and applied *Lawrence* in ways that went beyond a neutral application of its central holding, they gave the case a narrow construction more frequently than a broad one, although there are salient differences depending on the type of case.

2025]

## LIBERTY AND PRIVACY

21

Table 3: Cross Tabulation of Treatment by Case Type

| Case Type                            | Treatment of <i>Lawrence</i> |                            |                           |                 |
|--------------------------------------|------------------------------|----------------------------|---------------------------|-----------------|
|                                      | <i>Neutral</i>               | <i>Narrow Construction</i> | <i>Broad Construction</i> | <i>Total</i>    |
| <i>Civil</i>                         | 42<br>(13.7%)                | 16<br>(5.2%)               | 33<br>(11.7%)             | 94<br>(30.6%)   |
| <i>Criminal &amp; Quasi-Criminal</i> | 121<br>(39.4%)               | 66<br>(21.5%)              | 26<br>(8.5%)              | 213<br>(67.8%)  |
| <b>Total</b>                         | 163<br>(53.1%)               | 82<br>(26.7%)              | 62<br>(20.2%)             | 307<br>(100.0%) |

$\chi^2_{(2, 307)} = 28.552$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.305<sup>56</sup>

When judges interpreted and applied *Lawrence* in criminal cases in ways that went beyond a neutral application of its central holding, they gave the case a narrow construction far more frequently than a broad one, which, as Table 4 shows, overwhelmingly aided the prosecution in criminal cases.

Table 4: Cross Tabulation of Treatment by Criminal Case Outcome

| Criminal & Quasi-Criminal Case Outcome | Treatment of <i>Lawrence</i> |                            |                           |                 |
|----------------------------------------|------------------------------|----------------------------|---------------------------|-----------------|
|                                        | <i>Neutral</i>               | <i>Narrow Construction</i> | <i>Broad Construction</i> | <i>Total</i>    |
| <i>Prosecution</i>                     | 109<br>(51.2%)               | 59<br>(27.7%)              | 14<br>(6.6%)              | 182<br>(85.4%)  |
| <i>Defense</i>                         | 12<br>(5.6%)                 | 7<br>(3.3%)                | 12<br>(5.6%)              | 31<br>(16.6%)   |
| <b>Total</b>                           | 121<br>(56.8%)               | 66<br>(31.0%)              | 26<br>(12.2%)             | 213<br>(100.0%) |

$\chi^2_{(2, 213)} = 23.796$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.334<sup>57</sup>

56. When a chi-square analysis is run on a cross tabulation of case outcome and judicial treatment using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results remain statistically significant:  $\chi^2_{(1, 144)} = 22.745$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.397.

57. When a chi-square analysis is run on a cross tabulation of *criminal* case outcomes and judicial treatment of *Lawrence* using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results remain statistically significant:  $\chi^2_{(1, 92)} = 14.383$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.395.

## c. Region and Regional Politics

As Table 5 reveals, cases from southern states were disproportionately represented in comparison to other census regions of the country. The geographical region in which cases were decided was significantly related to how courts applied *Lawrence*, with judges in the northeastern region interpreting the case broadly by a margin of more than three to one over narrow constructions, while judges in other regions gave *Lawrence* a more narrow reading in roughly twice as many cases as they applied the case expansively.

Table 5: Treatment by Census Region of Cases

| Census Region         | Treatment of <i>Lawrence</i> |                            |                           |                |
|-----------------------|------------------------------|----------------------------|---------------------------|----------------|
|                       | <i>Neutral</i>               | <i>Narrow Construction</i> | <i>Broad Construction</i> | <i>Total</i>   |
| <i>Northeast</i>      |                              |                            |                           |                |
| New England           | 13<br>(4.2%)                 | 3<br>(1.0%)                | 10<br>(3.3%)              | 26<br>(8.5%)   |
| Mid-Atlantic          | 14<br>(4.6%)                 | 5<br>(1.6%)                | 15<br>(4.9%)              | 34<br>(11.1%)  |
| Subtotal              | 27<br>(8.8%)                 | 8<br>(2.6%)                | 25<br>(8.1%)              | 60<br>(19.5%)  |
| <i>South</i>          |                              |                            |                           |                |
| South-Atlantic        | 22<br>(7.2%)                 | 16<br>(5.2%)               | 8<br>(2.6%)               | 46<br>(15.0%)  |
| East South<br>Central | 14<br>(4.6%)                 | 3<br>(1.0%)                | 0<br>(0.0%)               | 17<br>(5.5%)   |
| West South<br>Central | 32<br>(10.4%)                | 11<br>(3.6%)               | 6<br>(2.0%)               | 49<br>(16.0%)  |
| Subtotal              | 68<br>(22.1%)                | 30<br>(9.8%)               | 14<br>(4.6%)              | 112<br>(36.5%) |
| <i>Midwest</i>        |                              |                            |                           |                |
| East North<br>Central | 10<br>(3.3%)                 | 11<br>(3.6%)               | 5<br>(1.6%)               | 26<br>(8.5%)   |
| West North<br>Central | 19<br>(6.2%)                 | 9<br>(2.9%)                | 4<br>(1.3%)               | 32<br>(10.4%)  |
| Subtotal              | 29<br>(9.4%)                 | 20<br>(6.5%)               | 9<br>(2.9%)               | 58<br>(18.9%)  |

2025]

## LIBERTY AND PRIVACY

23

|              |                |               |               |                 |
|--------------|----------------|---------------|---------------|-----------------|
| <i>West</i>  |                |               |               |                 |
| Mountain     | 16<br>(5.2%)   | 8<br>(2.6%)   | 6<br>(2.0%)   | 30<br>(9.8%)    |
| Pacific      | 23<br>(7.5%)   | 16<br>(5.2%)  | 8<br>(2.6%)   | 47<br>(15.3%)   |
| Subtotal     | 39<br>(12.7%)  | 24<br>(7.8%)  | 14<br>(4.6%)  | 77<br>(25.1%)   |
| <b>Total</b> | 163<br>(53.1%) | 82<br>(26.7%) | 62<br>(20.2%) | 307<br>(100.0%) |

Nine Regional Subdivisions:  $\chi^2_{(16, 307)} = 36.406$ ;  $p < 0.003$ ; Fisher exact = 0.001; Cramer's V = 0.244<sup>58</sup>

Four Major Regions:  $\chi^2_{(6, 307)} = 29.269$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.220<sup>59</sup>

The political affiliation of nearly two-thirds of the judges ( $n = 199$ , 64.9%) could not be determined because they had achieved judicial office by winning nonpartisan elections or through other nonpartisan means. Of the judges who were elected in partisan races or appointed via partisan political processes, forty-two (14.0%) were affiliated with the Democratic party and sixty-seven (21.8%) with the Republican party. The political affiliation of the judge writing an opinion was not statistically significantly related to its treatment of *Lawrence* ( $\chi^2_{(4, 301)} = 2.113$ ;  $p > 0.05$ , n.s.). But given the high percentage of judges whose political affiliation is unknown, cross-tabulations were run comparing the treatment of *Lawrence* to the “color” of the state in which the case was decided. Table 6 demonstrates that while “blue” and “purple” states do not differ significantly in the rate in which *Lawrence* is narrowly or broadly interpreted, decisions from “red” states apply *Lawrence* narrowly at least twice as frequently as they apply it broadly.

58. When a chi-square analysis is run on a cross tabulation of case outcome and judicial treatment using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results remain statistically significant:  $\chi^2_{(8, 144)} = 20.653$ ;  $p < 0.008$ ; Fisher exact = 0.009; Cramer's V = 0.379.

59. When a chi-square analysis is run on a cross tabulation of case outcome and judicial treatment using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results remain statistically significant:  $\chi^2_{(3, 144)} = 18.968$ ;  $p < 0.001$ ; Fisher exact = 0.001; Cramer's V = 0.363.

Table 6: Treatment of *Lawrence* by Politics of the State in Which Cases Were Decided

| State Political Climate | Treatment of <i>Lawrence</i> |                            |                           |              |
|-------------------------|------------------------------|----------------------------|---------------------------|--------------|
|                         | <i>Neutral</i>               | <i>Narrow Construction</i> | <i>Broad Construction</i> | <i>Total</i> |
| <i>Deep Red</i>         | 72 (23.5%)                   | 22 (7.2%)                  | 11 (3.6%)                 | 105 (34.2%)  |
| <i>Light Red</i>        | 11 (3.6%)                    | 13 (14.2%)                 | 5 (1.6%)                  | 29 (9.4%)    |
| <i>Purple</i>           | 7 (2.3%)                     | 5 (1.6%)                   | 5 (1.6%)                  | 17 (5.50%)   |
| <i>Light Blue</i>       | 8 (2.6%)                     | 3 (1.0%)                   | 3 (1.0%)                  | 14 (14.6%)   |
| <i>Deep Blue</i>        | 65 (21.2%)                   | 39 (12.7%)                 | 38 (24.4%)                | 142 (46.3%)  |
| <b>Total</b>            | 163 (53.1%)                  | 82 (26.7%)                 | 62 (20.2%)                | 307 (100.0%) |

$\chi^2_{(8, 307)} = 21.807$ ;  $p < 0.010$ ; Fisher exact = 0.005; Cramer's V = 0.188<sup>60</sup>

## 2. The Judges

Courts issued per curiam decisions in thirteen cases (4.2%). Of the remaining opinions, men authored 195 (63.5%) and women wrote ninety-nine (32.2%).

Table 7: Treatment by Sex

| Judge's Sex   | Treatment of <i>Lawrence</i> |                            |                           |              |
|---------------|------------------------------|----------------------------|---------------------------|--------------|
|               | <i>Neutral</i>               | <i>Narrow Construction</i> | <i>Broad Construction</i> | <i>Total</i> |
| <i>Male</i>   | 99 (33.7%)                   | 60 (20.4%)                 | 36 (12.2%)                | 195 (66.3%)  |
| <i>Female</i> | 57 (19.4%)                   | 17 (5.8%)                  | 25 (8.5%)                 | 99 (33.7%)   |
| <b>Total</b>  | 156 (53.1%)                  | 77 (26.2%)                 | 61 (20.7%)                | 294 (100.0%) |

$\chi^2_{(2, 294)} = 6.668$ ;  $p < 0.036$ ; Fisher exact = 0.038; Cramer's V = 0.151<sup>61</sup>

60. When a chi-square analysis is run on a cross tabulation of case outcome and judicial treatment using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results were no longer statistically significant:  $\chi^2_{(4, 144)} = 4.545$ ;  $p > 0.05$ , n.s.).

61. When a chi-square analysis is run on a cross tabulation of the sex of the judge and judicial treatment using only those cases in which judges did not straightforwardly apply *Lawrence* (i.e., negative and positive cases were included, but neutral cases excluded), the results remain statistically significant:  $\chi^2_{(1, 138)} = 5.746$ ;  $p < 0.017$ ; Fisher exact = 0.025; Cramer's V = 0.204.



The sex of the judge writing an opinion was not statistically significantly related to the outcomes in criminal and quasi-criminal cases ( $\chi^2_{(1, 202)} = 0.050$ ;  $p > 0.05$ , n.s.), even when the analyses excluded neutral applications of *Lawrence* ( $\chi^2_{(1, 88)} = 0.517$ ;  $p > 0.05$ , n.s.). As Table 7 illustrates, however, the sex of the judge writing an opinion was statistically significantly related to the treatment of *Lawrence*. Specifically, there were moderate sex differences between narrow and expansive constructions of *Lawrence*.

The racial/ethnic distribution of state court judges authoring opinions citing *Lawrence* in the past two decades is presented in Table 8. Given that people of color account for comparatively few of the judges represented in the study, it is necessary to collapse the categories in Table 8 into white ( $n = 254$ , 82.7%), nonwhite ( $n = 39$ , 12.7%), and not applicable/unknown ( $n = 14$ , 4.6%) to avoid there being too few observations for meaningful statistical analyses.

Table 8: Race/Ethnicity of Judges

| Race or Ethnicity           | <i>n</i> | %     |
|-----------------------------|----------|-------|
| African-American/Black      | 17       | 5.5%  |
| Asian and Pacific Islander  | 6        | 2.0%  |
| Hispanic                    | 16       | 5.2%  |
| White                       | 254      | 82.7% |
| Not Applicable (per curiam) | 13       | 4.2%  |
| Unknown                     | 1        | 0.3%  |

There were no statistically significant differences between white and nonwhite judges with regard to their treatment of *Lawrence* ( $\chi^2_{(4, 307)} = 1.521$ ;  $p > 0.05$ , n.s.).

### B. Logistic Regression

When neutral cases are excluded such that only cases in which judges interpreted *Lawrence* and applied it to the facts that went beyond the express holding or limitations of the case, the logistic regression results presented in Table 9 indicate that case type, depth of treatment, and region of the country were all statistically significantly related to how *Lawrence* was interpreted. Specifically, *Lawrence* being broadly or expansively interpreted is associated with 76.7% lower odds in criminal and quasi-criminal cases compared to civil ones, 65.6% lower odds when key to the case outcome compared to when mentioned in passing, and 88.2% and 87.0% lower odds in the South and Midwest compared to in the Northeast. Although the sex of a judge was not a statistically

| N = 144                                                                         |         |         |        |    |         |        |                      |        |
|---------------------------------------------------------------------------------|---------|---------|--------|----|---------|--------|----------------------|--------|
| Omnibus Test of Model Coefficients: $\chi^2 = 52.770_{(16, 144)}$ , $p < 0.001$ |         |         |        |    |         |        |                      |        |
| Hosmer & Lemeshow Test: $\chi^2 = 8.014_{(8, 144)}$ , $p > 0.05$                |         |         |        |    |         |        |                      |        |
| Nagelkerke Pseudo-R <sup>2</sup> = 0.412                                        |         |         |        |    |         |        |                      |        |
|                                                                                 | B       | S.E.    | Wald   | df | Sig.    | Exp(B) | 95% CI<br>for Exp(B) |        |
|                                                                                 |         |         |        |    |         |        | Lower                | Upper  |
| Type <sup>a</sup>                                                               | -1.458  | .465    | 9.840  | 1  | .002*** | .233   | .094                 | .579   |
| Depth <sup>b</sup>                                                              | -1.067  | .437    | 5.970  | 1  | .015**  | .344   | .146                 | .810   |
| Region <sup>c</sup>                                                             |         |         | 7.596  | 3  | .055    |        |                      |        |
| South                                                                           | -2.136  | .804    | 7.050  | 1  | .008*** | .118   | .024                 | .572   |
| Midwest                                                                         | -2.040  | .900    | 5.138  | 1  | .023**  | .130   | .022                 | .759   |
| West                                                                            | -1.282  | .654    | 3.845  | 1  | .051*   | .277   | .077                 | .999   |
| State Politics <sup>d</sup>                                                     |         |         | 2.505  | 4  | .644    |        |                      |        |
| Deep Red                                                                        | .955    | .702    | 1.852  | 1  | .174    | 2.598  | .657                 | 10.274 |
| Light Red                                                                       | .479    | .788    | .369   | 1  | .544    | 1.614  | .344                 | 7.568  |
| Purple                                                                          | 1.302   | .983    | 1.754  | 1  | .185    | 3.677  | .535                 | 25.268 |
| Light Blue                                                                      | .749    | 1.254   | .356   | 1  | .550    | 2.114  | .181                 | 24.694 |
| Judge's Sex <sup>e</sup>                                                        |         |         | 3.811  | 2  | .149    |        |                      |        |
| Female                                                                          | .918    | .470    | 3.811  | 1  | .051*   | 2.504  | .996                 | 6.294  |
| N/A (per curiam)                                                                | -23.094 | 40192.9 | 0.000  | 1  | 1.000   | .000   | .000                 | .      |
|                                                                                 |         | 73      |        |    |         |        |                      |        |
| Judicial Party <sup>f</sup>                                                     |         |         | 1.088  | 3  | .780    |        |                      |        |
| Democrat                                                                        | .155    | .653    | .056   | 1  | .813    | 1.167  | .325                 | 4.194  |
| Republican                                                                      | -.235   | .559    | .177   | 1  | .674    | .790   | .264                 | 2.363  |
| Unknown                                                                         | -1.059  | 1.169   | .821   | 1  | .365    | .347   | .035                 | 3.430  |
| Constant                                                                        | 1.927   | .603    | 10.206 | 1  | .001    | 6.870  |                      |        |

Reference categories:  
<sup>a</sup> = Civil   <sup>b</sup> = Mentioned in Passing   <sup>c</sup> = Northeast   <sup>d</sup> Deep Blue   <sup>e</sup> Male   <sup>f</sup> Nonpartisan

Significance: \*  $p < 0.10$  \*\*  $p < 0.05$  \*\*\*  $p < 0.01$

2025]

## LIBERTY AND PRIVACY

27

## IV. MIXED-METHODS ANALYSES OF CASES BY CATEGORY

A. *Noncommercial Consensual Sex Offenses (n = 29, 13.6% of Criminal Cases, 9.4% of Total Cases)*

Twenty-eight of the twenty-nine cases in this category concerned the constitutionality of laws either directly criminalizing sodomy, adultery, or fornication, or raising claims that depended, in part, on the validity or scope of such laws.<sup>62</sup> Of these, eleven (37.9%) applied *Lawrence* in a straightforward manner, thirteen (44.8%) construed the precedent narrowly, and only five (17.2%) gave the case a broad reading. Table 10 details the characteristics of the cases in this category across all dependent variables in the study, none of which was significantly related to how courts applied *Lawrence*.

Table 10: Variable Frequencies and Relationships to Treatment of *Lawrence* in Noncommercial Consensual Sex Offense Cases

| Category             | Treatment of <i>Lawrence</i><br>n (%) |               |              |               | Chi-Square       | Sig.      | Cramer's V |
|----------------------|---------------------------------------|---------------|--------------|---------------|------------------|-----------|------------|
| Type                 | Neutral                               | Narrow        | Broad        | Total         | 1.849<br>(2, 29) | p > 0.050 | N/A        |
| Civil                | 3<br>(10.3%)                          | 2<br>(6.9%)   | 0<br>(0.0%)  | 5<br>(17.2%)  |                  |           |            |
| Criminal             | 8<br>(27.6%)                          | 11<br>(37.9%) | 5<br>(17.2%) | 24<br>(82.8%) |                  |           |            |
| Depth                | Neutral                               | Narrow        | Broad        | Total         | 3.792<br>(2, 29) | p > 0.050 | N/A        |
| Mentioned in Passing | 7<br>(24.1%)                          | 4<br>(13.8%)  | 1<br>(3.4%)  | 12<br>(41.4%) |                  |           |            |
| Key to Case          | 4<br>(13.8%)                          | 9<br>(31.0%)  | 4<br>(13.8%) | 17<br>(58.6%) |                  |           |            |
| Outcome              | Neutral                               | Narrow        | Broad        | Total         | 3.538<br>(4, 29) | p > 0.050 | N/A        |
| Prosecution          | 7<br>(24.1%)                          | 9<br>(31.0%)  | 3<br>(10.3%) | 19<br>(65.5%) |                  |           |            |
| Defense              | 1<br>(3.4%)                           | 2<br>(6.9%)   | 2<br>(6.9%)  | 5<br>(17.2%)  |                  |           |            |
| Not Relevant (Civil) | 3<br>(10.3%)                          | 2<br>(6.9%)   | 0<br>(0.0%)  | 5<br>(17.2%)  |                  |           |            |

62. The other case merely noted that the state had repealed its sodomy law after *Lawrence* was decided. *Dixon v. Missouri State Highway Patrol*, 583 S.W.3d 521, 524 (Mo. Ct. App. 2019) (“In 2006, the General Assembly removed the language which criminalized deviate sexual intercourse with another person of the same sex . . . [p]resumably . . . in response to the decision in *Lawrence* . . .”).

| <b>State Politics</b>                  | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2.932<br>(4, 29) | p ><br>0.050 | N/A |
|----------------------------------------|----------------|---------------|--------------|---------------|------------------|--------------|-----|
| <i>Deep Red</i>                        | 3<br>(10.3%)   | 1<br>(3.4%)   | 2<br>(6.9%)  | 6<br>(20.7%)  |                  |              |     |
| <i>Light Red</i>                       | 2<br>(6.9%)    | 4<br>(13.8%)  | 1<br>(3.4%)  | 7<br>(24.1%)  |                  |              |     |
| <i>Purple</i>                          | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |              |     |
| <i>Light Blue</i>                      | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |              |     |
| <i>Deep Blue</i>                       | 6<br>(20.7%)   | 8<br>(27.6%)  | 2<br>(6.9%)  | 16<br>(55.2%) |                  |              |     |
| <b>Region</b>                          | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 4.195<br>(4, 29) | p ><br>0.050 | N/A |
| <i>Northeast</i>                       | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |              |     |
| <i>South</i>                           | 9<br>(31.0%)   | 8<br>(27.6%)  | 4<br>(13.8%) | 21<br>(72.4%) |                  |              |     |
| <i>Midwest</i>                         | 1<br>(3.4%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 1<br>(3.4%)   |                  |              |     |
| <i>West</i>                            | 1<br>(3.4%)    | 5<br>(17.2%)  | 1<br>(3.4%)  | 7<br>(24.1%)  |                  |              |     |
| <b>Judge's Sex</b>                     | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 3.504<br>(4, 28) | p ><br>0.050 | N/A |
| <i>Male</i>                            | 4<br>(13.8%)   | 7<br>(24.1%)  | 4<br>(13.8%) | 15<br>(55.6%) |                  |              |     |
| <i>Female</i>                          | 6<br>(22.2%)   | 5<br>(18.5%)  | 1<br>(3.7%)  | 12<br>(44.4%) |                  |              |     |
| <i>Not Applicable<br/>(per curiam)</i> | 0<br>(0.0%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 1<br>(3.6%)   |                  |              |     |
| <b>Judge's Race/Ethnicity</b>          | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2.557<br>(4, 29) | p ><br>0.050 | N/A |
| <i>White</i>                           | 9<br>(31.0%)   | 9<br>(31.0%)  | 5<br>(17.2%) | 23<br>(79.3%) |                  |              |     |
| <i>Nonwhite</i>                        | 1<br>(3.4%)    | 3<br>(10.3%)  | 0<br>(0.0%)  | 4<br>(13.8%)  |                  |              |     |
| <i>Not Applicable<br/>or Unknown</i>   | 1<br>(3.4%)    | 1<br>(3.4%)   | 0<br>(0.0%)  | 2<br>(6.9%)   |                  |              |     |
| <b>Judge's Political Affiliation</b>   | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 4.383<br>(4, 29) | p ><br>0.050 | N/A |
| <i>Nonpartisan</i>                     | 9<br>(31.0%)   | 7<br>(24.1%)  | 2<br>(6.9%)  | 18<br>(62.1%) |                  |              |     |

2025]

## LIBERTY AND PRIVACY

29

|                   |             |              |             |              |  |  |  |
|-------------------|-------------|--------------|-------------|--------------|--|--|--|
| <i>Democrat</i>   | 0<br>(0.0%) | 3<br>(10.3%) | 1<br>(3.4%) | 4<br>(13.8%) |  |  |  |
| <i>Republican</i> | 2<br>(6.9%) | 3<br>(10.3%) | 2<br>(6.9%) | 7<br>(24.1%) |  |  |  |

## 1. Sodomy and Solicitation to Engage in It

*Lawrence*, of course, decriminalized noncommercial acts of oral or anal sex if they occur in private between consenting adults.<sup>63</sup> Some states repealed their criminal sodomy laws after the decision in *Lawrence*.<sup>64</sup> Other states retained their sodomy laws, enforcing them in ways not covered by *Lawrence*. For instance, sodomy laws that include criminal prohibitions against bestiality may still be constitutionally enforced.<sup>65</sup> Courts reason that even if *Lawrence* removed morality as a basis for criminalizing sex acts between humans and animals, there are at least two rational bases for the continued prohibition of such acts: the prevention of cruelty to animals and the protection of public health.<sup>66</sup>

63. *Lawrence v. State*, No. 14-99-00109-CR, 2003 WL 22453791, at \*2 (Tex. App. Oct. 30, 2003) (reversing the original judgments of the trial court, ordering the complaints be dismissed, and entering judgments of acquittal after remand from the U.S. Supreme Court). As a result, an adult soliciting another person over the age of consent to engage in noncommercial acts of oral or anal sex, in private, when no vulnerability impacts the ability to consent, may not be constitutionally enforced. *Watson v. State*, 750 S.E.2d 143, 146-47 (Ga. 2013).

64. Notably, courts rejected attempts to reinstate sodomy as a criminal offense. In *McLaughlin v. Becerra*, the plaintiff had proposed a ballot measure titled the “Sodomite Suppression Act,” which would have made the “touch[ing of] another person of the same gender for purposes of sexual gratification” punishable by “death by bullets to the head or by any other convenient method.” No. B280529, 2018 WL 654556, at \*1 (Cal. Ct. App. Feb. 1, 2018). The state attorney general sought and was granted a declaratory judgment that the proposed ballot initiative was unconstitutional under *Lawrence*, thereby relieving her office of its usual obligations to summarize and circulate the proposed ballot initiative. *Id.* The California Court of Appeals upheld a lower court’s grant of the declaratory judgment. *Id.* at \*6.

65. See, e.g., *Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1096 (La. Ct. App.), writ denied, 916 So. 2d 1062 (2005) (“We conclude that the two types of behavior are severable, because the prohibition against human/human portion can be removed without affecting the validity or intent of the human/animal prohibition.”).

66. *Warren v. Commonwealth*, 822 S.E.2d 395, 402 (2019) (“Bestiality can be considered animal abuse because the sexual molestation of animals by humans may physically injure or kill the animal victim.” Emily Malhiot, *Chapter 86: Nevada Finally Outlaws Bestiality*, 49 U. PAC. L. REV. 555, 561 (2018) (internal alterations omitted)); *Warren*, 822 S.E.2d at 402 (“Scientists estimate that more than [six] out of every [ten] known infectious diseases in people are spread from animals, and [three] out of every [four] new or emerging infectious diseases in people are spread from animals.”) (*Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> [<https://perma.cc/9XHW-LZ6H>] (last updated July 1, 2021))

Sodomy laws may also be constitutionally applied to commercial sex (i.e., for compensation)<sup>67</sup> or when the acts occur in public.<sup>68</sup> Notably, most courts not only consider communal areas inside correctional facilities to be “public” spaces which lie outside the scope of *Lawrence*’s protections,<sup>69</sup> but also reason that consensual sexual activities occurring in inmates’ cells are also not constitutionally protected because judges reason that “prisoners have no cognizable right to sexual privacy” in their cells as a function of their diminished expectations of privacy while incarcerated.<sup>70</sup>

67. Because prostitution and related crimes involve commercial activity, cases involving those offenses are presented in their own category in Part IV.B. See *infra* notes 96-103 and accompanying text.

68. See, e.g., *Waller v. Commonwealth*, 833 S.E.2d 484, 486 (Va. Ct. App. 2019) (dismissing the petition for actual innocence on the grounds that *Lawrence* and state cases applying it voided a conviction for solicitation to commit sodomy based on acts that took place in a public park, reasoning that the petitioner “only advance[d] an argument on the legal effect of subsequent judicial decisions, a ground not contemplated by” state law, which limited writs of actual innocence to newly discovered nonbiological evidence (internal quotations and citations omitted)); *State v. Gentle*, 817 S.E.2d 833, 839 (N.C. Ct. App. 2018) (upholding a sodomy conviction for an act that the defendant unsuccessfully claimed had occurred “well outside the public view in an area . . . described as ‘dark’ and ‘wooded’”), *aff’d*, 822 S.E.2d 616 (N.C. 2019); *Singson v. Commonwealth*, 621 S.E.2d 682, 688 (Va. Ct. App. 2005) (“[B]ecause Singson’s proposed conduct [solicitation of sodomy from an undercover police officer] occurred in a public [restroom], . . . the circumstances of this case do[] not implicate [his] constitutionally-protected right to engage in private, consensual acts of sodomy.”); *Tjan v. Commonwealth*, 621 S.E.2d 669, 673 (Va. Ct. App. 2005) (same); see also *State v. Thomas*, 891 So. 2d 1233, 1236 (La. 2005) (reversing the dismissal of solicitation of oral sex charges against a sex worker because the *Lawrence* decision specifically stated it did “not disturb state statutes prohibiting public sexual conduct or prostitution”); *State v. Pope*, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005) (same).

69. See, e.g., *McClary v. Commonwealth*, No. 0240-13-4, 2014 WL 1707377, at \*2 (Va. Ct. App. Apr. 29, 2014), *aff’d*, No. 140785, 2015 WL 10945036 (Va. Feb. 26, 2015) (upholding the conviction for sodomy that occurred in a public area of a correctional facility); *Askew v. Commonwealth*, No. 0235-03-1, 2004 WL 234810, at \*2 (Va. Ct. App. Feb. 10, 2004) (refusing to find “good cause” that would excuse the defendant’s failure to object to the sodomy law at the trial court level because the oral sex “occurred the openness of the recreation area and was readily observable”).

70. See *People v. Groux*, No. F059366, 2011 WL 2547022, at \*11 (Cal. Ct. App. June 28, 2011); see also *Jacobson v. State*, No. 63293, 2013 WL 7167806 (Nev. Nov. 13, 2013) (upholding conviction for “conspiracy to commit voluntary sexual conduct between a prisoner and another person” without identifying the planned location). But see *Vann v. Pixley*, No. CL13000066-00, 2013 WL 9564167, at \*2 (Va. Ct. App. 2013) (granting habeas corpus petition from an inmate convicted of attempted sodomy for trying to engage in anal intercourse in a correctional courtyard, a public location, on the grounds that *Lawrence* rendered the sodomy law void ab initio).

The result in *Vann v. Pixley*, *id.*, is curious. The conduct in question occurred in a public location and, therefore, the conviction did not implicate *Lawrence*’s central holding. Nonetheless, the court felt constrained to grant the petition on the grounds that the U.S. Court of Appeals for the Fourth Circuit had declared the state law void under analogous circumstances—namely as

Because laws targeting oral or anal sex with minors also fall outside of *Lawrence*'s scope, they, too, have been upheld as a valid exercise of the state's police power.<sup>71</sup> As a result, inchoate offenses related to sodomy, such as the solicitation of a minor to engage in oral or anal sex, may be prosecuted without running afoul of the Constitution.<sup>72</sup> Additionally, convictions for sodomy against children that predate *Lawrence* may be used for sentencing purposes for sex crimes committed after the case was decided.<sup>73</sup> Moreover, sodomy laws targeting sexual activity with minors may engender differential punishments than other forms of sex with minors. The California Court of Appeals reasoned that it was "not irrational" for the state legislature to have granted judges more discretion for imposing potentially harsher sentences for oral sex than for sexual intercourse between adults and certain teenagers because it may

---

applied to a solicitation of a minor to engage in oral sex. See *MacDonald v. Moose*, 710 F.3d 154, 165 (4th Cir. 2013) (stating that "although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so" and, therefore, the court would not rewrite the law to conform it to constitutional requirements). That same logic did not affect the direct appeal of a conviction for sodomy that occurred in a public area of a correctional facility in *McClary*, 2014 WL 1707377, at \*2, presumably because Virginia state courts "construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit." *Virginia Society for Human Life v. Caldwell*, 500 S.E.2d 814, 817 n.3 (1998).

71. *McDonald v. Commonwealth*, 645 S.E.2d 918, 924 (Va. 2007); *People v. Fields*, 178 Cal. Rptr. 3d 425, 434 (Ct. App. 2014), *review granted and opinion superseded*, 340 P.3d 1043 (Cal. 2015), *app. dismissed* 348 P.3d 875 (2015); *Saunders v. Commonwealth*, 753 S.E.2d 602, 608 (Va. Ct. App. 2014), *aff'd*, No. 140507, 2015 WL 10945236 (Va. Feb. 26, 2015); *State v. Torres*, No. COA07-156, 2007 WL 3256856, at \*4 (N.C. Ct. App. Nov. 6, 2007).

72. *Toghill v. Commonwealth*, 768 S.E.2d 674, 678-80 (2015); *Blackington v. Commonwealth*, No. CL-2013-18691, 2015 WL 10521382, at \*1 (Va. Cir. Ct. Mar. 3, 2015) (applying *Toghill* as "dispositive").

73. The Texas Court of Appeals determined otherwise in *Fisk v. State*, 538 S.W.3d 763, 776 (Tex. App. 2017), *rev'd*, 574 S.W.3d 917 (Tex. Crim. App. 2019). In that case, the defendant was convicted of three counts of sexual indecency with a child. *Fisk*, 538 S.W.3d at 766 (citing TEX. PENAL CODE ANN. § 22.011 (2009)). He was sentenced to three life sentences as a habitual defender, in part, because he had been convicted of sodomy while in the military during the time when former Article 125 of the Uniform Military Code of Justice criminalized all forms of sodomy. *Id.* at 767 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 87). On appeal, he argued that his military conviction was not substantially similar to the state law offenses and, therefore, should not trigger the provision imposing automatic life sentences on habitual offenders. *Id.* at 771-75. The court agreed the military's former sodomy statute "was designed to protect against a certain type of sexual activity—penetration of the mouth or anus by the sexual organ of another—regardless of whether that activity was between consenting adults, between adults and children, or between persons and animals," whereas the state penal code protected "against nonconsensual contact or penetration of the mouth, anus, or sexual organ of an adult or any sexual acts against children." *Id.* at 776. The Texas Court of Criminal Appeals reversed, 574 S.W.3d at 923.

have wanted to “deter offenses it perceives as more common, more difficult to detect, and more likely to be committed than similar offenses, by imposing more severe punishment for them, even if the less common offenses involve a greater risk of harm.”<sup>74</sup>

Finally, acts of oral or anal sex that are not mutually consensual fall outside of *Lawrence*’s scope.<sup>75</sup>

## 2. The Criminal Regulation of Adultery and Fornication

Shortly after *Lawrence*, activists moved quickly to seek the invalidation of laws criminalizing fornication and adultery. They were unsuccessful in the first such case because the court found that the fear of possible criminal prosecution did not give rise to a “distinct and palpable injury” that would confer standing to challenge such laws.<sup>76</sup> But within two years of the *Lawrence* decision, the Virginia Supreme Court declared the state’s fornication law unconstitutional in *Martin v. Zierl*.<sup>77</sup> The court reasoned that *Lawrence* was dispositive:

We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because [the law] . . . is an attempt by the state to control the liberty interest which is exercised in making these personal

74. *Fields*, 178 Cal. Rptr. 3d at 434; *see also* *People v. Garza*, No. E041547, 2008 WL 187982, at \*6 (Cal. Ct. App. Jan. 23, 2008); *People v. Sintay*, No. B177202, 2005 WL 2789322, at \*7 (Cal. Ct. App. Oct. 27, 2005). *But see* *People v. Hofsheier*, 129 P.3d 29, 41-42 (Cal. 2006) (holding that mandatory lifetime sex offender registration for a twenty-two-year-old convicted of engaging in oral sex with a sixteen-year-old violated equal protection because vaginal sexual intercourse between people of those same ages was not subject to a mandatory registration requirement), *overruled by* *Johnson v. Dep’t of Just.*, 341 P.3d 1075 (Cal. 2015) (finding that the potential for teenage pregnancy provided a rational basis to allow judges discretion in placing offenders on the registry, while mandating registration for those convicted of other nonforcible sex crimes).

75. Incest and bigamy could arguably be included in this category, but because consent is often questionable in many cases involving those offenses, they are presented in Part IV.E. *See infra* notes 245-277 and accompanying text. Other cases presenting questions of consent are discussed in the Part IV.D. *See infra* note 134-240 and accompanying text.

76. *Berg v. State*, 100 P.3d 261, 265 (Utah 2004).

77. 607 S.E.2d 367 (Va. 2005). The Virginia fornication law designated sex outside of marriage a low-level misdemeanor punishable by a fine case. VA. CODE § 18.2-344 (1975 & 2004 Supp.) (repealed by Va. Acts 2020, ch. 122).



decisions, it violates the Due Process Clause of the Fourteenth Amendment.<sup>78</sup>

The court in *Martin* noted that because *Lawrence* did not apply strict scrutiny, it would apply the rational basis test.<sup>79</sup> Even under this deferential standard, the court rejected the notion that any valid public reasons justified the fornication law’s “encroachment on personal liberty.”<sup>80</sup> Previous commentators noted that the court rejected several state arguments—including the promotion of marriage, raising children in families with married parents, and the dubious notion that extramarital intercourse increases public health risks—that prior to *Lawrence*, would have likely satisfied the rational basis test.<sup>81</sup> In light of *Lawrence*, there can be little doubt that the outcome in *Martin* represents both an “acceptance of reality” regarding contemporary views on extramarital sex and a recognition of “the proper limits of the law.”<sup>82</sup>

The *Martin* case is well known. Indeed, the “citing references” feature in Westlaw reveals that at the time of this writing in July 2022, the case has been cited by fifty-four courts and 147 secondary sources.<sup>83</sup> It is, therefore, somewhat surprising that few states have followed *Martin*’s lead. In fact, only four cases since *Martin* have applied *Lawrence* to fornication or adultery statutes and only one, *Hobbs v. Smith*, similarly declared a fornication statute unconstitutional on due process grounds.<sup>84</sup>

---

78. *Martin*, 607 S.E.2d at 370.

79. *Id.*

80. *Id.*

81. WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS 344 (2008); Dale Carpenter, Is *Lawrence* Libertarian? 88 MINN. L. REV. 1140, 1159 (2004).

82. Robert E. Rains, *The Future of Justice Scalia’s Predictions of Family Law Doom*, 29 BYU J. PUB. L. 353, 370 (2015).

83. For an extensive analysis of adultery and fornication laws before and after *Lawrence*, including a discussion of the *Martin* case, see, e.g., Joanne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127 (2014).

84. *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at \*1 (N.C. Super. Ct. Aug. 25, 2006) (“The Court has reviewed the pleadings, the submissions of the parties, and has heard the arguments of counsel and is of the opinion that N.C.G.S. § 14-184 violates plaintiff’s substantive due process right to liberty as explained in *Lawrence* . . . [and is therefore] declared unconstitutional, both on its face and as applied to the plaintiff, because it is in violation of the Fourteenth Amendment to the United States Constitution and Article I Section 19 of the North Carolina Constitution.”).

### 3. The Civil Law Reach of Constitutionally Questionable Laws Criminalizing Adultery or Fornication

In *York v. Longlands Plantation*, the court refused to consider the constitutionality of South Carolina's fornication statute in a civil case for workers compensation survivor benefits because the claimant was unable to show she had been dependent on the decedent for the "reasonable necessities of life" and, therefore, would not qualify as a dependent for death benefits.<sup>85</sup> Other cases, though, provide insight into how some courts limit *Lawrence*'s reach.

In *Robinson v. Salvation Army*, the plaintiff filed a common law wrongful termination claim against her former employer in which she alleged that she had been fired for refusing to engage in sex with her manager.<sup>86</sup> Despite the fact that *Martin* had invalidated Virginia's fornication law, the plaintiff argued that because it remained "on the books," it represented the state's public policy; thus, she argued that terminating her employment-at-will for refusal to commit a violation of the law was actionable.<sup>87</sup> Both a trial court and the Supreme Court of Virginia rejected her argument, reasoning that for her claim to be cognizable, her manager would have to have encouraged her to engage in conduct that fell outside the realm of *Lawrence* by engaging in "public fornication, prostitution, or other such crimes."<sup>88</sup> Absent such facts, the court held that demands for extramarital sex "can no longer provide the basis for a valid allegation of wrongful termination whether the employee accedes to the demands or is terminated for refusing the demands." But this is quite a narrow interpretation of *Lawrence*. At-will employees who are subject to termination for refusing to engage in sexual activity with a supervisor could easily fall within *Lawrence*'s exclusion for those "who are situated in relationships where consent might not easily be refused."<sup>89</sup> Indeed, a lower court in Virginia cited that very sentence in *Lawrence* when ruling that a wrongful termination claim stemming from an alleged refusal to engage in acts of adultery, fornication, or sodomy did, in fact,

---

85. 840 S.E.2d 544, 578 n.5 (S.C. 2020) ("While we are cognizant of *Lawrence* . . . and case law from other states casting doubt on the constitutionality of section 16-15-60, we need not address this issue in light of our decision.").

86. 791 S.E.2d 577, 578 (Va. 2016).

87. *Id.* at 578-80.

88. *Id.* at 580.

89. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

violate the public policy of the state.<sup>90</sup> Curiously, that case was not cited in *Robinson* despite the fact that it had been decided three years earlier.

*Malecek v. Williams* involved the constitutionality of two “common law causes of action—alienation of affection and criminal conversation—that permit litigants to sue the lovers of their unfaithful spouses.”<sup>91</sup> The court acknowledged these “aging” torts “were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side.”<sup>92</sup> Yet, the court rejected the defendant’s challenge to these causes of action, reasoning that they deterred and compensated for personal injuries while fostering “the promise of monogamy that accompanies most marriage commitments.”<sup>93</sup> In so holding, the court rejected the defendant’s argument that these torts infringed on the constitutionally protected liberty interest for consenting adults to engage in private sexual relations. The court noted *Lawrence* applies only to activity that did not inflict “injury to a person” or “abuse . . . an institution the law protects.”<sup>94</sup> Because marriage is an “obvious choice” of an important human institution the law protects, the court held that the two torts at issue in the case served a legitimate—even a substantial—governmental interest in compensating aggrieved spouses for the injuries caused by marital infidelity.<sup>95</sup>

*B. Prostitution and Related Commercial Sex Offenses (n = 11, 5.1% of Criminal Cases, 3.6% of Total Cases)*

All eleven of the prostitution and related cases (e.g., pimping) were criminal in nature. Three judicial opinions (27.3%) applied *Lawrence* straightforwardly, one dissenting opinion applied the precedent broadly, and the rest construed *Lawrence* narrowly in this context ( $n = 7$ , 63.6.7%). Table 11 illustrates that all of the cases were resolved in favor of the prosecution, but none of the other variables was significantly related to how *Lawrence* was applied in these cases.

90. See, e.g., *Bomar v. Chesapeake Bay Steakhouse, Inc.*, No. CL12-2415, 2013 WL 9564168 (Va. Cir. Ct. 2013).

91. 804 S.E.2d 592, 594 (N.C. Ct. App. 2017).

92. *Id.*

93. *Id.*

94. *Id.* at 595.

95. *Id.* at 595-96.

Table 11: Variable Frequencies and Relationships to Treatment of *Lawrence* in Prostitution Cases

| Category                    | Treatment of <i>Lawrence</i><br><i>n</i> (%) |               |                  |               | Chi-Square                                                                                               | Sig.      | Cramer's V |
|-----------------------------|----------------------------------------------|---------------|------------------|---------------|----------------------------------------------------------------------------------------------------------|-----------|------------|
| Depth                       | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i>     | <i>Total</i>  | 1.946<br>(2,11)                                                                                          | p > 0.050 | N/A        |
| <i>Mentioned in Passing</i> | 2<br>(18.2%)                                 | 2<br>(18.2%)  | 0<br>(0.0%)      | 4<br>(36.4%)  |                                                                                                          |           |            |
| <i>Key to Case</i>          | 1<br>(9.1%)                                  | 5<br>(45.5%)  | 1<br>(9.1%)      | 7<br>(63.6%)  |                                                                                                          |           |            |
| Outcome                     | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i>     | <i>Total</i>  | No statistics can be computed because all case outcomes ( <i>n</i> = 11, 100.0%) favored the prosecution |           |            |
| <i>Prosecution</i>          | 3<br>(27.3%)                                 | 7<br>(63.6%)  | 1<br>(9.1%)      | 11<br>(65.5%) |                                                                                                          |           |            |
| <i>Defense</i>              | 0<br>(0.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)      | 0<br>(0.0%)   |                                                                                                          |           |            |
| State Politics              | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i>     | <i>Total</i>  | 5.587<br>(6, 11)                                                                                         | p > 0.050 | N/A        |
| <i>Deep Red</i>             | 0<br>(0.0%)                                  | 3<br>(27.3%)  | 0<br>(0.0%)      | 3<br>(27.3%)  |                                                                                                          |           |            |
| <i>Light Red</i>            | 1<br>(9.1%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)      | 1<br>(9.1%)   |                                                                                                          |           |            |
| <i>Purple</i>               | 0<br>(0.0%)                                  | 1<br>(9.1%)   | 0<br>(0.0%)      | 1<br>(9.1%)   |                                                                                                          |           |            |
| <i>Light Blue</i>           | 0<br>(0.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)      | 0<br>(0.0%)   |                                                                                                          |           |            |
| <i>Deep Blue</i>            | 2<br>(18.2%)                                 | 3<br>(27.3%)  | 1<br>(9.1%)<br>† | 6<br>(54.4%)  |                                                                                                          |           |            |
| Region                      | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i>     | <i>Total</i>  | 7.543<br>(4, 11)                                                                                         | p > 0.050 | N/A        |
| <i>Northeast</i>            | 0<br>(0.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)      | 0<br>(0.0%)   |                                                                                                          |           |            |
| <i>South</i>                | 0<br>(0.0%)                                  | 3<br>(27.3%)  | 0<br>(0.0%)      | 3<br>(27.3%)  |                                                                                                          |           |            |
| <i>Midwest</i>              | 0<br>(0.0%)                                  | 3<br>(27.3%)  | 0<br>(0.0%)      | 3<br>(27.3%)  |                                                                                                          |           |            |
| <i>West</i>                 | 3<br>(27.3%)                                 | 1<br>(9.1%)   | 1<br>(9.1%)      | 5<br>(45.5%)  |                                                                                                          |           |            |
| Judge's Sex                 | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i>     | <i>Total</i>  | 0.629<br>(2, 11)                                                                                         | p > 0.050 | N/A        |
| <i>Male</i>                 | 3<br>(27.3%)                                 | 6<br>(54.5%)  | 1<br>(9.1%)      | 10<br>(90.9%) |                                                                                                          |           |            |
| <i>Female</i>               | 0                                            | 1             | 0                | 1             |                                                                                                          |           |            |

2025]

## LIBERTY AND PRIVACY

37

|                                      | (0.00%)        | (9.1%)        | (0.0%)       | (9.1%)       |                  |              |     |
|--------------------------------------|----------------|---------------|--------------|--------------|------------------|--------------|-----|
| <b>Judge's Race/Ethnicity</b>        | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i> |                  |              |     |
| <i>White</i>                         | 2<br>(182%)    | 6<br>(545%)   | 0<br>(0.0%)  | 8<br>(727%)  | 3,317<br>(2, 11) | p ><br>0.050 | N/A |
| <i>Nonwhite</i>                      | 1<br>(9.1%)    | 1<br>(9.1%)   | 1<br>(9.1%)  | 3<br>(273%)  |                  |              |     |
| <b>Judge's Political Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i> |                  |              |     |
| <i>Nonpartisan</i>                   | 3<br>(273%)    | 3<br>(273%)   | 0<br>(0.0%)  | 6<br>(546%)  | 7,857<br>(4, 29) | p ><br>0.050 | N/A |
| <i>Democrat</i>                      | 0<br>(0.0%)    | 1<br>(9.1%)   | 1<br>(9.1%)  | 2<br>(182%)  |                  |              |     |
| <i>Republican</i>                    | 0<br>(0.0%)    | 3<br>(273%)   | 0<br>(0.0%)  | 3<br>(273%)  |                  |              |     |

† Dissenting opinion

Justice Scalia's dissent in *Lawrence* warned that the majority decision in the case threatened the validity of laws against prostitution.<sup>96</sup> Justice Scalia's concerns have not materialized. Courts have uniformly held that *Lawrence* specifically excluded commercial conduct from its holding and, therefore, laws criminalizing prostitution—including solicitation of prostitution and pimping—have uniformly withstood constitutional challenges.<sup>97</sup> Indeed, the lack of any statistically significant results in Table 11 lends support to the fact that judges are unified in their approaches to applying *Lawrence* in prostitution cases. Specifically, regardless of extra-legal characteristics, courts uniformly rejected arguments that *Lawrence* “recognized any fundamental right to privacy concerning consensual adult sexual activity” and, therefore, laws criminalizing commercial sex need only survive rational basis review.<sup>98</sup> Reasoning such laws are rationally related to the legitimate governmental interests of deterring related crimes, “such as human trafficking and sexual assault” as well as curbing “the spread of infectious diseases,” courts consistently upheld such laws in the name of public health, safety,

96. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

97. *See, e.g., People v. Conroy*, 145 N.E.3d 537, 541-44 (2019); *State v. Romano*, 155 P.3d 1102, 1110-1115 (2007); *Robles v. State*, 585 S.W.3d 591, 595-96 (Tex. App. 2019).

98. *Jackson v. State*, No. 05-10-00561-CR, 2011 WL 2320819, at \*2 (Tex. App. June 14, 2011).

and welfare.<sup>99</sup> Laws specifically targeting pimping have also been upheld on the grounds that they prevent exploitation of others and potentially decrease the number of people available for sex work.<sup>100</sup>

Although all majority decisions unanimously rejected the notion that *Lawrence* protects commercial sex, not all judges agreed. For example, in *State v. Romano*, after acknowledging *Lawrence*'s specific exclusion of prostitution from its holding, Justice Steven H. Levinson of the Hawai'i Supreme Court wrote the following in his dissent:

[W]here two consenting adults swap money for sex in a transaction undertaken entirely in seclusion, the analysis of the *Lawrence* majority, despite the majority's attempt to avoid the notion, leads inexorably to the conclusion that the state may not exercise its police power to criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not.<sup>101</sup>

Justice Levinson, therefore, would have applied strict scrutiny to the prostitution law as applied to the defendant.<sup>102</sup> Because he viewed potential threats to marriage and the possible transmission of sexually transmitted infections as being "speculative and attenuated," he argued that less restrictive time, place, and manner restrictions as applied to the public sphere, including "streetwalking" and advertisements for escort services, were more constitutionally appropriate.<sup>103</sup> To date, no appellate court applying *Lawrence* to laws criminalizing prostitution or related offenses has agreed with Justice Levinson.

*C. Obscenity and Pornography (n = 12, 5.6% of Criminal Cases, 3.9% of Total Cases)*

Sexually-explicit expression that is indecent, but not obscene, is protected by the First Amendment. Obscene materials are not. Since 1973, the test for obscenity has been governed by the U.S. Supreme

99. *Cardoso-Reyna v. State*, No. 03-19-00050-CR, 2021 WL 219303, at \*4 (Tex. App. Jan. 22, 2021); *People v. Ford*, No. B300811, 2020 WL 5687501, at \*4-5 (Cal. Ct. App. Sept. 24, 2020); *State v. Green*, 989 N.E.2d 1088, 1090 (Ohio Ct. App. 2013); *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); *People v. Williams*, 811 N.E.2d 1197, 1198-99 (Ill. Ct. App. 2004).

100. *People v. Miller*, No. B267728, 2016 WL 6835497, at \*4 (Cal. Ct. App. Nov. 21, 2016); *People v. Grant*, 123 Cal. Rptr. 3d 840, 844-48 (2011);

101. *Romano*, 155 P.3d at 1118-19 (Levinson, J., dissenting).

102. *Id.* at 1124.

103. *Id.*

Court's decision in *Miller v. California*.<sup>104</sup> *Miller* held that work is obscene if three criteria are met: (1) The average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to the prurient interest (i.e., a shameful or morbid interest in nudity, sex, or excretion); (2) it must depict, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) taken as a whole, the work must lack serious literary, artistic, political, or scientific value.<sup>105</sup>

Although states may criminalize the production and distribution of obscene materials, it may not criminally regulate the personal possession of such materials pursuant to the U.S. Supreme Court's decision in *Stanley v. Georgia*, in which the Court reasoned that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."<sup>106</sup> The scope of *Stanley*'s protections, however, does not extend to the possession of child pornography because "safeguarding the physical and psychological well-being of a minor" constitutes a compelling governmental interest, and banning the possession of such material is tailored to achieve that end.<sup>107</sup>

Courts have been called upon to apply these principles of obscenity law in cases in which litigants argued that *Lawrence* somehow altered the landscape of these leading precedents. Judges overwhelmingly disagreed with such arguments as illustrated by the criminal case outcome distribution in Table 12, which also presents frequencies for the other variables and their relationships to how courts applied *Lawrence* in this category of cases. Notably, courts in the South and Midwest construed *Lawrence* narrowly in this context, to a statistically significant degree compared to alternative applications of the precedent.

Table 12: Variable Frequencies and Relationships to Treatment of *Lawrence* in Obscenity and Pornography Cases

| Category            | Treatment of <i>Lawrence</i><br>n (%) |               |              |              | Chi-Square       | Sig.         | Cramer's V |
|---------------------|---------------------------------------|---------------|--------------|--------------|------------------|--------------|------------|
|                     | <i>Neutral</i>                        | <i>Narrow</i> | <i>Broad</i> | <i>Total</i> |                  |              |            |
| <b>Depth</b>        |                                       |               |              |              |                  |              |            |
| <i>Mentioned in</i> | 1                                     | 3             | 1            | 5            | 1.714<br>(2, 12) | p ><br>0.050 | N/A        |
| <i>Passing</i>      | (8.3%)                                | (25.0%)       | (8.3%)       | (41.7%)      |                  |              |            |

104. 413 U.S. 15 (1973).

105. *Id.* at 24-25.

106. 394 U.S. 557, 566 (1969).

107. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

|                                  |                |               |              |               |                  |                                   |       |
|----------------------------------|----------------|---------------|--------------|---------------|------------------|-----------------------------------|-------|
| <i>Key to Case</i>               | 1<br>(8.3%)    | 6<br>(50.0%)  | 0<br>(0.0%)  | 7<br>(58.3%)  |                  |                                   |       |
| <b>Outcome</b>                   | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |                                   |       |
| <i>Prosecution</i>               | 2<br>(16.7%)   | 9<br>(75.0%)  | 0<br>(0.0%)  | 11<br>(91.7%) | 12000<br>(2, 12) | Fisher<br>Exact<br>p =<br>.008    | 0.999 |
| <i>Defense</i>                   | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(9.1%)  | 1<br>(8.3%)   |                  |                                   |       |
| <b>State Politics</b>            | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |                                   |       |
| <i>Deep Red</i>                  | 2<br>(16.7%)   | 7<br>(58.3%)  | 0<br>(0.0%)  | 0<br>(75.0%)  |                  |                                   |       |
| <i>Light Red</i>                 | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |                                   |       |
| <i>Purple</i>                    | 0<br>(0.0%)    | 1<br>(8.3%)   | 0<br>(0.0%)  | 1<br>(8.3%)   | 5926<br>(4, 12)  | p ><br>0.050                      | N/A   |
| <i>Light Blue</i>                | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |                                   |       |
| <i>Deep Blue</i>                 | 0<br>(0.7%)    | 1<br>(8.3%)   | 1<br>(8.3%)  | 2<br>(16.7%)  |                  |                                   |       |
| <b>Region</b>                    | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |                                   |       |
| <i>Northeast</i>                 | 0<br>(0.0%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                  |                                   |       |
| <i>South</i>                     | 2<br>(16.7%)   | 5<br>(41.7%)  | 0<br>(0.0%)  | 7<br>(58.3%)  | 13524<br>(4, 12) | Fisher's<br>Exact<br>p =<br>0.041 | 0.751 |
| <i>Midwest</i>                   | 0<br>(0.0%)    | 4<br>(33.3%)  | 0<br>(0.0%)  | 4<br>(33.3%)  |                  |                                   |       |
| <i>West</i>                      | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(8.3%)  | 1<br>(8.3%)   |                  |                                   |       |
| <b>Judge's Sex</b>               | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |                                   |       |
| <i>Male</i>                      | 1<br>(9.1%)    | 6<br>(54.5%)  | 1<br>(9.1%)  | 8<br>(72.7%)  | 0917<br>(2, 11)  | p ><br>0.050                      | N/A   |
| <i>Female</i>                    | 1<br>(9.1%)    | 2<br>(18.2%)  | 0<br>(0.0%)  | 4<br>(33.3%)  |                  |                                   |       |
| <b>Judge's Race/Ethnicity</b>    | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |                                   |       |
| <i>White</i>                     | 2<br>(16.7%)   | 7<br>(58.3%)  | 0<br>(0.0%)  | 9<br>(75.0%)  |                  |                                   |       |
| <i>Nonwhite</i>                  | 0<br>(0.0%)    | 1<br>(8.3%)   | 1<br>(8.3%)  | 2<br>(16.7%)  | 5926<br>(4, 12)  | p ><br>0.050                      | N/A   |
| <i>Not Applicable or Unknown</i> | 0<br>(0.0%)    | 1<br>(8.3%)   | 0<br>(0.0%)  | 1<br>(8.3%)   |                  |                                   |       |



2025]

## LIBERTY AND PRIVACY

41

| <b>Judge's Political Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i> |                 |              |     |
|--------------------------------------|----------------|---------------|--------------|--------------|-----------------|--------------|-----|
| <i>Nonpartisan</i>                   | 1<br>(8.3%)    | 2<br>(16.7%)  | 0<br>(0.0%)  | 3<br>(25.0%) | 2333<br>(6, 12) | p ><br>0.050 | N/A |
| <i>Democrat</i>                      | 0<br>(0.0%)    | 2<br>(16.7%)  | 0<br>(0.0%)  | 2<br>(16.7%) |                 |              |     |
| <i>Republican</i>                    | 1<br>(8.3%)    | 4<br>(33.3%)  | 1<br>(8.3%)  | 6<br>(50.0%) |                 |              |     |
| <i>Unknown</i>                       | 0<br>(0.0%)    | 1<br>(8.3%)   | 0<br>(0.0%)  | 1<br>(8.3%)  |                 |              |     |

## 1. Child Pornography

Courts uniformly rejected arguments advanced by defendants who asserted that *Lawrence*'s recognition of a protected liberty interest for adults to engage in private, consensual sexual conduct extends to the possession or creation of materials that fall within the definition of child pornography.

[I]n this case the defendant engaged in sex with a minor and pressured him to pose nude for photographs, one of which was sent over the internet. We find no support in *Lawrence* to prevent the defendant's prosecution . . . . The defendant's privacy argument also fails, for his activities related to child pornography are not protected by a constitutional right of privacy.<sup>108</sup>

Importantly, this logic applied to child pornography cases in which the minors depicted in photos or videos had reached the age of consent and, therefore, were old enough to engage in sexual activity lawfully under state law.<sup>109</sup> Courts explained that laws barring child pornography are aimed at different types of harm than those targeted by statutory rape laws.<sup>110</sup>

108. *Cochran v. State*, 111 So. 3d 148, 157 (Ala. Crim. App. 2012) (internal citations and alterations omitted); *see also* *State v. Horn*, No. 91,692, 2005 WL 823896, at \*2 (Kan. Ct. App. Apr. 8, 2005) (“[*Lawrence*] specifically excluded children from its determination and pointed out that the only legitimate historical precedent for a state regulating sexual practices involved predatory acts, such as an adult victimizing a child. . . . Because an individual has no constitutionally protected interest in engaging in sexual contact with minors, we reject [the defendant's] due process challenge.”).

109. *Id.*; *see also Ex parte Dehnert*, 605 S.W.3d 885, 892 (Tex. App. 2020) (differentiating *Lawrence* as involving “the privacy rights of two consenting adults” from those of minors “who might be injured or coerced”).

110. *E.g.*, *State v. Senters*, 270 Neb. 19, 26, 699 N.W.2d 810, 817 (2005).

Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons [sixteen] and [seventeen] years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week.<sup>111</sup>

In contrast to courts' unanimous rejection of *Lawrence* as protecting the possession or creation of child pornography, at least one court held that *Lawrence* limited the terms of probation that could be imposed on a defendant convicted of possessing such materials. The defendant in *People v. Kinley* appealed his sentence for possession of child pornography because it included a condition that required him to "not establish an intimate/romantic relationship or cohabit with a person, whether or not that person is responsible for the care of minor children, without having fully disclosed to that person the nature of [his] conviction, probation status and necessity for their written informed consent."<sup>112</sup> The court agreed with the defendant that the provision was overbroad because it infringed on his constitutionally protected privacy rights by forcing him to disclose his criminal history with potential partners who have no children while not serving any rehabilitative purpose.<sup>113</sup>

## 2. Pornography Involving Adults

Only one case in the study concerned a constitutional question about pornography that did not involve children. In *Baird v. State*, although the defendant had been convicted of possessing child pornography,<sup>114</sup> he challenged the use of pornographic material involving adults that had been found on his computer during his sentencing. The prosecution offered such images purportedly to give the judge "a full picture" of his "sexual proclivities" and "the extent to which he will go to indulge in those sexual proclivities" so the court could evaluate the defendant's "redeemability" and "danger to the community."<sup>115</sup> On appeal, the defendant argued that because those images were not illegal, they were

111. *Id.*; see also *People v. Hollins*, 971 N.E.2d 504, 510-11 (Ill. 2012) (relying on *Senters*).

112. No. A130550, 2011 WL 6099374, at \*5 (Cal. Ct. App. Dec. 8, 2011).

113. *Id.* at \*5-6.

114. *Baird v. State*, 379 S.W.3d 353, 354 (Tex. App. 2012), *aff'd*, 398 S.W.3d 220 (Tex. Crim. App. 2013).

115. *Id.* at 359.

constitutionally protected under *Lawrence* and, therefore, should not have been used as evidence at the sentencing hearing.<sup>116</sup> Because the admissibility of evidence used at sentencing lies within the discretion of a trial court, the appellate court did not meaningfully address the constitutional issue, but rather applied the abuse of discretion standard to hold that “it was within the zone of reasonable disagreement for the trial court to admit this evidence.”<sup>117</sup>

### 3. Sale, Distribution, and Promotion of Adult-Oriented Materials

In cases narrowly construing *Lawrence*, courts rejected assertions that *Lawrence* recognized a fundamental right to sexual privacy, thereby paving the way to uphold laws criminalizing the sale of adult materials, including sex toys, using the deferential rational basis standard of review.<sup>118</sup> Consider a case in which the Alabama Supreme Court upheld the constitutionality of a state statute that criminalized the sale or distribution of “any device designed or marketed as primarily useful for the stimulation of human genital organs for anything of pecuniary value.”<sup>119</sup> Following the lead of the Eleventh Circuit in *Williams v. Pryor*, a pre-*Lawrence* federal case upholding that same law,<sup>120</sup> the Alabama Supreme Court reasoned that there were rational bases for such a prohibition, including the protection of public morality.<sup>121</sup> But *Lawrence* should have led to the rejection of that justification. Yet, the court embraced Justice Scalia’s dissent in *Lawrence*—which, of course, was not controlling law—when it stated that “to hold that public morality can never serve as a rational basis for legislation after *Lawrence* would cause a ‘massive disruption of the current social order.’”<sup>122</sup> The court quoted heavily from the federal district court decision in the remand of *Williams*, which conflated *Lawrence*’s due process and equal protection implications when it upheld the Alabama law, reasoning that *Lawrence*’s statements about morality were not aimed at ending all morals legislation, but rather were limited to the criminalization of conduct that targeted a

---

116. *Id.*

117. *Id.* at 360.

118. 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 329 (Ala. 2010).

119. *Id.* at 330 (citing ALA. CODE § 13A-12-200.2 (1999)).

120. *Williams v. Pryor*, 240 F.3d 944, 950 (11th Cir. 2001).

121. 568 *Montgomery Highway*, 45 So. 3d at 341.

122. *Id.* at 334-35 (quoting *Williams v. King*, 420 F. Supp 2d. 1224, 1249-50 (quoting *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting)), *aff’d*, 478 F.3d 1316 (11th Cir. 2007)).

class of people out of animus, hostility, or moral condemnation.<sup>123</sup> Because the Alabama law applied to all adults—married or unmarried, regardless of sex or sexual orientation, the court distinguished the case from the morals-laden regulation of sodomy at issue in *Lawrence*.<sup>124</sup> It also distinguished the case at bar from *Lawrence* in that the Alabama law regulated commercial activity, not private conduct.<sup>125</sup>

By contrast, other courts invalidated laws banning the sale of adult materials by interpreting *Lawrence* more broadly. One of the leading cases to do so was *Reliable Consultants, Inc. v. Earle*, a federal case in which the Fifth Circuit stated that *Lawrence* was not just concerned with the constitutionality of a particular act, “but instead a right to be free from governmental intrusion regarding the most private human contact, sexual behavior.”<sup>126</sup> The court specifically rejected the argument that the general applicability of the Texas law at issue removed the statute from the scope of *Lawrence*’s protection by not targeting a specific class of people because *Lawrence*’s central holding rested on due process, not equal protection grounds.<sup>127</sup>

An individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right. This conclusion is consistent with the decisions in *Carey* and *Griswold*, where the Court held that restricting commercial transactions unconstitutionally burdened the exercise of individual rights. Indeed, under this statute it is even illegal to “lend” or “give” a sexual device to another person. This further restricts the exercise of the constitutional right to engage in private intimate conduct in

---

123. *Id.*

124. *Id.*

125. *Id.* at 336 (quoting *Williams*, 478 F.3d at 1322-23); see also *Ex parte Dave*, 220 S.W.3d 154, 158-59 (Tex. App. 2007) (rejecting the argument that *Lawrence* expanded the right to privacy “into the public sphere of commercial transactions between consenting adults”); *State v. Acosta*, No. 08-04-00312-CR, 2005 WL 2095290, at \*3 (Tex. App. Aug. 31, 2005) (rejecting that *Lawrence* encompasses the commercial sale of sexual devices); *State v. Jenkins*, No. C-040111, 2004 WL 3015091 (Ohio Ct. App. Dec. 30, 2004) (“[E]ven though the Supreme Court has recognized a person’s right to sit alone in the privacy of his own home and view obscene matter, . . . the Court has never articulated a correlative right to transport, distribute, mail, or sell such materials.” (internal citations omitted)); cf. *Varkonyi v. State*, 276 S.W.3d 27, 38-39 (Tex. App. 2008) (upholding an obscenity conviction for showing undercover officers a video depicting bestiality on the grounds that *Lawrence* did not protect the “promotion of obscene material”).

126. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (internal quotations omitted).

127. *Id.*

the home free from government intrusion. It also undercuts any argument that the statute only affects public conduct.<sup>128</sup>

Thus, by applying *Lawrence* more faithfully than the Eleventh Circuit or the Alabama Supreme Court were willing to do in similar cases, the Fifth Circuit rejected public morality as a basis for upholding the statute at issue in *Reliable Consultants*.<sup>129</sup> It also rejected the protection of children as a rational basis for the law, reasoning that such an aim was not logically connected to prohibiting consenting adults from accessing such materials.<sup>130</sup>

In 1568 *Montgomery Highway, Inc. v. City of Hoover*, the Alabama Supreme Court found the Eleventh Circuit's reasoning in *Williams* to be more persuasive than the Fifth Circuit's reasoning in *Reliable Consultants*, largely because the Alabama statute reached "public commercial activity, not the regulation of private sexual conduct."<sup>131</sup> But the Texas statute invalidated by the Fifth Circuit also reached commercial activity by banning the sale or advertisement of sexual devices.<sup>132</sup> Because the Alabama Supreme Court did not fully explain its reasons beyond that one, flawed justification, the decision in 568 *Montgomery Highway* does not satisfactorily explain why the Fifth Circuit's more expansive view of *Lawrence* is less persuasive than the Eleventh Circuit's.

*D. Sexual Assault and Statutory Rape (n = 97, 45.5% of Criminal Cases, 31.6% of Total Cases)*

As previously discussed, the scope of *Lawrence*'s constitutional protections concerns private sexual conduct between consenting adults. There is no protected due process liberty interest in nonconsensual sex acts, including those involving a participant whose capacity to consent is impaired. That fact notwithstanding, discussions of *Lawrence* were more prevalent in sexual assault cases than in any other category in the study—the overwhelming majority of which ( $n = 79$ , 81.4%) simply called for a straightforward application of *Lawrence*'s so-called exclusion paragraph.<sup>133</sup> In the remaining cases, eleven (11.3%) construed *Lawrence*

128. *Id.* at 744.

129. *Id.* at 745-46.

130. *Id.* at 746.

131. 1568 *Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 341 (Ala. 2010).

132. See *Reliable Consultants*, 517 F.3d at 741 (citing TEX. PENAL CODE § 43.21 (1994)).

133. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or

narrowly and seven (7.2%) construed the case broadly. Table 13 summarizes the characteristics of the cases in this category across the other dependent variables in the study.

Table 13: Variable Frequencies and Relationships to Treatment of *Lawrence* in Sexual Assault Cases

| Category                    | Treatment of <i>Lawrence</i><br><i>n</i> (%) |               |              |               | Chi<br>-<br>Squ<br>are | Sig.                              | Cra-<br>mer's<br>V |
|-----------------------------|----------------------------------------------|---------------|--------------|---------------|------------------------|-----------------------------------|--------------------|
| <b>Type</b>                 | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                        |                                   |                    |
| <i>Civil</i>                | 1<br>(1.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)  | 1<br>(1.0%)   | 0.230<br>(2, 97)       | p ><br>0.050                      | N/A                |
| <i>Criminal</i>             | 78<br>(80.4%)                                | 11<br>(11.3%) | 7<br>(7.2%)  | 96<br>(99.0%) |                        |                                   |                    |
| <b>Depth</b>                | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                        |                                   |                    |
| <i>Mentioned in</i>         | 26<br>(26.8%)                                | 5<br>(5.2%)   | 6<br>(6.2%)  | 37<br>(38.1%) | 7.880<br>(2, 97)       | Fisher's<br>Exact<br>p =<br>0.014 | 0.285              |
| <i>Key to Case</i>          | 53<br>(54.6%)                                | 6<br>(6.2%)   | 1<br>(1.0%)  | 60<br>(61.9%) |                        |                                   |                    |
| <b>Outcome</b>              | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                        |                                   |                    |
| <i>Prosecution</i>          | 73<br>(75.3%)                                | 8<br>(8.2%)   | 2<br>(2.1%)  | 83<br>(85.6%) | 25.643<br>(4, 97)      | Fisher's<br>Exact<br>p =<br>0.001 | 0.364              |
| <i>Defense</i>              | 5<br>(5.2%)                                  | 3<br>(3.1%)   | 5<br>(5.2%)  | 13<br>(13.4%) |                        |                                   |                    |
| <i>Not Relevant (Civil)</i> | 1<br>(1.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)  | 1<br>(1.0%)   |                        |                                   |                    |
| <b>State Politics</b>       | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                        |                                   |                    |
| <i>Deep Red</i>             | 38<br>(39.2%)                                | 2<br>(2.1%)   | 2<br>(2.1%)  | 42<br>(4.3%)  | 13.899<br>(8, 97)      | p ><br>0.050                      | N/A                |
| <i>Light Red</i>            | 6<br>(6.2%)                                  | 4<br>(4.1%)   | 0<br>(0.0%)  | 10<br>(10.3%) |                        |                                   |                    |
| <i>Purple</i>               | 3<br>(3.1%)                                  | 0<br>(0.0%)   | 1<br>(1.0%)  | 4<br>(4.1%)   |                        |                                   |                    |
| <i>Light Blue</i>           | 5<br>(5.2%)                                  | 1<br>(1.0%)   | 1<br>(1.0%)  | 7<br>(7.2%)   |                        |                                   |                    |
| <i>Deep Blue</i>            | 27<br>(27.8%)                                | 4<br>(4.1%)   | 3<br>(3.1%)  | 34<br>(35.1%) |                        |                                   |                    |

prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

2025]

## LIBERTY AND PRIVACY

47

| <b>Region</b>                            | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 5.719<br>(6, 97) | p ><br>0.050 | N/A |
|------------------------------------------|----------------|---------------|--------------|---------------|------------------|--------------|-----|
| <i>Northeast</i>                         | 10<br>(10.3%)  | 2<br>(2.1%)   | 2<br>(2.1%)  | 14<br>(14.4%) |                  |              |     |
| <i>South</i>                             | 34<br>(35.1%)  | 3<br>(3.1%)   | 2<br>(2.1%)  | 39<br>(40.2%) |                  |              |     |
| <i>Midwest</i>                           | 17<br>(17.5%)  | 5<br>(5.2%)   | 1<br>(1.0%)  | 23<br>(23.7%) |                  |              |     |
| <i>West</i>                              | 18<br>(18.6%)  | 1<br>(1.0%)   | 2<br>(2.1%)  | 21<br>(21.6%) |                  |              |     |
| <b>Judge's Sex</b>                       | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 0.990<br>(4, 93) | p ><br>0.050 | N/A |
| <i>Male</i>                              | 47<br>(50.5%)  | 8<br>(8.6%)   | 4<br>(4.3%)  | 59<br>(63.4%) |                  |              |     |
| <i>Female</i>                            | 26<br>(28.0%)  | 3<br>(3.2%)   | 3<br>(3.2%)  | 32<br>(34.4%) |                  |              |     |
| <i>Not Applicable<br/>(per curiam)</i>   | 2<br>(2.2%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 2<br>(2.2%)   |                  |              |     |
| <b>Judge's<br/>Race/Ethnicity</b>        | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2.925<br>(4, 97) | p ><br>0.050 | N/A |
| <i>White</i>                             | 66<br>(68.0%)  | 11<br>(11.3%) | 6<br>(6.2%)  | 83<br>(85.6%) |                  |              |     |
| <i>Nonwhite</i>                          | 7<br>(7.2%)    | 0<br>(0.0%)   | 1<br>(1.0%)  | 8<br>(8.2%)   |                  |              |     |
| <i>Not Applicable or<br/>Unknown</i>     | 6<br>(6.2%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 6<br>(6.2%)   |                  |              |     |
| <b>Judge's Political<br/>Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 5.711<br>(6, 97) | p ><br>0.050 | N/A |
| <i>Nonpartisan</i>                       | 51<br>(52.6%)  | 6<br>(6.2%)   | 4<br>(4.1%)  | 61<br>(62.9%) |                  |              |     |
| <i>Democrat</i>                          | 11<br>(11.3%)  | 1<br>(1.0%)   | 1<br>(1.0%)  | 13<br>(13.4%) |                  |              |     |
| <i>Republican</i>                        | 16<br>(16.5%)  | 3<br>(3.1%)   | 1<br>(1.0%)  | 20<br>(20.6%) |                  |              |     |
| <i>Not Applicable or<br/>Unknown</i>     | 1<br>(1.0%)    | 1<br>(1.0%)   | 1<br>(1.0%)  | 3<br>(3.1%)   |                  |              |     |

Table 13 shows that two variables were statistically significantly related to the treatment of *Lawrence* in sexual assault cases. First, when *Lawrence* was mentioned in passing or briefly discussed, it was neutrally interpreted in twenty-six (26.8%) cases and nearly evenly divided in the others, with five cases interpreting it narrowly and six interpreting it

broadly. But when *Lawrence* was key to the outcome in case, its central holding or specified exclusions were dispositive in fifty-three (54.6%) cases, while narrow interpretations outnumbered broad interpretations by a ratio of six to one. Second, neutral application of *Lawrence* resulted in an outcome favorable to the prosecution in seventy-three cases compared to just five with outcomes favoring the defense. When judges went beyond *Lawrence*'s holding and articulated exclusions, narrow constructions of the precedent occurred in eight cases decided in favor of the prosecution, compared to only two that gave *Lawrence* broad interpretations but nonetheless resulted in a conviction being upheld. In cases with outcomes favoring defendants, broad interpretations of *Lawrence* were more common than narrow constructions. These data show a very strong association between the treatment of *Lawrence* and the ultimate outcome in sexual assault cases. The qualitative analyses of cases illustrate the reasons why this is true.

#### 1. Sexual Assaults Involving Force, Threats of Force, or Clear Nonconsent

A straightforward application of *Lawrence* results in courts unanimously rejecting claims that *Lawrence* somehow shields defendants' actions when a trier-of-fact concludes that the victim either did not consent to the acts in question in any given case,<sup>134</sup> or withdrew

134. *E.g.*, *State v. Music*, No. 33285-3-III, 2016 WL 1704687 (Wash. Ct. App. Apr. 28, 2016) (reversing a declaration that the state's sodomy law was facially unconstitutional since the conviction at issue was for forcible, not consensual, sodomy from a time that predated the update of rape statutes to include nonconsensual oral sex); *Gilbert v. State*, 220 So. 3d 1099, 1105 (Ala. Crim. App. 2016) (upholding a sodomy conviction in the absence of consent); *Wesson v. State*, 208 So. 3d 1160, 1163 (Ala. Crim. App. 2015) (same); *In re J.F.*, 766 S.E.2d 341, 348 (N.C. Ct. App. 2014) (reversing a sodomy conviction for insufficient evidence that any penetration occurred, but noting that had there been oral penetration; *Lawrence* would not be a bar to delinquency liability for a fourteen-year-old convincing a seven-year-old to engage in oral sex); *People v. Garza*, No. E041547, 2008 WL 187982, at \*6 (Cal. Ct. App. Jan. 23, 2008) (rejecting a claim that *Lawrence* prohibits differential punishments for sexual assault and sodomy on a child by someone over a certain age); *State v. Schrader*, No. 97,206, 2007 WL 4577915, at \*2-3 (Kan. Ct. App. Dec. 21, 2007) (rejecting a constitutional challenge to a sodomy law in a case involving an attempt on a presumed fourteen-year-old who was actually a police officer posing as such in a chat room); *State v. Irby*, No. 95,349, 2007 WL 219971, at \*1 (Kan. Ct. App. Jan. 26, 2007) (upholding convictions for forcible rape and sodomy of a child over the defendant's claim that such conduct was protected by *Lawrence*); *State v. Tillman*, No. 92,850, 2005 WL 3579258, at \*5 (Kan. Ct. App. Dec. 30, 2005) (upholding the constitutionality of a child rape statute on the grounds that it served the legitimate state interest of protecting children from adult sexual predators); *People v. Sanches*, No. G032738, 2004 WL 2757435, at \*6 (Cal. Ct. App. Dec. 2, 2004) ("We further dismiss out of hand defendant's contention that his spousal rape conviction infringed on the right to privacy between a marital couple. This is not a victimless case where the state has charged



consent during the encounter.<sup>135</sup> By contrast, when defendants are acquitted at trial for sexual assaults for which consent is a defense, sodomy laws cannot be used as a catch-all offense.<sup>136</sup> Consider the decision in *Williams v. State*.<sup>137</sup>

The defendant in *Williams* had been charged with forcible sodomy. He was acquitted but convicted of the lesser included offense of sexual misconduct—an offense that Alabama law defined at the time as “engag[ing] in deviate sexual intercourse with another person under circumstances other than those [constituting forcible sodomy or nonforcible sodomy on a teenager between the ages of twelve and sixteen]. Consent is no defense to a prosecution under this subdivision.”<sup>138</sup> On appeal, he argued that the sexual misconduct law was unconstitutionally applied to him in light of *Lawrence*. The court agreed with him that because a jury had acquitted him of engaging in nonconsensual sodomy, a conviction for sexual misconduct violated the defendant’s due process rights.<sup>139</sup>

---

mutually consenting adults with committing a sexual act prohibited by state law in the privacy of their home.”); *cf.* *State v. Goewey*, 135 A.3d 1220, 1224 (Vt. 2015) (upholding the maximum sentence for aggravated sexual assault imposed on a sixty-one year-old-man for having performed oral sex on a “young man” over the defendant’s objections that the trial court biasedly referred to the victim as having been “repeatedly sodomized,” thereby expressing a purportedly “religious view or moral judgment by the judge about sexual practices, which impermissibly tainted the sentencing hearing”); *House v. State*, No. 1717 Sept. Term 2013, 2015 WL 6087609, at \*2 (Md. Ct. Spec. App. July 21, 2015) (rejecting an appeal from a defendant convicted of forcible rape and sodomy over his objection to a pattern jury instruction that had not been updated to reflect *Lawrence*’s holding, although he had requested this at trial); *State v. Franco*, 319 P.3d 551, 556-57 (Kan. Ct. App. 2014) (upholding the conviction for forcible sodomy over the defendant’s argument that the judge should have provided the jury with lesser included offense instruction for nonforcible sodomy even though that offense had been effectively decriminalized by *Lawrence*).

135. *Commonwealth v. Sherman*, 116 N.E.3d 597, 605 (Mass. 2019) (“[C]onsensual sexual intercourse between adults is not only lawful, but also a private act of intimacy so important that it is constitutionally protected as a liberty interest[, but . . .] consensual sexual intercourse can become unlawful where the victim withdraws consent after the initial act of penetration has occurred.”).

136. *E.g.*, *State v. Whiteley*, 616 S.E.2d 576, 583 (2005) (finding a sodomy law unconstitutional as applied to a defendant whom the jury acquitted on nonconsensual sexual assault charges); *cf.* *State v. Hunt*, 728 S.E.2d 409, 413 (N.C. App. 2012) (vacating sodomy conviction on double jeopardy grounds after jury had been instructed only about the lack of consent, rather than on additional grounds that would have justified a conviction based on the fact that the victim was a minor, thereby rendering the “crime against nature” charge a lesser-included offense of a second-degree sexual offense under the particular facts of the case), *aff’d in part*, 766 S.E.2d 288 (N.C. 2014).

137. 184 So. 3d 1064 (Ala. Crim. App. 2015).

138. *Id.* at 1069 (quoting ALA. CODE § 13A-6-65 (1977 & 2010 Supp.)).

139. *Id.* at 1070. The court also held that double jeopardy prevented the defendant from being retried. *Id.* at 1071; *cf. In re Williams*, 253 P.3d 327, 337 (2011) (mentioning, *in dicta*, in an

Even in cases where *Lawrence* clearly offers no constitutional protections from criminal liability for the underlying acts due to the absence of consent, it nonetheless has implications for what evidence or arguments might be proper during sexual assault trials or how convicted defendants should be sentenced. For instance, in *People v. Cassala*, the defendant was convicted of sexually assaulting a fifteen-year-old victim for having forced her to submit to anal intercourse.<sup>140</sup> Given his use of force and the age of his victim, *Lawrence* offered the defendant no recourse concerning criminal liability. But during trial, the prosecution called the defendant's former wife who testified as to his "preference for anal intercourse during their consensual sexual relationship."<sup>141</sup> An appellate court agreed with the defendant that the defense counsel's performance was constitutionally deficient for having failed to object to such testimony or to have requested limiting instruction which, in turn, allowed the jury to consider constitutionally-protected intimacy between husband and wife as impermissible propensity evidence under factually dissimilar circumstances (i.e., nonconsensual rape).<sup>142</sup>

Similarly, in *Commonwealth v. Baran*, an appellate court in Massachusetts upheld the granting of a new trial on the grounds of ineffective assistance of counsel.<sup>143</sup> The defendant had been convicted of multiple counts of raping children at the daycare center where he had been employed.<sup>144</sup> His trial was significantly flawed—seemingly tainted by judicial errors in admitting unreliable evidence, prosecutorial misconduct that appears to have included *Brady* violations, and his attorney's "grievous failure to have investigated and prepared his case."<sup>145</sup> One of the many deficiencies that both a trial court judge and an appellate panel of judges noted was the defense counsel's "treatment of certain irrelevant and highly prejudicial evidence," which included the defendant's homosexuality.<sup>146</sup> The court juxtaposed prevailing social attitudes from

---

opinion upholding a determination that a defendant was a sexually dangerous person, that one prior charge—originally filed as rape, then reduced to sodomy, and subsequently dismissed without prejudice—was unsubstantiated).

140. 15 N.Y.S.3d 479, 481 (Sup. Ct. App. Div. 2015).

141. *Id.* at 484.

142. *Id.*; see also *People v. Garcia*, 177 Cal. Rptr. 3d 231, 240 (Ct. App. 2014) (overturning the conviction for sexual abuse of a six-year-old girl by her babysitter on the grounds that the prosecution had repeatedly referenced the defendant's sexual orientation, tying it to motive, thereby impermissibly telling "the jury the reason [the] appellant chose to victimize A.G. is because she is gay").

143. 905 N.E.2d 1122, 1126-48 (Mass. Ct. App. 2009).

144. *Id.* at 1126.

145. *Id.* at 1128.

146. *Id.* at 1145.

the time when the defendant was convicted with those of today, first by noting that “[i]n 1984, when the trial occurred, private consensual homosexual sex was criminalized in many States, and homosexuality, particularly male homosexuality, often described as a “crime against nature,” was routinely linked with criminality, child molestation, indecency, deviance, pathology, uncontrolled urges, moral turpitude, and pedophilia.”<sup>147</sup> The court then quoted from *Lawrence* with a “compare” signal: “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.”<sup>148</sup> When added to the fear of LGBTQ+ people at the height of the AIDS crisis, the court concluded that failing to keep the defendant’s sexuality from the jury added to a list of errors that “compound[ed] the already significant prejudice that . . . likely had a material effect on the jury and gave rise to a substantial risk that justice miscarried.”<sup>149</sup>

The way the Massachusetts Court of Appeals treated the evidence of homosexuality in *Baran* differed markedly from the way the North Carolina Court of Appeals treated such evidence in *State v. Oakley*.<sup>150</sup> As with *Baran*, there was no question in *Oakley* about the fact that the defendant’s actions were not shielded by *Lawrence*, as the case not only involved a minor, but also one who lived with the defendant while the latter served in the capacity as a “substitute parent.”<sup>151</sup> Yet, the defendant allegedly exploited the minor, trading sex for money while he was supposed to be caring for the teenage victim.<sup>152</sup> At trial, and over the defense’s objection that they were unduly prejudicial, the court admitted fifteen photos depicting some shirtless males, some males in uniform, and some handcuffed males.<sup>153</sup> On appeal, the defendant argued that these photos unfairly biased the jury against him on the basis of his sexual orientation in violation of his rights under *Lawrence*. The appellate court

147. *Id.* at 1147.

148. *Id.* at 1147-48 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (1993)).

149. *Id.* at 1148. *But cf.* *State v. Oakley*, 605 S.E.2d 215, 218 (N.C. Ct. App. 2004) (upholding the admission of photos showing some shirtless males, some males in uniform, and some handcuffed males over a defendant’s objection that they unfairly prejudiced the jury on the basis of his sexual orientation in violation of his rights under *Lawrence* in his trial for unlawful sexual activity by an substantive parent against a minor). The *Oakley* court noted that the photos were not unduly prejudicial because the jury already knew about the defendant’s sexuality because he admitted to engaging in sex with his male victim and because other witnesses referred to his sexual orientation before the photos were introduced. *Id.* at 2018. 905 N.E.2d 1122, 1145.

150. 605 S.E.2d 215 (N.C. Ct. App. 2004).

151. *Id.* at 217.

152. *Id.*

153. *Id.*

disagreed, reasoning that the jury already knew about the defendant's sexuality because he admitted to engaging in sex with his male victim and because other witnesses referred to his sexual orientation before the photos were introduced.<sup>154</sup> But in light of that, why were the photos even needed? The state claimed they helped to corroborate the victim's testimony, but since the defendant admitted to engaging in sexual acts with the minor in his care, they seem to have served little probative value. Given the fact this case took place in North Carolina only one year after *Lawrence* was decided, anti-gay bias may account for the different treatment of sexuality evidence in *Oakley* than the Massachusetts Court of Appeals' treatment of it in *Baran*.

## 2. Sexual Assaults Testing the Limits of Consent Between Adults

The majority opinion in *Lawrence* was careful to note that that case did "not involve persons who might be injured or coerced."<sup>155</sup> Courts grapple with the extent to which this sentence calls into question the degrees to which people can consent to injuries when the parties engaged in acts of bondage and discipline/sado-masochism (BDSM).

In the context of BDSM, consent appears to constitute a valid defense for minor assaults that do not cause serious physical injury, such as spanking. But courts consistently find that people are not legally capable of granting effective legal consent to more serious harms, "even when the injuries are not permanent, seriously debilitating, or harmful enough that they cause a risk of death."<sup>156</sup>

The cases grappling with *Lawrence* in this context did not present genuine issues about the degrees to which people can knowingly and voluntarily grant consent to injury during BDSM sex. Rather, the facts of

---

154. *Id.* at 218.

155. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

156. Ryan G. Fischer, Henry F. Fradella & Connie E. Ireland, *Sex, Violence, and the Boundaries of the Defense of Consent*, 45 CRIM. L. BULL. 1137, 1146 (2009); see also Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) (discussing some of the paradoxes in the way the criminal law treats consent as a defense).

the cases turned on whether consent was present at all,<sup>157</sup> or, alternatively, the scope of such consent.<sup>158</sup>

In *People v. Davidson*, the defendant was convicted of several crimes that the victim had repeatedly reported as domestic violence.<sup>159</sup> Indeed, one time she needed to be transported via ambulance to a hospital where “emergency room personnel observed extensive bruising throughout her body, including on her face, neck, extremities, torso, abdomen, and pelvic area; a perforated ear drum; two bite marks (on her leg and chest); and a previously stitched lip laceration.”<sup>160</sup> By the time of trial, she recanted and claimed her injuries were a result of consensual BDSM activities. Given her prior statements to family, friends, medical personnel, and police, a jury convicted the defendant of torture, corporal injury to a cohabitant, and criminal threats. An appellate court upheld the verdict, stating that “[u]nlike the circumstances in *Lawrence*, the conduct

---

157. In *Commonwealth v. Carey*, 974 N.E.2d 624 (Mass. 2012), the defendant attempted to argue that consent could be a defense to armed home invasion, attempted murder, and assault with a dangerous weapon because the actions giving rise to these offenses stemmed from a consensual sexual encounter. But the evidence of nonconsent was overwhelming. *Id.* at 628; see also *State v. Christel*, No. 2020AP1127-CR, 2021 WL 5828953, at \*4 (Wisc. Ct. App. 2022) (rejecting the argument in the post-conviction relief petition that *Lawrence* created a “right to engage in strangulation or suffocation in the privacy of one’s bedroom” in a case in which the defendant claimed he and wife engaged in consensual erotic asphyxiation during sex).

158. *E.g.*, *State v. Van*, 688 N.W.2d 600, 614-15 (Neb. 2004) (upholding convictions for assault, false imprisonment, and terroristic threats in a “no limits” BDSM situation in which the submissive participant “expected to be tortured, humiliated, and to eventually die as a result of [the] relationship” over a *Lawrence* challenge on the basis that the case only provided constitutional protection for sexual relationships “absent injury to a person or abuse of an institution the law protects.” (quoting *Lawrence* at 567); cf. *State v. Jensen*, 118 P.3d 762, 770 (N.M. Ct. App. 2005) (Robinson, J., concurring, in part, and dissenting, in part). In *Jensen*, a husband was convicted of raping his wife. His defense was consent. He sought and was denied an instruction that would have told the jury that if they found evidence of consent, the state had to prove nonconsent beyond a reasonable doubt. The majority rejected his appeal, but a dissenting judge wrote the following:

If an affirmative defense of consent is not a true defense, the effect is to make legal activity illegal. If a party cannot consent to sex involving force or violence, then each act of “rough sex” in the State of New Mexico before 2005 was illegal. There are cases in which consensual actions are prohibited for a good purpose. In the case of statutory rape, the public has a proper interest in the protection of persons under the age of consent, who cannot be said to have the ability to consent themselves. . . . With the issue at hand, what would be the public interest in prohibiting an intimate activity between consenting adults? [citing *Lawrence*]

*Id.*

159. No. D064880, 2015 WL 4751166, at \*1 (Cal. Ct. App. Aug. 12, 2015).

160. *Id.* at \*2.

at issue in this case involves serious physical injury and terrorizing behavior.”<sup>161</sup>

The defendant in *People v. Febrissy* appealed a conviction for “infliction of corporal injury upon a cohabitant” stemming from acts of BDSM.<sup>162</sup> Although his partner had consented to certain acts, she claimed that he exceeded the scope of her consent when he beat her with a whip and a riding crop, resulting in welts on her body.<sup>163</sup> He asserted that his conviction should be set aside because it violated a protected liberty interest under *Lawrence*.<sup>164</sup> The court declined to consider whether *Lawrence* applies to BDSM in cases involving physical injury because the jury’s verdict “necessarily reflect[ed] a rejection of any claim that the victim consented or the defendant reasonably could have believed in her consent.”<sup>165</sup> It affirmed his conviction, reasoning that for any sexual activities to fall with *Lawrence*’s scope, it must involve private acts between adults who grant “full and mutual consent” to each other.<sup>166</sup>

*State v. Dudas* involved a series of violent sexual encounters between husband and wife that the latter claimed were sometimes nonconsensual.<sup>167</sup> The wife testified that when she declined to engage in a particular sex act, her husband would suffocate her until she submitted: “He would strangle me until I obeyed what he said to do.”<sup>168</sup> In addition to multiple counts of sexual assault in varying degrees, the state also charged him with eleven counts of strangulation and suffocation—a distinct offense under Wisconsin law.<sup>169</sup> As part of his defense, the husband sought to introduce evidence that the two consensually engaged in BDSM and that the strangulation was part of their consensual sexual activities.<sup>170</sup> Among other arguments he raised on appeal, the defendant

---

161. *Id.* at \*8; *cf.* *People v. Schneider*, No. A145308, 2016 WL 4183943, at \*6 (Cal. Ct. App. Aug. 8, 2016) (upholding the exclusion of videos showing prior consensual activities between boyfriend and girlfriend in his domestic violence trial on the ground that they were more prejudicial than probative and did not show any sexual violence that could support the defendant’s claim that the victim’s injuries on the date in question had occurred during consensual BDSM sexual activity).

162. No. C049033, 2006 WL 2006161, at \*1 (Cal. Ct. App. July 19, 2006).

163. *Id.* at \*3.

164. *Id.* at \*5.

165. *Id.*

166. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

167. No. 2016AP2443-CR, 2020 WL 770083, at \*2 (Wis. Ct. App. 2020).

168. *Id.*

169. WISC. STAT. ANN. § 940.235(1) (2008) (“Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.”).

170. *Id.*

relied on *Lawrence* to argue that “[i]nstructing the jury that strangulation occurred during sexual relations when [she] performed oral sex on [him] and not requiring the jury to evaluate whether [she] consented to sexual intercourse improperly broaden[ed] the scope of the statute, and create[d] criminal liability for acts that are not criminal.”<sup>171</sup> The court distinguished the case as involving someone who “might be injured” and reasoned that “*Lawrence* does not support an argument that [the strangulation statute] infringes upon a constitutional right, regardless of whether ten percent of the population engages in consensual BDSM sex.”<sup>172</sup>

Collectively, *Davidson*, *Febrissy*, and *Dudas* illustrate that courts are highly skeptical of criminal defendants who attempt to avoid criminal liability by claiming that injuries to sexual partners occurred as a result of constitutionally protected BDSM activities. Of course, that distrust of defendants’ self-serving arguments is particularly well-founded in cases in which the alleged evidence of consent was highly circumspect, at best. If someone sought medical attention for injuries sustain during BDSM activities that both parties credibly maintained were truly consensual, it remains to be seen whether courts would find *Lawrence* applicable under such circumstances.

### 3. Statutory Factors Vitiating Consent

In many states, statutory provisions carve out criteria that render a person without the legal capacity to consent to sexual activity. The most common of such factors is the youthful age of post-pubescent teenagers, but other statutory factors vitiating consent include an actor’s unconsciousness, intoxication, or cognitive deficits.<sup>173</sup> Numerous cases raised questions about the capacity to consent under one of these circumstances.

#### a. Youthful Age: The Capacity of Minors to Consent

Perhaps the most well-known type of statutory rape law criminalizes sex between adults and minors under a certain age.

---

171. *Id.* at \*6.

172. *Id.*

173. *See generally* HENRY F. FRADELLA, CRIMINAL LAW: AN INTRODUCTION TO KEY CASES AND COMMENTS 205-07 (2022); Henry F. Fradella & Kenneth Grundy, *The Criminal Regulation of Sex: The Limits of Morality and Consent*, in SEX, LAW, AND (IN)JUSTICE 201-03 (Henry F. Fradella & Jennifer Sumner eds., 2016); *see also* ARIZ. REV. STAT. § 13-1401(A)(7)(b) (2021); OHIO REV. CODE § 2907.03(A)(2)-(3) (2019); TEX. PENAL CODE § 22.011(4)-(6) (2021).

The crime was first codified in English law in 1275, when the Statute of Westminster provided “[T]he King prohibiteth that none do ravish, nor take away by force, any Maiden within Age.” The age of consent was initially twelve years of age, but it was lowered to ten in 1576. That same age of ten years was incorporated into early American laws, but rose to eighteen or even twenty-one during the 1800s. Today, all US jurisdictions continue to have criminal laws penalizing sexual conduct with someone under their specified age of consent.<sup>174</sup>

Approximately thirty states and the District of Columbia currently set the age of consent at sixteen, eight states set the age of consent at seventeen, and the remaining twelve states use eighteen.<sup>175</sup> Courts unanimously uphold these laws over due process challenges that attempt to extend *Lawrence*’s protections of private sexual activity between consenting adults into the realm of sex with teenagers who have not yet reached the statutory age of consent: “Certainly, the State has a significant interest in prohibiting sex between adults and minors not only because of the potentially coercive effect of an adult’s influence but also because of concern regarding the minor’s ability to arrive at an informed consent.”<sup>176</sup>

Most states maintain the common law’s treatment of statutory rape as a strict liability crime, an approach that courts have upheld since *Lawrence* was decided.<sup>177</sup> By contrast, other states have changed their

174. FRADELLA, *supra* note 173, at 216 (citing Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 334 n.122 (2003); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109 (2004-2005)); *see also* 3 Edw. 1, c. 13 (1275) (Eng.).

175. FRADELLA, *supra* note 173, at 216 fig. 8.1.

176. *Crooks v. State*, No. 93,759, 2006 WL 90104, at \*10 (Kan. Ct. App. Jan. 13, 2006) (quoting *State v. Limon*, 122 P.3d 22, 35-36 (Kan. 2005)); *see also* *Saunders v. Commonwealth*, 753 S.E.2d 602, 608 (Va. Ct. App. 2014) (“[T]he case at bar involved actions between an adult and minors, removing it, therefore, from the ruling in *Lawrence*.”), *aff’d*, No. 140507, 2015 WL 10945236 (Va. Feb. 26, 2015); *Maxwell v. State*, 895 A.2d 327, 336 (Md. Ct. Spec. App. 2006) (“[W]e see nothing in *Lawrence* that would apply to a statute properly drawn to protect minors from adult sexual predators.”). And, as previously mentioned in the section on sodomy laws, the same logic applies when no act takes place, but it is solicited or attempted. *Toghill v. Commonwealth*, 768 S.E.2d 674, 678-80 (2015); *Blackington v. Commonwealth*, No. CL-2013-18691, 2015 WL 10521382, at \*1 (Va. Cir. Ct. Mar. 3, 2015) (applying *Toghill* as “dispositive”); *State v. Rung*, 774 N.W.2d 621, 630 (Neb. 2009) (rejecting *Lawrence* as a basis to invalidate law criminalizing the use of a computer to entice a child—or a peace officer believed to be a child—for sexual purposes).

177. Courts continue to uphold the constitutionality of a strict liability approach to statutory rape. *See, e.g., Fleming v. State*, 455 S.W.3d 577, 580-83 (Tex. Crim. App. 2014) (“Because this statute serves the legitimate state objective of protecting children, we will not read a *mens rea*



laws to require some proof as to *mens rea* such that “an honest and reasonable mistake regarding the age of the victim can be a complete defense to statutory rape in approximately thirteen states and the District of Columbia.”<sup>178</sup>

element into the statute and do not believe that failure to require *mens rea* as to the victim’s age violates the federal or state constitution. . . .”).

*Id.* at 581-82; *see also* State v. Holmes, 920 A.2d 632, 636 (N.H. 2007) (rejecting the argument that *Lawrence* requires proof of a *mens rea* element with respect to a minor’s age for statutory rape liability); Campos v. State, No. 03-18-00788-CR, 2020 WL 6834216, at \*3 (Tex. App. Nov. 20, 2020) (same); State v. Valdez, No. 2 CA-CR 2013-0463, 2015 WL 428358, at \*2-3 (Ariz. Ct. App. Jan. 30, 2015) (same); Jacobs v. State, 355 S.W.3d 99, 101 (Tex. App. 2011) (same); State v. Browning, 629 S.E.2d 299, 303 (N.C. Ct. App. 2006) (same).

178. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1403(B) (2019) (“A person commits public sexual indecency to a minor if the person intentionally or knowingly engages in any of the acts listed in subsection A of this section and such person is reckless about whether a minor who is under fifteen years of age is present.”); 18 PA. CONS. STAT. § 3102 (2018) (“When criminality depends on the child’s being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.”); WYO. STAT. ANN. § 6-2-308(a) (2018) (“Except as provided by subsection (b) of this section, if criminality of conduct in this article depends on a victim being under sixteen (16) years of age, it is an affirmative defense that the actor reasonably believed that the victim was sixteen (16) years of age or older.”).

An honest and reasonable mistake as to a minor’s age may also be a defense to select crimes that are often thought of as precursors to illicit sexual activity with a minor, such as “luring a child into a motor vehicle.” *See, e.g.*, *Commonwealth v. Gallagher*, 874 A.2d 49, 50 (Pa. Super. Ct. 2005), *aff’d*, 924 A.2d 636 (Pa. 2007) (holding that for criminal liability to attach for luring, the state must prove defendants either intentionally sought out victims under the age of eighteen, knew their victims were under that age, or were reckless as to their victims’ ages). *Gallagher* was among the cases in the study because a concurring judge criticized the prosecutor for bringing charges against the defendant for a host of reasons, one of which caused the judge to cite *Lawrence*:

[I]f Appellant was prosecuted for luring due to the fact that the encounter actually led to consensual sex, then by rights every individual, including other minors, who have engaged in consensual sex with a minor in a car or after driving the minor in a car to another place to have sex, should similarly be prosecuted for luring . . . . Also, the prosecution and potential punishment imposed here is incongruous when one considers that had Appellant lived near the convenience store and been on foot when he met the complainant, and had the two met and a consensual sexual encounter followed, no criminal liability would have attached to the incident. Why should Appellant, or anyone else similarly situated, be subject to two to four years’ imprisonment simply because the encounter started in a motor vehicle?

If the prosecution was motivated due to a discrepancy in age, it should be remembered that Appellant was found to have been operating under a reasonable belief that the complainant was 18 years of age or older . . . . Whatever the prosecutor may think of men or woman interested in partners much younger than they, any disdain for such a preference cannot be thought of as criminal and deserving of two to four years’ imprisonment. Lastly, if the prosecution was motivated because of Appellant’s sexual orientation, such a stance would certainly be unconstitutional in light of *Lawrence* . . . . In short, to the extent Appellant is guilty of luring a child into a motor vehicle, it is clear

The final resolution of *Estes v. State* illustrates how statutory rape laws typically operate, but the intermediate court of appeals' decision demonstrates how courts grapple with *Lawrence*'s impact on the validity of statutory rape laws.<sup>179</sup> The defendant in *Estes* was the father of a teenage boy whose teenage girlfriend frequently slept over at their home.<sup>180</sup> Unbeknownst to his wife and son, the defendant and his son's girlfriend engaged in sexual intercourse and other sex acts together over the course of approximately a one-year period while she was too young to grant consent.<sup>181</sup> The girl disclosed the abuse after one encounter during which she felt particularly scared in light of the defendant's roughness.<sup>182</sup> He was tried and convicted of five counts of sexual assault, among other charges.<sup>183</sup> On appeal, there was no question about the validity of a statutory rape conviction under such circumstances. But he nonetheless challenged the constitutionality of the statute for its sentencing provisions on the grounds that it treated "married people more harshly than unmarried people and therefore violate[d] his due process and equal protection rights."<sup>184</sup> The defendant made this argument because sexual assault is typically a second-degree felony under Texas law, but such an offense is elevated to a felony in the first degree "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married."<sup>185</sup> Because the defendant was legally married to his wife at the time of his sexual assaults on the victim, he was subjected to harsher penalties than an unmarried person would have been for the same conduct. The Texas Court of Appeals agreed with him, citing the concurring opinion in *Lawrence* for the proposition that "equal protection may be violated when a penal statute 'treats the same conduct differently based solely on the participants.'"<sup>186</sup> Because the court could not discern any rational basis for such a classification, it affirmed the

---

that a great many other individuals are also guilty of the offense, yet there is no effort expended to prosecute those individuals. As such, Appellant is clearly the victim of a selective prosecution.

*Id.* at 63 (Bender, J., concurring).

179. 487 S.W.3d 737 (Tex. App. 2016), *rev'd*, 546 S.W.3d 691 (Tex. Crim. App. 2018).

180. *Id.* at 744.

181. *Id.* at 744-45.

182. *Id.* at 744.

183. *Id.* at 745.

184. *Id.*

185. *Id.* at 746 (citing TEX. PENAL CODE ANN. § 22.011(f) (2009)).

186. *Id.* at 747-48 (quoting *Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (O'Connor, J., concurring)).

substance of his convictions, but remanded for resentencing on second-degree felony charges.<sup>187</sup> After the state sought further appellate review, the Texas Court of Criminal Appeals revised the intermediate appellate court's decision without citation to *Lawrence*, finding that the state had rational bases for the classification at issue in the case, namely "advancing both the narrow goal of deterring sexually-assaultive polygamous practices and the broader goal of providing 'more protection to children' from sexually exploitative practices generally."<sup>188</sup>

#### b. Statutory Rape Age Gap Provisions

The overwhelming majority of U.S. states have enacted so-called "Romeo and Juliet" age-gap provisions, statutory exceptions that either reduce the age of consent to as low as twelve years of age when the sexual activity occurs between two teenagers close in age, or alternatively reduce the penalties for such acts.<sup>189</sup> Courts have consistently upheld the constitutionality of these provisions over age-based equal protection challenges by defendants significantly older than their teenage victims to fall within the scope of the protections. In doing so, courts typically first differentiate *Lawrence* from the cases under consideration on the grounds that *Lawrence* did not involve minors.<sup>190</sup> Applying a rational basis review,

187. *Id.* at 750.

188. *Estes v. State*, 546 S.W.3d 691, 700 (Tex. Crim. App. 2018); *see also State v. Pries*, No. 2009AP2-CR, 2009 WL 1606746 at \*2 (Wis. Ct. App. June 10, 2009) (rejecting an equal protection challenge to a statutory rape law that differentiates between married and unmarried sixteen- and seventeen-year-olds because many of the state's interests in criminalizing statutory rape "are addressed when a minor has obtained permission to marry—most obviously the lack of considered consent, heightened vulnerability to physical and psychological harm, the lack of mature judgment, the potential for sexual exploitation and the potential for a minor bearing a child outside of a marital relationship"); *State v. Jones*, No. 95,558, 2007 WL 656367, at \*2 (Kan. Ct. App. Mar. 2, 2007) (same); *People v. Downin*, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005) (same); *State v. Moore*, 606 S.E.2d 127, 131-132 (N.C. Ct. App. 2004) (same); *State v. Clark*, 588 S.E.2d 66, 69 (N.C. Ct. App. 2003) (same).

189. *Id.*; *see generally* Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and A Call for Reform*, 78 UMKC L. REV. 241 (2009) (critiquing the often inconsistent and biased application of age gap provisions and advocating for reforms). Compare N.J. REV. STAT. 2C:14-2(c)(4) (2022) ("An actor is guilty of sexual assault if [he] commits an act of sexual penetration with another person . . . [and the] victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim"), with GA. CODE ANN. § 16-6-3(c) (2022) (reducing statutory rape from a felony to a misdemeanor if "the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim").

190. *E.g.*, *Arias v. State*, 503 S.W.3d 523, 528 (Tex. App. 2016) ("*Lawrence*, however, applies to consenting adults and 'does not involve minors. . . .' There is no fundamental liberty interest in having a consensual intimate relationship with a child.").

these courts go on to uphold the differential treatment of people close in age from others outside the applicable age range, often reasoning as follows:

By permitting the affirmative defense, the legislature has recognized that individuals with less than a three-year age differential are still children in the eyes of the law and, because of that lack of maturity, their conduct should not be punished in the same manner as that of an adult like Arias, who at the time of the offense was twenty-four years old. . . . The recognition of a difference in judgment, maturity, and in an ability to control conduct between underage juveniles and significantly older, more sophisticated adults is a matter well within the peculiar province of the legislature.<sup>191</sup>

Notably, defendants raising constitutional challenges to the prescribed ages in statutory rape laws and corresponding age gap provisions are not limited to adults who are older than their victims. For instance, *In re R.L.C.* involved a fourteen-year-old boy who had engaged in oral sex with his twelve-year-old girlfriend and was subsequently adjudicated as a delinquent for violating the state's sodomy law.<sup>192</sup> He appealed, arguing that the age gap provision in other statutes should apply to the sodomy law, and further, that the sodomy law was unconstitutional as applied to two juveniles. The court dispensed with the former argument that the sodomy law needed to be analyzed *in pari materia* (on the same subject) "with other statutes that criminalize similar activity," such as statutory rape and a few other sex crimes in the state.<sup>193</sup> If the two juveniles had engaged in vaginal sexual intercourse, there would have been no liability because they were within the age gap exempting youths close in age from statutory rape liability.<sup>194</sup> Despite the merits of an *in pari materia* argument, the court simply stated it would "not judicially impose an age differential element into the crime against nature statute."<sup>195</sup> It then went on to dispense with the juvenile's due process argument by noting that *Lawrence* did not involve minors and that "[b]esides the goal of promoting proper notions of morality among our State's youth, the government's desire for a healthy young citizenry underscores the legitimacy of the government's interest in prohibiting the commission of

---

191. *Id.* at 529.

192. *In re R.L.C.*, 643 S.E.2d 920, 921 (N.C. 2007).

193. *Id.* at 923-24. "When determining the meaning of a statute, the purpose of viewing the statute *in pari materia* with other statutes is to harmonize statutes of like subject matter and, if at all possible, give effect to each." *Id.* at 924.

194. N.C. GEN. STAT. § 14-27.2(a)(1) (2004).

195. *In re R.L.C.*, 643 S.E.2d at 924.

crimes against nature by minors.”<sup>196</sup> But as Strader noted, the court’s assertion that criminalization of oral sex serves a legitimate state interest promoting “‘a healthy young citizenry’ is factually incorrect” because there is “substantial evidence that engaging in unprotected vaginal intercourse carries a substantial risk of transmitting HIV, while engaging in oral sex carries little or no risk of HIV transmission, and zero risk of pregnancy.”<sup>197</sup> Moreover, the court cited no evidence—“no studies, no expert testimony, nothing”—to support its dubious assertion that oral sex poses some greater risk to the psychological health of teenagers than vaginal sexual intercourse.<sup>198</sup> Accordingly, it appears the court upheld the delinquency determination on morality grounds that should have been rejected based on *Lawrence*.<sup>199</sup>

One might attempt to explain *In re R.L.C.* as a remnant of outdated decision-making that had yet to catch up with the times shortly after *Lawrence* was decided. But in 2021, the Supreme Court of Kansas similarly upheld a delinquency adjudication against a juvenile, but in that case, the two teenagers were the same age!<sup>200</sup> The state initially charged a fourteen-year-old girl in *In re A.B.* with “unlawful voluntary sexual relations” for having had sex with a fourteen-year-old boy.<sup>201</sup> That charge was dismissed because she was actually a few months younger than the boy and previous case law held the statute required that the offender be older than the victim.<sup>202</sup> The state then charged the girl with having taken “aggravated indecent liberties with a child.”<sup>203</sup> She appealed her delinquency adjudication, arguing the statute was unconstitutionally vague and overbroad. The court easily dispensed with the former, finding that there is nothing vague about a statute that criminalizes sexual

---

196. *Id.* at 925.

197. J. Kelly Strader, *Lawrence’s Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 82 (2011).

198. *Id.*

199. *Id.* at 82-83 (“Of course, the North Carolina court might have been bending over backwards to sustain a criminal law in order to punish the fourteen-year-old defendant for having sex with a twelve-year-old girl. . . . In any event, the decision’s precedential impact reaches far beyond the facts of the case and ensnares all minors who engage in oral or anal sex in that state.”); *see also* McDonald v. Commonwealth, 630 S.E.2d 754, 755 (Va. Ct. App. 2006), *aff’d* 645 S.E.2d 918, 924 (Va. 2007) (upholding the sodomy conviction against a forty-five-year-old man who engaged in oral sex with a sixteen- and a seventeen-year-old girl, even though both teenagers were over the age of consent for vaginal intercourse, on the grounds that the sodomy statute did not contain an age limitation).

200. *In re A.B.*, 484 P.3d 226, 229 (Kan. 2021).

201. *Id.*; *see also* KAN. STAT. ANN. § 21-5507 (2011).

202. *In re A.B.*, 484 P.3d at 229 (citing *In re E.R.*, 197 P.3d 870, 871 (Kan. Ct. App. 2008)).

203. *Id.* (APPLYING KAN. STAT. ANN. § 21-5506 (2011)).

intercourse with a minor who is fourteen or fifteen years of age.<sup>204</sup> With regard to the overbreadth claim, the girl argued that under *Lawrence*, sexual intercourse between fourteen- or fifteen-year-old minors was “constitutionally protected activity” and that the statute was “designed to infringe on the right of privacy of young teenagers by preventing them from engaging in consensual sexual intercourse.”<sup>205</sup> The court disagreed, emphasizing that *Lawrence*’s holding was limited to adults.<sup>206</sup>

The facts of *In re A.B.* are perplexing. Because both parties were the same age, the case is easily distinguishable from cases in which an older juvenile exploits a younger child.<sup>207</sup> Yet, nothing in the *In re A.B.* decision elucidates why delinquency proceedings were instituted in the first place. And because the justices said nothing remotely critical of the state for prosecuting a teenage girl for having sex with boy of the same age, one is left to wonder if Strader’s observation about *In re R.L.C.* might be equally relevant to *In re A.B.* insofar as it “ignored *Lawrence*’s underlying theory and doctrine, rejecting *Lawrence*’s harm principle and relying on *Hardwick*’s morality rationale to sustain the laws at issue.”<sup>208</sup>

Finally, it should be noted that age gap provisions for statutory rape liability have been applied in ways that disproportionately burden LGBTQ+ youth.<sup>209</sup> Arguably the most well-known case illustrating such discrimination is *State v. Limon*.<sup>210</sup>

The age gap provision in Kansas law set the maximum penalty for sexual activity between teenagers close in age to fifteen months’ incarceration, whereas sexual activity with a minor for those outside the age gap carried a maximum prison term of seventeen years.<sup>211</sup> Notably, however, it only applied to acts that occurred between members of the

---

204. *Id.* at 232.

205. *Id.* at 233.

206. *Id.* (“[W]hile the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults, that alone does not support A.B.’s premise that younger teenagers’ sexual intercourse with their close-in-age mates is constitutionally protected.” (internal quotations and citations omitted)).

207. *Commonwealth v. Wilbur W.*, 95 N.E.3d 259, 268 (Mass. 2018). In that case, a twelve-year-old pressured an eight-year-old into performing oral sex on him. The court rejected the defense’s argument that the case concerned “juvenile experimentation” because the older minor was the “aggressor” who frightened the younger child into compliance. *Id.* at 268.

208. Strader, *supra* note 196, at 85.

209. See, e.g., Caitlyn Silhan, Comment, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 TUL. J.L. & SEXUALITY 97 (2011).

210. 122 P.3d 22 (Kan. 2005).

211. *Id.* at 29 (invalidating KAN. STAT. ANN. § 21-3522 (2000), repealed by Laws 2010, ch. 136, § 307, eff. July 1, 2011, recodified as amended at KAN. STAT. ANN. § 21-5507 (2011)).

opposite sex, meaning it was “purposefully written to apply to ‘Romeo and Juliet,’ but not ‘Romeo and Romeo’ or ‘Juliet and Juliet,’ thereby illustrating the continued stigma and discrimination that gays and lesbians face under the law.”<sup>212</sup>

At the relevant time, Matthew Limon was a football player in his senior year of high school. Shortly after his eighteenth birthday, he engaged in a non-coercive act of oral sex with a fourteen-year-old boy who was also a student at the same high school. Limon’s attorneys argued that limiting the age gap exception to opposite-sex encounters violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The lower courts of Kansas rejected this argument and, as a result, Limon was sentenced to more than seventeen years in prison, rather than the fifteen-month maximum sentence that could be imposed if Limon had engaged in oral sex with a female. The Kansas intermediate court of appeals affirmed Limon’s conviction. Limon served three years in prison before the [U.S. Supreme Court ordered a review of the case in light of *Lawrence* and the] Kansas Supreme Court reversed his conviction, holding that the state’s age gap provision could not be limited to sex acts between opposite-sex partners without violating equal protection.<sup>213</sup>

No other cases in the study raised issues like those in *Limon*.

c. When the Capacity to Consent Is Limited

The defendant in *Hopkins v. State* admitted to performing oral sex on a twenty-three-year-old who had several intellectual impairments.<sup>214</sup> The central issue at trial concerned his capacity to consent. Testimony established that he functioned at a level consistent with that of someone in the fourth through sixth grade.<sup>215</sup> A jury convicted the defendant and he appealed. After affirming the sufficiency of the evidence, an appellate court quickly dispensed with the defendant’s argument that *Lawrence*

212. Diana Caraveo Parra, Henry F. Fradella, Jessica M. Salerno, & Cody W. Telep, *Does Homophobia Affect Prosecutorial Discretion in Ambiguous Statutory Rape Cases?*, 3 WILLAMETTE SOC. JUST. & EQUITY L.J. 1, 18 (2019) (citing Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 226-52 (2008); Shulamit H. Shvartsman, “*Romeo and Romeo*”: An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359 (2004)).

213. *Id.* at 18-19 (internal citations omitted).

214. *Hopkins v. State*, 615 S.W.3d 530, 534 (Tex. App. 2020).

215. *Id.* at 538.

rendered the state's sexual assault law unconstitutional because it categorically established that intellectually disabled persons cannot grant effective legal consent to engage in sexual activity.<sup>216</sup> The court simply said: "To the extent he relies on *Lawrence v. Texas*, we note that the consensual nature of the sexual relations in that case was undisputed. . . . *Lawrence* therefore is inapposite."<sup>217</sup> Courts reached the same result in cases in which the evidence established that the victim was too intoxicated to grant consent,<sup>218</sup> even if there were evidence that an unconscious victim had engaged in consensual sexual activity with the defendant on prior occasions.<sup>219</sup>

Some states also limit the capacity to consent to sexual activity if the participants are in a particular type of relationship—those involving positions of trust or supervision such that a difference in power calls into question whether voluntary and knowing consent can genuinely be given.<sup>220</sup> These relationships often include those between relatives not covered by incest statutes, such as stepsiblings, aunts and uncles by marriage, and the like;<sup>221</sup> civilians and certain public servants (e.g., between those under correctional supervision and correctional service

---

216. *Id.* at 552.

217. *Id.*; see also *People v. Vukodinovich*, 189 Cal. Rptr. 3d 126, 132-33 (2015); *State v. Knutsen*, 345 P.3d 989, 994 (Idaho 2015); *Grabowski v. State*, No. 04-15-00699-CR, 2016 WL 6473066, at \*3-5 (Tex. App. Nov. 2, 2016); *State v. Cook*, 192 P.3d 1085, 1088 (Idaho Ct. App. 2008).

218. *State v. Gomez-Alas*, 477 P.3d 911, 919 (Idaho 2020) ("*Lawrence*'s holding does not affect our state's legitimate interest and indeed, duty, to interpose when consent is in doubt." (internal citations and quotations omitted)).

219. *People v. Jones*, No. C045990, 2005 WL 2160425, at \*5 (Cal. Ct. App. Sept. 7, 2005) (quoting *People v. Dancy*, 124 Cal. Rptr. 2d 898, 910-11 (2002)).

220. See e.g., ARK. CODE ANN. § 5-14-126 (2021); OHIO REV. CODE § 2907.03(A)(6)-(13) (2019); TEX. PENAL CODE §§ 22.011(b)(8)-(14), 21.12 (2021).

221. *Stinson v. Commonwealth*, 396 S.W.3d 900, 907-09 (Ky. 2013) (upholding the conviction of an uncle by marriage for the statutory rape of his seventeen-year-old niece by marriage, who was one year over the age of consent in Kentucky, because she spent the summer living with him and he could therefore exercise *undue influence over her*).



providers);<sup>222</sup> students and their teachers, coaches, counselors, or tutors;<sup>223</sup> patients and those who are or purport to be their health providers;<sup>224</sup> congregants seeking pastoral counseling from their clergy members;<sup>225</sup>

222. *Sheesley v. State*, 437 P.3d 830, 836-38 (Wyo. 2019) (upholding prohibition under rational basis to ensure the relationships between prisoners and correctional officials, as well as institutional order and discipline, are not undermined by sexual contact); *Commonwealth v. Mayfield*, 832 A.2d 418, 425 (Pa. 2003) (same); *R.H. v. State*, 849 N.E.2d 1165, 1169 (Ind. Ct. App. 2006) (“[S]ervice providers have the ability by virtue of their positions to coerce compliance or authorize privileges. It is apparent that favoritism toward certain detainees, or unfounded retaliation against them, could undermine the integrity of the correctional facility.”). *But cf.* *State v. Mole*, 994 N.E.2d 482, 491 (Ohio Ct. App. 2013), *aff’d*, 74 N.E.3d 368 (Ohio 2016) (invalidating law as applied to peace officers, broadly).

223. *State v. McKenzie-Adams*, 915 A.2d 822, 837 (Conn. 2007), *overruled on other grounds by State v. Payne*, 34 A.3d 370 (Conn. 2012); (“[T]he legislature reasonably could have concluded that a sexually charged learning environment likely would confuse, disturb and distract students, thereby undermining the quality of education in the state.”); *State v. Murphy*, No. 27801, 2018 WL 4190982 \*6 (Ohio Ct. App. Aug. 31, 2018) (upholding prohibition under rational basis review to prevent school personnel “from taking unconscionable advantage of students, no matter their age, by using their undue influence over the students in order to pursue sexual relationships”); *Pruitt v. State*, 272 So. 3d 732, 737 (Ala. Crim. App. 2018) (upholding prohibition even though the student attended a different school than the one at which the defendant taught); *see also Johnson v. State*, 626 S.W.3d 451, 456 (Ark. Ct. App. 2021); *Sellers v. State*, No. 13-18-00572-CR, 2019 WL 2042040, at \*1 (Tex. App. May 9, 2019); *State v. Solomon*, 274 So. 3d 1017, 1027 (Ala. Crim. App. 2018); *Ramirez v. State*, 557 S.W.3d 717, 721 (Tex. App. 2018); *Toledo v. State*, 519 S.W.3d 273, 281 (Tex. App. 2017); *Collops v. State*, No. 02-12-00396-CR, 2014 WL 1324422, at \*4 (Tex. App. Apr. 3, 2014); *State v. Edwards*, 288 P.3d 494, 502-03 (Kan. Ct. App. 2012); *Ex parte Morales*, 212 S.W.3d 483, 494 (Tex. App. 2006); *Berkovsky v. State*, 209 S.W.3d 252, 253-54 (Tex. App. 2006); *State v. Clinkenbeard*, 123 P.3d 872, 879 (Wash. Ct. App. 2005); *Commonwealth v. Batykefer*, No. 520 WDA 2016, 2017 WL 1906100, at \*6 (Pa. Super. Ct. May 8, 2017); *Commonwealth v. Merklinger*, No. 2195 MDA 2014, 2015 WL 6603444, at \*6 (Pa. Super. Ct. Oct. 29, 2015). *But see Paschal v. State*, 388 S.W.3d 429, 435 (Ark. 2012) (invalidating the provision as applied to teachers with students over the age of eighteen).

No sexual activity need be consummated for liability to attach on laws prohibiting sexual conduct between school personnel and students. For instance, a solicitation to that effect from a teacher to a student—even one over the age of consent—can still be criminalized to prevent “the sexual exploitation of students by educators” and preserve “an educational environment conducive to learning.” *Collins v. State*, 479 S.W.3d 533, 543 (Tex. App. 2015).

224. *McCoy v. People*, 442 P.3d 379, 383, 389 (Colo. 2019) (upholding the provision vitiating consent “when an actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices” as applied to a defendant who, after purporting to be a trained health provider, “examined” men in their late teens through early twenties as part of a fake job interview for positions ostensibly requiring physical fitness); *State v. Hollenbeck*, 53 A.3d 591, 598 (N.H. 2012) (upholding the sexual assault conviction against a licensed psychologist for having sex with a former client within one year of termination of their therapeutic relationship).

225. *State v. Wenthe*, 865 N.W.2d 293, 303-05 (Minn. 2015) (upholding a statute vitiating consent over a claim that a clergy member must know that the congregant is seeking or receiving spiritual counsel over a dissenting opinion arguing that without such *mens rea*, sexual activity

and disabled persons and their caregivers.<sup>226</sup> Nearly all courts reject defendants' attempts to use *Lawrence* to escape criminal liability for sexual activity under such circumstances because the parties in the more subordinate roles are situated in relationships where consent might not be easily refused, even if both parties were over the age of consent. This held true even in a case in which both parties to the sexual coupling were residents in a care facility when the defendant, who had autism spectrum disorder, engaged in sex with another resident who was intellectually disabled to the point that the latter did not understand the nature of the act.<sup>227</sup> Because the former knew that the latter could not "appraise the nature of such conduct or resist it due to mental disease or defect," the Texas Court of Appeals upheld his conviction over a challenge that he was a part of the class the law was designed to protect.<sup>228</sup> But two cases carved out an exception to criminal liability under *Lawrence* in circumstances that criminalized consensual sex between actors based on one of their statuses.

In *State v. Mole*, a thirty-six-year-old police officer had been convicted of the sexual battery of a fourteen-year old that he met online

---

between ministers and members of their flock would infringe on their constitutional rights under *Lawrence*); *State v. Edouard*, 854 N.W.2d 421, 444 (Iowa 2014), *overruled on other grounds by* *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016) (upholding a pastor's conviction for sexual exploitation by a counselor or therapist, reasoning that the statute did not limit liability to those using modern psychological principles and methods or those licensed to provide mental health services); *Talbert v. State*, 239 S.W.3d 504, 511 (Ark. 2006) (upholding the conviction against a minister noting that he had "no liberty interest to engage in sexual activity by abusing his position of trust and authority"); *cf. Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 35 (Iowa 2018) (rejecting civil claims for negligent supervision after a pastor was criminally convicted of using his position to sexually exploit parishioners, but only because the claims were time-barred under the applicable statute of limitations).

226. *People v. Lemons*, No. D050763, 2008 WL 4335684, at \*4 (Cal. Ct. App. Sept. 24, 2008); *see also, e.g.*, ARK. CODE ANN. § 5-14-126 (2021); OHIO REV. CODE § 2907.03(A)(6)-(13) (2019); TEX. PENAL CODE §§ 22.011(8)-14), 21.12 (2021).

227. *Painter v. State*, No. 11-15-00318-CR, 2017 WL 6559653, at \*2-4 (Tex. App. Dec. 21, 2017).

228. *Id.* at \*4-5; *see also State v. Hamlin*, 156 Idaho 307, 316, 324 P.3d 1006, 1015 (Ct. App. 2014) ("By its express terms, the statute prohibits 'any person' from sexually abusing and exploiting a vulnerable adult. That is, both [intellectually disabled] persons and persons who are not [intellectually disabled] are prohibited from sexual contact with a vulnerable adult. Accordingly, [the defendant] cannot legitimately assert that the State is treating him differently on account of any classification. [He] is not requesting that we invalidate a law that treats him unfairly on the basis of some classification; he is requesting preferential treatment. That is not a cognizable equal protection claim."); *cf. Haynes v. State*, No. W2015-00919-CCA-R3-PC, 2016 WL 750233, at \*1, \*5 (Tenn. Crim. App. Feb. 26, 2016) (denying post-conviction relief from convictions for the rape of an intellectually disabled nineteen-year-old where the petitioner claimed he was also intellectually disabled).

in a chat room.<sup>229</sup> He appealed, arguing that the statutory provision under which he had been convicted was facially unconstitutional. The provision at issue stated that “no person shall engage in sexual conduct with another, not the spouse of the offender, when . . . the other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.”<sup>230</sup> Unlike the other sections in the sexual battery statute, the provision aimed at peace officers “is unique in that it: (1) has no *mens rea* requirement and (2) contains no relationship or occupational requirement between the offender and victim.”<sup>231</sup> Accordingly, the defendant argued, and the Ohio Court of Appeals accepted, that the provision singled-out peace officers in an impermissible manner:

[T]he state might have a legitimate interest in protecting minors from police officers who use their profession to pursue inappropriate sexual relationships. But there exists no occupational connection or relationship requirement in [the statute].

We agree with Mole that one’s occupation as a peace officer alone, without more, does not provide a person with an “unconscionable advantage” over a minor.

Consequently, because the state’s method or means of achieving its interest is not rational, [the statute] fails the second prong of the rational-basis test.<sup>232</sup>

The Supreme Court of Ohio affirmed this holding, without any citation to *Lawrence*, calling out the differential treatment of peace officers as “irrational” for not only “fail[ing] to include any relationship or other element that justifies the omission of a scienter requirement,” but also for singling out peace officers in a manner that “bears no rational relationship to the government’s interest in protecting minors from sexual coercion by people in positions of authority who use that authority to compel submission.”<sup>233</sup>

In *Paschal v. State*, a teacher had been convicted of second-degree sexual assault for engaging in a consensual sexual relationship with an

229. 994 N.E.2d 482, 483 (Ohio Ct. App. 2013), *aff’d*, 74 N.E.3d 368 (Ohio 2016).

230. *Id.* at 484 (quoting OHIO REV. CODE § 2907.03(A)(13) (2009)).

231. *Id.* at 486.

232. *Id.* at 487-88.

233. 74 N.E.3d 368, 389 (Ohio 2016). *But see* State v. Mogler, 719 N.W.2d 201, 208-09 (Minn. Ct. App. 2006) (upholding the conviction of a police officer for sexual intercourse with a seventeen-year-old while he in his police vehicle over challenges that (1) the statute criminalizing such conduct when performed by someone in a position of authority was unconstitutionally vague and (2) that *Lawrence* applied despite the fact that the victim was a minor).

eighteen-year-old student enrolled at the school in which the defendant worked.<sup>234</sup> He appealed his conviction, arguing that *Lawrence* recognized a fundamental right for consenting adults to engage in private, sexual relationships and the Supreme Court of Arkansas agreed.<sup>235</sup> Thus, the court applied strict scrutiny. The court accepted that the state has a compelling interest in preserving “the special learning environment” in a high school by protecting all students, “regardless of their age, from the sexual advances of teachers who have special authority and control over” them.<sup>236</sup> Nonetheless, the court invalidated the law because there were less restrictive means of achieving the governmental interests at stake than criminalizing what the court called “adult consensual sex.”<sup>237</sup> The court’s opinion does not make clear what those less restrictive means might be.

Arkansas courts rejected this approach when high school students were under the age of eighteen.<sup>238</sup> Curiously, they rejected this approach in the context of congregants and clergy members. Consider, for instance, that *Talbert v. State* affirmed a pastor’s conviction for engaging in sexual relationships with two congregants even though they were all adults.<sup>239</sup> The court reasoned that the pastor

was being prosecuted for using his position of trust and authority over those individuals to engage in those acts. Substantive due process, including his right to engage in private, consensual sex, protects an individual’s liberty interest under the United States Constitution (*Lawrence* . . .), but [he] has no liberty interest to engage in sexual activity by abusing his position of trust and authority. His substantive due process rights simply were not violated in this instance.<sup>240</sup>

---

234. 388 S.W.3d 429, 434 (Ark. 2012) (quoting ARK. CODE ANN. § 5-14-125(a)(6) (Supp. 2009), which provided, at that time, that “[a] person commits sexual assault in the second degree if the person [i]s a teacher in a public school in a grade kindergarten through twelve (K-12) and engages in sexual contact with another person who is [a] student enrolled in the public school and [l]ess than twenty-one (21) years of age”).

235. *Id.* at 436-37.

236. *Id.* at 436.

237. *Id.* at 437.

238. *E.g.*, *Akers v. State*, 464 S.W.3d 483, 488 (Ark. Ct. App. 2015).

239. 239 S.W.3d 504, 511 (Ark. 2006).

240. *Id.* But see *State v. Bussmann*, 741 N.W.2d 79, 86 (Minn. 2007). In *Bussman*, the Supreme Court of Minnesota allowed an intermediate court decision to stand due to the justices on the higher court being equally divided in their views as to whether a statute criminalizing sexual relationships between clergy and congregants was constitutional. Some of the justices’ logic mirrored that of the majority in *State v. Mole*, which invalidated a similar provision against peace officers. 994 N.E.2d 482, 483 (Ohio Ct. App. 2013), *aff’d*, 74 N.E.3d 368 (Ohio 2016). These justices also would have invalidated the statute on First Amendment grounds because, in their

Why this same logic did not apply to the teacher in *Paschal* is a mystery. Given that most courts reject the notion that *Lawrence* recognized any fundamental right, *Paschal*'s application of strict scrutiny is anomalous and curious. But even if strict scrutiny properly applies to such instances, if protecting adults seeking pastoral counsel satisfies a compelling state interest for criminalizing sex between adults, why wouldn't the same be true for protecting high school students who have reached the age of maturity—especially since they arguably are in a far more vulnerable position with their teachers than adults are who chose to engage in sex with members of their clergy?

#### 4. Other Cases

Two sexual assault cases cited *Lawrence* in passing, but did not meaningfully rely on its holding for any substantive reason.<sup>241</sup> One of these cases demonstrates the continuing pervasive nature of anti-LGBTQ+ bias.<sup>242</sup>

In *Kupper v. State*, an appellate court refused to consider the appellant's argument that in light of *Lawrence*, photographs of the defendant engaged in "homosexual activity" should have been excluded from evidence on the ground that their probative value was outweighed by their prejudicial effect because the defense had not objected to their admission.<sup>243</sup> Had the issue not been waived, it appears to present a bona-fide concern. The case involved a male defendant charged with the sexual assault of a middle-school girl under the age of fourteen.<sup>244</sup> Introducing photos of him during the punishment phase of his trial that depicted him engaging in consensual sexual activity with a male over the age of consent serves little purpose other than to use constitutionally-protected acts to play on anti-LGBTQ+ prejudices in an attempt to secure a particularly

---

opinion, the law was not religiously neutral, but rather "incorporate[d] religious doctrine" because the law assumes that clergy members are "always in a position of power" over advisees and that any sexual relationships between such persons will always be "causally related to the religious and spiritual advice" the clergy member dispenses. *Id.* at 89. The other justices on the court disagreed with these premises or the conclusion that they burdened the free exercise of religion. *Id.* at 89-92. They argued the law was based on "secular legislative determinations, not church doctrine." *Id.* at 100 (Anderson, C.J., dissenting).

241. *State v. Stevens*, 323 P.3d 901, 910 (N.M. 2014) (holding that the offense of "criminal sexual penetration during the commission of a felony" requires proof that the penetration was unlawful, such as when it occurred without consent); *Kupper v. State*, No. 05-03-00486-CR, 2004 WL 60768, at \*4 (Tex. App. Jan. 14, 2004).

242. *Kupper* 2004 WL 60768, at \*4.

243. *Id.*

244. *Id.* at \*1.

harsh sentence. Under the particular facts of the case, it may well be that this mistake constituted harmless error; nonetheless, it illustrates that the year after *Lawrence* was decided, prosecutors and courts may still have viewed sexual activity between members of the same sex as sufficiently deviant conduct purportedly illustrative of a defendant's bad character.

*E. Privacy and Other Sex Crimes (n = 25, 11.7% of Criminal Cases, 8.1% of Total Cases)*

More than two dozen cases in the study presented questions about the constitutional validity of criminal offenses or punishments for a range of other types of sexual offenses. Some of these involve crimes that have been around for hundreds of years, such as bigamy, incest, and variations on public sexual indecency. Others, however, involve relatively new offenses that have been adopted within the past fifty years to address public health crises, such as the knowing transmission of sexually transmitted infections, or privacy concerns in the digital age, such as laws criminalizing revenge porn. Regardless of the comparable age of these offenses, defendants in these cases tried to use *Lawrence* to shield or diminish their liability. Most of the time, they were unsuccessful.

In-depth analysis of *Lawrence* was strongly associated with narrow interpretations of the case ( $n = 11$ , 44.0%), compared to only one case (4.0%) in which *Lawrence* was broadly interpreted as being key to the case outcome. Final case outcomes favored the prosecution by a ratio of more than seven to one as Table 14 demonstrates. Notably, criminal cases raising issues of sexual privacy were more likely to be associated with an expansive interpretation of *Lawrence* in the Northeast compared to narrow ones in that region. This finding stands in contrast to the fact that overall, largely due to decisions in the Midwestern and Western regions, narrow interpretations of *Lawrence* outnumbered broad interpretations by a two-to-one ratio, resulting in statistically significant differences that reveal strong associations between region of the country and the way judges construe *Lawrence* in this category of criminal cases.

Table 14: Variable Frequencies and Relationships to Treatment of *Lawrence* in Other Sexual Privacy Criminal Cases

| Category            | Treatment of <i>Lawrence</i><br><i>n</i> (%) |               |              |              | Chi-Square | Sig.     | Cramer's<br>V |
|---------------------|----------------------------------------------|---------------|--------------|--------------|------------|----------|---------------|
|                     | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i> |            |          |               |
| <b>Depth</b>        |                                              |               |              |              | 9.964      | Fisher's | 0.631         |
| <i>Mentioned in</i> | 3                                            | 1             | 5            | 9            | (2, 25)    | Exact    |               |

2025]

## LIBERTY AND PRIVACY

71

|                                        |                |               |              |               |                   |                                  |       |
|----------------------------------------|----------------|---------------|--------------|---------------|-------------------|----------------------------------|-------|
| <i>Passing</i>                         | (12.0%)        | (4.0%)        | (20.0%)      | (36.0%)       |                   | p=<br>0.005                      |       |
| <i>Key to Case</i>                     | 4<br>(16.0%)   | 11<br>(44.0%) | 1<br>(4.0%)  | 16<br>(64.0%) |                   |                                  |       |
| <b>Outcome</b>                         | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 3.580<br>(2, 25)  | p ><br>0.050                     | N/A   |
| <i>Prosecution</i>                     | 5<br>(20.0%)   | 12<br>(48.0%) | 5<br>(20.0%) | 22<br>(88.0%) |                   |                                  |       |
| <i>Defense</i>                         | 2<br>(8.0%)    | 0<br>(0.0%)   | 1<br>(4.0%)  | 3<br>(12.0%)  |                   |                                  |       |
| <b>State Politics</b>                  | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 7.606<br>(8, 25)  | p ><br>0.050                     | N/A   |
| <i>Deep Red</i>                        | 4<br>(16.0%)   | 3<br>(12.0%)  | 2<br>(8.0%)  | 9<br>(36.0%)  |                   |                                  |       |
| <i>Light Red</i>                       | 0<br>(0.0%)    | 2<br>(8.0%)   | 1<br>(4.0%)  | 3<br>(12.0%)  |                   |                                  |       |
| <i>Purple</i>                          | 0<br>(0.0%)    | 3<br>(12.0%)  | 0<br>(0.0%)  | 3<br>(12.0%)  |                   |                                  |       |
| <i>Light Blue</i>                      | 0<br>(0.0%)    | 1<br>(4.0%)   | 0<br>(0.0%)  | 1<br>(4.0%)   |                   |                                  |       |
| <i>Deep Blue</i>                       | 3<br>(12.0%)   | 3<br>(12.0%)  | 3<br>(12.0%) | 9<br>(36.0%)  |                   |                                  |       |
| <b>Region</b>                          | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 15.880<br>(6, 25) | Fisher's<br>Exact<br>p=<br>0.011 | 0.564 |
| <i>Northeast</i>                       | 1<br>(4.0%)    | 0<br>(0.0%)   | 3<br>(12.0%) | 4<br>(16.0%)  |                   |                                  |       |
| <i>South</i>                           | 4<br>(16.0%)   | 1<br>(4.0%)   | 2<br>(8.0%)  | 7<br>(28.0%)  |                   |                                  |       |
| <i>Midwest</i>                         | 1<br>(4.0%)    | 5<br>(20.0%)  | 1<br>(4.0%)  | 7<br>(28.0%)  |                   |                                  |       |
| <i>West</i>                            | 1<br>(4.0%)    | 6<br>(24.0%)  | 0<br>(0.0%)  | 7<br>(28.0%)  |                   |                                  |       |
| <b>Judge's Sex</b>                     | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2.158<br>(4, 25)  | p ><br>0.050                     | N/A   |
| <i>Male</i>                            | 5<br>(20.0%)   | 8<br>(32.0%)  | 3<br>(12.0%) | 16<br>(64.0%) |                   |                                  |       |
| <i>Female</i>                          | 2<br>(8.0%)    | 3<br>(12.0%)  | 3<br>(12.0%) | 8<br>(32.0%)  |                   |                                  |       |
| <i>Not Applicable<br/>(per curiam)</i> | 0<br>(0.0%)    | 1<br>(4.0%)   | 0<br>(0.0%)  | 1<br>(4.0%)   |                   |                                  |       |
| <b>Judge's<br/>Race/Ethnicity</b>      | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2307<br>(4, 25)   | p ><br>0.050                     | N/A   |
| <i>White</i>                           | 5<br>(20.0%)   | 10<br>(40.0%) | 5<br>(20.0%) | 20<br>(80.0%) |                   |                                  |       |

|                                              |                |               |              |               |                 |              |     |
|----------------------------------------------|----------------|---------------|--------------|---------------|-----------------|--------------|-----|
| <i>Nonwhite</i>                              | 2<br>(8.0%)    | 1<br>(4.0%)   | 1<br>(4.0%)  | 4<br>(16.0%)  |                 |              |     |
| <i>Not Applicable<br/>or Unknown</i>         | 0<br>(0.0%)    | 1<br>(4.0%)   | 0<br>(0.0%)  | 1<br>(4.0%)   |                 |              |     |
| <b>Judge's<br/>Political<br/>Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                 |              |     |
| <i>Nonpartisan</i>                           | 5<br>(20.0%)   | 11<br>(44.0%) | 4<br>(16.0%) | 20<br>(80.0%) |                 |              |     |
| <i>Democrat</i>                              | 1<br>(4.0%)    | 0<br>(0.0%)   | 1<br>(4.0%)  | 2<br>(8.0%)   | 2545<br>(4, 25) | p ><br>0.050 | N/A |
| <i>Republican</i>                            | 1<br>(4.0%)    | 1<br>(4.0%)   | 1<br>(4.0%)  | 3<br>(12.0%)  |                 |              |     |

### 1. Bigamy

Justice Scalia's dissent in *Lawrence*, in which he eschewed LGBTQ+ people's equal treatment under law,<sup>245</sup> warned that the

245. Justice Scalia's comments about LGBTQ+ people, some of which compared them to child molesters, were once described as "breathtaking in their bigotry." Jeet Herr, *Antonin Scalia Does Not Understand the Difference Between Gay People and Child Abusers*, NEW REPUBLIC (Nov. 17, 2005), <https://newrepublic.com/article/124002/antonin-scalia-not-understand-difference-gay-people-child-abusers> [<https://perma.cc/LMC5-ZH4Z>]. In his *Romer v. Evans* dissent, Scalia compared homosexuality to murder and or cruelty to animals. 517 U.S. 620, 644 (1995) (Scalia, J., dissenting). For an analysis of his animus toward LGBTQ+ people, see, e.g., Daniel Gordon, *Symptoms for Scalia and Texas: Gay Rights and American Nationalism*, 35 GOLDEN GATE U. L. REV. 111, 125 (2005); see also Barney Frank, *Justice Scalia Is a Homophobe*, POLITICO (June 26, 2015), <https://www.politico.com/magazine/story/2015/06/justice-scalia-gay-marriage-ruling-119480/> [<https://perma.cc/NB38-9298>]. For a more general discussion of his often vitriolic style, especially when in dissent, see J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 202 (2017) ("His dissents frequently reflected uncloaked scorn for the majority.").

Given social changes toward greater acceptance of LGBTQ+ people, at least one scholar opined that Justice Scalia's dissent in *Lawrence* was more muted than his fiery dissent in *Romer*. Nancy J. Knauer, *Lawrence v. Texas: When "Profound and Deep Convictions" Collide with Liberty Interests*, 10 CARDOZO WOMEN'S L.J. 325, 332 (2004) ("The majority's synopsis of the state regulation of same-sex desire in *Lawrence* directly challenged the notion of a trans-historical and universally condemned homosexual and took Chief Justice Burger to task for his unreflective reference to 'Western civilization.' Perhaps surprisingly, this evolution of understanding is also evident in Justice Scalia's dissent. The homosexual-as-sodomite reasoning has not simply failed to garner a majority of the Supreme Court, it has receded from socially acceptable discourse." (internal citations and alterations omitted)). Despite his slightly more civil tone in *Lawrence*, Scalia still argued on behalf of those who "do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home," because "they view this as protecting themselves



decriminalization of sodomy would lead to the fall of legal prohibitions against plural marriage.<sup>246</sup> His fears were overblown. In all cases in which people charged with violating laws against bigamy attempted to use *Lawrence* to shield their actions, they were unsuccessful.

a. Laws Criminalizing Plural Marriage

One of the leading cases dealing with the criminalization of bigamy is *State v. Holm*.<sup>247</sup> The defendant in that case argued that the State of Utah could not constitutionally criminalize bigamy because, under *Lawrence*, polygamy implicates a “fundamental liberty interest” that cannot be infringed absent compelling governmental interests.<sup>248</sup> The Utah Supreme Court dismissed this argument by recognizing the protection of monogamous marital relationships as a compelling governmental interest.<sup>249</sup>

[T]his case implicates the public institution of marriage, an institution the law protects . . . . First, the behavior at issue in this case is not confined to personal decisions made about sexual activity, but rather raises important questions about the State’s ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful. . . . Our State’s commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life . . . .

*Holm* also rejected an equal protection challenge to the state’s bigamy law on the grounds that it violated protections of the free exercise of religion. The court reasoned that the law was neutral with regard to religion: “One could engage in polygamy out of animus for religion and still be considered in violation of the statute. Quite simply, the statute is

---

and their families from a lifestyle that they believe to be immoral and destructive.” *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

246. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable 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. . . .”).

247. 137 P.3d 726, 744-45 (Utah 2006) (citing UTAH CODE § 76-7-101 (2003)).

248. *Id.* at 742.

249. *Id.* at 744 (quoting *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (“[T]he State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.”)).

designed to punish behavior regardless of the motivations giving rise to that behavior.”<sup>250</sup>

b. Criminalizing Sex with Underage “Spouses”

The *Holm* case involved a thirty-two-year-old man who, after being legally married to a woman, subsequently participated in a religious marriage ceremony to a sixteen-year-old girl.<sup>251</sup> In addition to a bigamy charge, the state also charged the defendant with unlawful sexual conduct with a sixteen- or seventeen-year-old, a particular variation of statutory rape that excluded those within ten years of each other in age, as well as those who were lawfully married to each other.<sup>252</sup> The defendant argued that such a statutory scheme impermissibly discriminated based on marital status.<sup>253</sup> The court reasoned that there were valid reasons for treating married and unmarried minors in that age bracket differently:

The protections afforded persons who are married in the eyes of the law include rights, vis-à-vis their spouses, to support and maintenance, . . . to the fulfillment of certain procedural requirements before the union can be dissolved, . . . to a fair distribution of property and debt obligations in the event such a dissolution occurs, . . . and to inherit all or a portion of the spouses’ estates in the event of their death, . . . . These examples represent only a few of the instances in which marital status is legally relevant.<sup>254</sup>

Additionally, the court reasoned that the state possesses legitimate interests in protecting minors from sexual exploitation at the hands of “older, more experienced persons until they reach the legal age of consent and can more maturely comprehend and appreciate the consequences of their sexual acts.”<sup>255</sup>

The Utah Supreme Court’s decision in *Holm* is not unique. In both other cases in the study in which criminal defendants charged with sexual abuse of minors argued their purported polygamous marriages to the victims of such crimes shielded them from criminal liability, courts

---

250. *Id.* at 745.

251. *Id.* at 730.

252. *Id.* at 731 (citing UTAH CODE § 76-5-401.2 (2003)).

253. *Id.* at 750-51.

254. *Id.* at 752 (internal citations omitted).

255. *Id.* at 752 (quoting *State v. Elton*, 680 P.2d 727, 732 (Utah 1984)).

2025]

## LIBERTY AND PRIVACY

75

unanimously rejected their attempted contortion of *Lawrence* to such effect.<sup>256</sup>

## 2. Incest

Justice Scalia's dissent in *Lawrence* opined that the decriminalization of sodomy would lead the country down a slippery slope such that prohibitions against adult incest would no longer be valid.<sup>257</sup> But as with his fears concerning bigamy and prostitution laws, his warning turned out to be bluster rather than prescience. Courts uniformly distinguished *Lawrence* in cases in which defendants attempted to avoid liability for incest.<sup>258</sup>

### a. Incest Generally

The defendant in *Fergusson v. Commonwealth* appealed his conviction for incest for having engaged in sexual intercourse with his eighteen-year-old stepdaughter.<sup>259</sup> In upholding Virginia's law criminalizing incest, the court reasoned that the defendant's "sexual relationship with his eighteen-year-old stepdaughter is not protected by the liberty interest recognized in *Lawrence* . . . because it falls into one of the categories of relationships specifically excluded by *Lawrence*—relationships where one party 'might be injured or coerced' or 'where

---

256. *E.g.*, *State v. Bateman*, No. 1 CA-CR 07-0043, 2008 WL 4516447, at \*7 (Ariz. Ct. App. Oct. 2, 2008) ("Th[e state] interest in protecting minors is rationally related to the distinction between minors entering into non-plural marriages and minors entering into plural marriages because of the evidence of pressure the [Fundamentalist Church of Jesus Christ of Latter-Day Saints] community places on young girls to consent to these plural marriages, including the evidence that a refusal to enter into the marriage would result in their having sinned and becoming outcasts from the only community they know."); *State v. Fischer*, 199 P.3d 663, 669 (Ariz. Ct. App. 2008) (rejecting both due process and equal protection challenges to statutory rape convictions).

257. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable 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. . . .").

258. Indeed, some courts did so with very little analysis. For instance, in a case in which a prisoner convicted of incest sought to toll the statutory period for seeking post-conviction relief on the grounds that *Lawrence* had established a constitutional right that would have provided him with a defense if it had been recognized at the time of his trial, the court simply stated that *Lawrence* did "not address the crime of incest" and did not alter any prior case law establishing that incestuous relationships were not constitutionally protected. *Beard v. State*, No. M200402227CCAR3PC, 2005 WL 1334378, at \*2 (Tenn. Crim. App. June 7, 2005).

259. 838 S.E.2d 75 (Va. Ct. App. 2020).

consent might not easily be refused.”<sup>260</sup> The court also stated that laws criminalizing incest survive rational basis review for another reason, namely that they further the “legitimate state interest in protecting the family unit.”<sup>261</sup> Other courts articulated these same reasons,<sup>262</sup> sometimes adding public health to the list of rational bases for upholding incest laws to prevent genetic abnormalities in the offspring of two closely-related people.<sup>263</sup>

One court, however, disagreed with that final rationale.<sup>264</sup> On equal protection grounds, the Connecticut Court of Appeals reasoned in *State v. John M.* that although the prevention of inbreeding could provide a rational basis for criminalizing incest between opposite-sex partners who are closely related by consanguinity, that logic could not support criminalizing sexual relations between opposite-sex people who are related only by marriage or adoption.<sup>265</sup> Additionally, the court found this proffered basis to be irrationally related to opposite-sex couplings:

The inescapable infirmity of the state’s proffered basis for the classification here involved is that it pertains to only a portion of those relationships governed by the statute. . . . The breadth of [the incest statute] is sweeping. The classification contained therein includes not only heterosexual persons related by consanguinity, but persons related by affinity as well. Furthermore, [it] encompasses adopted relatives . . . . The dangers of inbreeding are inapplicable,

260. *Id.* at 82 (quoting *Lawrence*, 539 U.S. at 578).

261. *Id.* at 83.

262. *State v. Lowe*, 861 N.E.2d 512, 517-18 (Ohio 2007) (upholding an incest ban as applied to a stepparent and stepchild under a rational basis review on the grounds of maintaining the integrity of the family unit); *Morris v. State*, No. 08-15-00249-CR, 2019 WL 396807, at \*1, \*66 (Tex. App. Jan. 31, 2019) (upholding the conviction of a father for sex with his estranged seventeen-year-old biological daughter in a state where the age of consent is seventeen, noting that the acts “took place against a backdrop of coercion and involved the active manipulation of a relationship where consent might not easily be refused”); *see also Prather v. Commonwealth*, No. 2012-CA-001725-MR, 2014 WL 2536866, at \*4 (Ky. Ct. App. June 6, 2014); *State v. Freeman*, 801 N.E.2d 906, 909 (Ohio Ct. App. 2003) (noting that consent was questionable in an incest case and that it can injure the psychological well-being of participants and disrupt the family unit).

263. *People v. McEvoy*, 154 Cal. Rptr. 3d 914, 923 (Ct. App. 2013) (upholding a statute criminalizing incest between siblings on both genetic and family cohesion grounds); *People v. Scott*, 68 Cal. Rptr. 3d 592, 595 (2007) (“[T]here is a rational basis for criminalizing incest, specifically between consenting adults of the opposite sex who are related by consanguinity (e.g., fathers and daughters) as the present case involves . . . [including] in maintaining the integrity of the family unit, in protecting persons who may not be in a position to freely consent to sexual relationships with family members, and in guarding against inbreeding.”).

264. *State v. John M.*, 894 A.2d 376 (Conn. Ct. App. 2006), *rev’d* 940 A.2d 755 (Conn. 2008).

265. *Id.* at 391-92.

and hence irrelevant, to sexual intercourse between persons related by affinity or adoption. Even more basic is the fact that certain persons are incapable of inbreeding, be it attributable to sterility or elderliness . . . . To conclude that the state's proffered basis is rational, it must be one that we may reasonably presume to have motivated an impartial legislature. In light of the foregoing, we conclude that the relationship of the classification to the proffered goal is so attenuated as to render the distinction arbitrary and irrational. Accordingly, the prevention of genetic defects due to inbreeding is not a rational basis for the classification . . . .<sup>266</sup>

Even though the State of Connecticut had only offered the prevention of inbreeding as a basis for upholding the classification affecting opposite-sex relations, but not same-sex ones, the court took it upon itself to also consider alternative arguments. Citing *Lawrence*, it rejected avoiding “the socially and morally undesirable consequences of sexual relations between persons within the prohibited degrees of relationship” as a basis for upholding the incest law.<sup>267</sup> Finally, the court rejected the preservation of tranquility within—and the integrity of—the family unit as a basis for the classification. It noted that reason should apply to sexual acts between all related persons regardless of sexuality: “there is little justification for proscribing sexual intercourse between stepfather and stepdaughter, but not between stepfather and stepson.”<sup>268</sup>

The state appealed the decision in *John M.* to the Connecticut Supreme Court.<sup>269</sup> That court scrutinized the precise wording of the incest prohibition in the penal code, which provided, in relevant part, “a person is guilty of sexual assault in the third degree when such person . . . (2) engages in sexual intercourse with another person whom the actor knows to be related to him or her within any of the *degrees of kindred* specified in section 46b-21.”<sup>270</sup> The other statute referenced in that provision, contained in the family statutes, provided “no man may marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman may marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson. Any marriage within these degrees is void.”<sup>271</sup> The court reasoned that the use of the term “degrees of kinship” in the criminal incest statute was not limited to

---

266. *Id.* at 391-92.

267. *Id.* at 393.

268. *Id.* at 394.

269. 940 A.2d 755 (Conn. 2008).

270. *Id.* at 766 (quoting CONN. GEN. STAT. ANN. § 53a-72a (2002)) (emphasis in original).

271. *Id.* at 766 (quoting CONN. GEN. STAT. ANN. § 46b-21 (1978)).

“the precise male-female unions” set forth in the family law code, but rather incorporates “only the proximity of relation specified therein, namely, parent-child, grandparent-grandchild, sibling-sibling, aunt/uncle-niece/nephew and stepparent-stepchild.”<sup>272</sup> Accordingly, the court concluded that the incest statute did not violate equal protection.<sup>273</sup>

Importantly, even if the Connecticut Supreme Court had upheld the decision of the intermediate court of appeals, that would not have been fatal to the penal social control of adult incest because the rationale for invalidating the statute was a classification on the basis of sexual orientation that lacked a rational basis.<sup>274</sup> Nothing in the opinion suggested that an incest statute of general applicability—one that applied regardless of sex, sexuality, or gender identity—would be unconstitutional under *Lawrence* or any due process principles.

b. Incest When There Is Reasonable Doubt as to Consent for Other Sex Crimes

Courts have also upheld incest laws when applied as a fallback position for crimes to which consent is a defense. For instance, in *People v. McPhee*, the defendant, his wife, and her sixteen-year-old sister lived together. One night while the wife was out, the defendant served the minor so much alcohol that she vomited and eventually passed out.<sup>275</sup> She awoke in her sister’s bed to find herself being sexually assaulted. At trial, the court instructed the jury on two different theories under which it could convict the defendant of criminal sexual conduct—“that defendant used force or coercion or that defendant was related to ‘the complainant by blood or marriage within the third degree as a brother-in-law.’”<sup>276</sup> Because it was not known under which theory the jury convicted the defendant, an appellate court in Michigan reasoned it did not matter from a constitutional perspective:

In contrast to a consensual sexual relationship between two adults . . . this case involved a 42-year-old married man’s forced sexual contact with his intoxicated, 16-year-old sister-in-law to whom he acted as an authority figure. The familial relationship, the age discrepancy, the victim’s alcohol consumption, and defendant’s

---

272. *Id.* at 767.

273. *Id.*

274. *State v. John M.*, 894 A.2d 376, 391-92 (Conn. Ct. App. 2006), *rev’d*, 940 A.2d 755 (Conn. 2008).

275. No. 258285, 2007 WL 912116, at \*1 (Mich. Ct. App. Mar. 27, 2007).

276. *Id.*

position as an authority figure in the victim's life certainly situated the victim in a position "where consent might not easily be refused. . . ." *Lawrence* does not extend to protect defendant's actions in this case. Applying rational-basis review, because there is no other authority cited and *Lawrence* does not stand for the proposition that defendant's asserted right is a fundamental right, we also conclude that [the statute] furthers the legitimate state interests of prohibiting sexual relationships that have traditionally been considered incestuous, as well as protecting the sanctity of the family.<sup>277</sup>

### 3. Lewdness and Public Sexual Indecency

Many U.S. states have laws against "lewd" or "lascivious" conduct that fail to define these terms or, alternatively, define them tautologically by using phrases such as "lewd act" or "lascivious act" or "unnatural act" to define the actus reus of the crime.<sup>278</sup> Typically, these laws ban the commission of any act of sexual gratification, either by oneself or with another person, with knowledge or recklessness that the actions are "likely to be observed by others who would be affronted or alarmed."<sup>279</sup> Other states criminalize such conduct as public sexual indecency.<sup>280</sup>

The lack of definitional clarity in some lewdness laws can sometimes give rise to concerns that the statutes are unconstitutionally vague. Almost all courts reject such challenges by giving statutes narrow

277. *Id.* at \*3.

278. *E.g.*, FLA. STAT. ANN. § 800.02 (1993 & 2022 Supp.); NEV. REV. STAT. § 201.210 (2017 & 2022 Supp.).

279. *E.g.*, ARIZ. REV. STAT. § 13-1403 (2011 & 2022 Supp.); MODEL PENAL CODE § 251.1 (AM. L. INST. Proposed Official Draft 1962); *see also* *Berry v. State*, 2009, 212 P.3d 1085, 1097 (Nev. 2009) (upholding jury instruction defining lewdness as "any act of sexual nature which actor knew was likely to be observed by victim who would be affronted by the act"), *abrogated on other grounds* by *State v. Castaneda*, 245 P.3d 550 (Nev. 2010). With regard to the variability in *mens rea*, compare *Bruno v. Warren*, 344 F. Supp. 97, 98 (E.D. Wis. 1972) (citing a state statute defining lewd and lascivious behavior as including the commission of "an indecent act of sexual gratification with another with knowledge that they are in the presence of others"), with *Commonwealth v. Heinbaugh*, 354 A.2d 244, 467 (Pa. 1976) (interpreting a lewdness statute as requiring an intent element that the acts are "likely to be observed by others who would be affronted or alarmed").

280. *E.g.*, ARK. CODE ANN. § 5-14-111 (1975 & 2022 Supp.) ("A person commits public sexual indecency if he or she engages in any of the following acts in a public place or public view: (1) An act of sexual intercourse; (2) An act of deviate sexual activity; or (3) An act of sexual contact.").

constructions in accordance with the rule of lenity,<sup>281</sup> but even that is not always the case. Consider, for instance, that the Supreme Judicial Court of Massachusetts upheld a lewdness conviction over a vagueness challenge by a man who had pulled down his pants in front of four thirteen-year-old girls and “moon[ed]” them by “expos[ing] his buttocks along with a pair of red ‘thong’ underwear” he was wearing at the time.<sup>282</sup>

The lack of clarity in some lewdness statutes can also cause courts to struggle with how the elements of this offense intersect. For instance, a divided panel of the Indiana Court of Appeals upheld a felony conviction in *Riddle v. State* for “performing sexual conduct in the presence of a minor” against a man who masturbated in an alley while children were playing in the street.<sup>283</sup> The statute under which prosecutors charged the defendant prohibited anyone over the age of eighteen from “knowingly or intentionally . . . touch[ing] or fondl[ing] the person’s own body . . . in the presence of a child less than fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of the child or the older person.”<sup>284</sup> The defendant maintained the children were unaware of the activity and, therefore, at most he was guilty of public indecency, a misdemeanor offense.<sup>285</sup> The majority disagreed with him, reasoning that its precedents established there need not be any “nexus” between the act and the presence of children, but rather that it was sufficient that “a child under age fourteen be in the general area where the perpetrator is so that there is a reasonable prospect that children might be exposed to the perpetrator’s conduct.”<sup>286</sup>

A dissenting judge agreed with the defendant that the proper conviction was for public indecency. First, she distinguished the facts of the case from those the majority relied upon because those cases involved acts committed with knowledge of children being in the presence of the perpetrators, whereas in *Riddle*, “no children witnessed, or were near enough to witness, [the defendant’s] conduct.”<sup>287</sup> But the crux of her analysis centered on the fact that the public indecency statute did not

---

281. *People v. Graves*, 368 P.3d 317, 328 n.12 (Colo. 2016) (“[T]he liberty interest . . . recognized in *Lawrence* . . . does not extend to public places such as the theater in this case”).

282. *Commonwealth v. Quinn*, 789 N.E.2d 138, 141 (Mass. 2003).

283. *Riddle v. State*, No. 39A04-1712-CR-2975, 2018 WL 5274027, at \*2 (Ind. Ct. App. Oct. 24, 2018).

284. *Id.* (quoting IND. CODE § 35-42-4-5(c)(3) (2014)).

285. IND. CODE § 35-45-4-1 (2014).

286. *Id.* (citing *Glottzbach v. State*, 783 N.E.2d 1221, 1227 (Ind. Ct. App. 2003) (interpreting the public indecency statute)).

287. *Id.* at \*6 (Robb, J., dissenting) (explaining that the people who had witnessed the defendant were adults, and “only after a conscious attempt to do so”).



require a child's presence "with the intent to arouse or satisfy the sexual desires."<sup>288</sup> Although her analysis centered on principles of statutory construction, Judge Robb noted that the majority's interpretation about the possibility of children being exposed to sexual conduct could "lead to absurd results."<sup>289</sup> She then inserted a footnote in which she said, "[a]lthough protecting children from the mere possibility of witnessing sexual conduct is a compelling governmental interest, I am not convinced this interpretation of the statute could pass constitutional scrutiny. See *Lawrence* . . . ." She did not elaborate any further.

Although all courts upheld the validity of criminal laws targeting lewd and lascivious behaviors, not all judges agreed with those in the majority of such decisions.<sup>290</sup> For instance, *In re A.P.*, in which the Supreme Court of Vermont upheld a delinquency finding based on violation of the state's "open and gross lewdness and lascivious behavior" statute.<sup>291</sup> In that case, a high school student groped the complainant's breast with his hand in the hallway of their school.<sup>292</sup> The court first rejected the petitioner's contention that the act was not "open" because no one else was present to observe the act, reasoning that a school hallway was "sufficiently public to meet its requirements" because "open" refers to "not concealed," rather than any occurrence in the presence of third-party witnesses.<sup>293</sup> Reasoning that the defendant's actions were "patently offensive," the court also rejected his argument that the act did not constitute gross lewdness because it involved an "unwanted touch over clothing for approximately one second."<sup>294</sup> Finally, the defendant challenged his adjudication on vagueness grounds, but the court cited its own precedent defining the meaning of lewd and lascivious conduct<sup>295</sup> and then held that the petitioner "should have known that groping a girl's breast without her consent in a school hallway constitutes prohibited

---

288. *Id.* at \*7.

289. *Id.* at \*8.

290. *E.g.*, *People v. Graves*, 368 P.3d 317, 328 (Colo. 2016) ("Sexual conduct in public is not constitutionally protected expressive activity. . . . Even assuming that some overtly sexual fondling or caressing may be expressive conduct protected under the First Amendment, the conduct potentially chilled by the legitimate enforcement of [the statute] is slight compared to the 'easily identifiable and constitutionally proscribable conduct' to which the statute applies").

291. 246 A.3d 399, 401 (Vt. 2020) (citing 13 VT. STAT. ANN. tit. 13, § 2601 (1981)), *cert. denied*, 141 S. Ct. 2630 (2021).

292. *Id.*

293. *Id.* at 402.

294. *Id.* at 403-04.

295. *Id.* at 407.

conduct.”<sup>296</sup> One justice, however, filed a dissent in which she explained her disagreement on two key points.<sup>297</sup>

Justice Robinson first argued that the use of the word “open” was targeted at preventing public sexual indecency, but in contravention of the historical context of that word’s meaning, an expansive definition of “open” no longer requires the presence of any person other than the actor and the victim, thereby allowing “the State to prosecute acts that the Legislature has not otherwise expressly criminalized, namely nonconsensual touching short of sexual assault.”<sup>298</sup>

She also would have declared the statute unconstitutionally vague for three reasons. First, the meaning ascribed to the key terms in the statute refer to “ambiguous moralistic judgments” such that “murky and self-referential definition of lewdness invites prosecutors and courts to ‘mandate our own moral code’ by applying the statute to any sexual act that could be perceived as wrongful.”<sup>299</sup> Second, she argued that the legislature needed to criminalize acts with more precise language.

We are no longer bound to respect the undesirability of the expression of certain words or thoughts within the chambers of Victorian society. If certain acts of a sexual nature are considered by our Legislature to be objectionable, then let such acts be enacted as crimes fully defined in clear, unequivocal language.<sup>300</sup>

Finally, Justice Robinson maintained that “lascivious has no discernible meaning distinct from lewdness.”<sup>301</sup> Applying that critique to the facts of the case, she noted that it was “not at all clear” the “unwanted touch over complainant’s clothing was not only ‘lewdness’ but also ‘lascivious behavior.’”<sup>302</sup> The distinction is not merely rhetorical, as lewd conduct alone is a misdemeanor under Vermont law, whereas lewd *and*

---

296. *Id.* at 404 (“[L]ewd and lascivious behavior means behavior that is sexual in nature, lustful, or indecent, that which offends the common social sense of the community, as well as its sense of decency and morality.” (internal citations omitted)).

297. *Id.* at 407-19 (Robinson, J., dissenting) (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

298. *Id.* at 410. “In fact, punishing nonconsensual touching has become a primary use of the statute, even though the statute is theoretically aimed at conduct that ‘tends to affront the public conscience and debase the community morality,’ and was not originally enacted to address invasions of individual privacy or bodily integrity.” *Id.* at 411.

299. *Id.* at 412 (quoting *Lawrence* at 571).

300. *Id.* at 416 (internal quotations and citations omitted).

301. *Id.* at 417.

302. *Id.* at 419.

lascivious behavior constitutes a felony.<sup>303</sup> Justice Robinson noted that “even though lasciviousness is the feature that elevates conduct from a misdemeanor to a felony within this statutory scheme, our statutes and case law provide no clarity as to what ‘lascivious’ means, or how it is distinct from ‘lewd.’”<sup>304</sup>

The position Justice Robinson took in her *In re A.P.* dissent was unique among the cases in the study. But her logic was mirrored by other courts that invalidated lewd and lascivious conduct statutes before *Lawrence* was decided.<sup>305</sup>

#### 4. Public Nudity/Indecent Exposure

The lewd and lascivious conduct statutes in some U.S. states include indecent exposure.<sup>306</sup> But when so included, statutory language often limits liability for sexually motivated exposures.<sup>307</sup> In some jurisdictions, however, indecent exposure constitutes a separate statutory offense that may or may not require any sexual motive. Either way, nearly all states today exempt breast-feeding from the definition of lewdness or indecent exposure.<sup>308</sup>

303. Compare 13 VT. STAT. ANN. tit. 13, § 2601a (2017) (punishing “open and gross lewdness” by up to one year in jail, a fine of up to \$300, or both), with 13 VT. STAT. ANN. tit. 13, § 2601 (1981) (punishing “open and gross lewdness and lascivious behavior” by up to five years imprisonment, fine of up to \$300, or both).

304. *A.P.*, 246 A.3d at 418 (Robinson, J., dissenting).

305. See, e.g., *D.C. v. City of St. Louis, Mo.*, 795 F.2d 652, 654-55 (8th Cir. 1986) (declaring “indecent or lewd act of behavior” unconstitutionally vague); *Pryor v. Municipal Ct.*, 599 P.2d 636, 642 (Cal. 1979) (same); *State v. Kueny*, 215 N.W.2d 215, 217-18 (Iowa 1974) (same); *District of Columbia v. Walters*, 319 A.2d 332, 335 (D.C. 1974) (same); *Courtemanche v. State*, 507 S.W.2d 545, 547 (Tex. Crim. App. 1974) (same).

306. E.g., KAN. STAT. ANN. § 21-5513(a)(2) (2011 & 2022 Supp.) (“Lewd and lascivious behavior is . . . publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.”); N.J. STAT. ANN. § 2C:14-4 (c) (1992 & 2022 Supp.) (“As used in this section, ‘lewd acts’ shall include the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person.”); N.Y. PENAL LAW 245.00 (2015 & 2022 Supp.) (“A person is guilty of public lewdness when he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act: (a) in a public place, or (b) (i) in private premises under circumstances in which he or she may readily be observed from either a public place or from other private premises, and with intent that he or she be so observed, or (ii) while trespassing, . . .”).

307. See statutes cited *supra* note 306.

308. REV. CODE WASH. § 9A.88.010(1) (2004 & 2022 Supp.) (“A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.”).

*People v. Krause* illustrates conduct that satisfies an indecent exposure statute requiring sexual motivation.<sup>309</sup> In that case, the defendant rented a room from the victim who told him when he moved in that they would be “strictly roommates and friends.”<sup>310</sup> Within a few weeks of his moving in, however, he exposed himself to her several times (in addition to other actions that resulted in criminal liability). For the exposures, though, he was convicted of “willfully and lewdly . . . [exposing] his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby.”<sup>311</sup> On appeal, he conceded his acts were lewd and willful, but he argued that the statute could not reach exposure in one’s own home just because the person with whom he lived was “not receptive to the overture.”<sup>312</sup> The court disagreed, noting that the statute used the phrase “in any place” without limitation. The court also rejected the defendant’s vagueness challenge to the statute, as well as his as-applied challenge on privacy grounds, noting that *Lawrence*’s scope required mutual consent even in the home.<sup>313</sup>

*Krause* involved a flagrant example of sexualized exposure to a nonconsenting victim. Indeed, some states would handle *Krause* through lewd and lascivious conduct statutes. By contrast, in jurisdictions that separate nonsexual exposure from lewdness, action such as “(1) flashing a passerby for shock value, (2) streaking naked across a school campus, or (3) mooning someone out a window” can all satisfy the *actus reus* of indecent exposure.<sup>314</sup> Several courts struggled to harmonize such broad indecent exposure laws with Fourteenth Amendment constitutional rights.

The defendant in *State v. Lilley* went topless while on a New Hampshire beach.<sup>315</sup> While there, she also did some yoga. Police were summoned and they asked her to cover up; she refused and was therefore arrested for violating an ordinance that made it unlawful “for any person to knowingly or intentionally, in a public place . . . appear in a state of nudity.”<sup>316</sup> Because the ordinance included exposure of females’ breasts in its definition of nudity, but not males’ chests, she argued the ordinance

---

309. No. C050840, 2007 WL 1152688 (Cal. Ct. App. Apr. 19, 2007).

310. *Id.* at \*1.

311. *Id.* at \*4 (quoting CAL. PENAL CODE § 314 (1982)).

312. *Id.*

313. *Id.* at \*5-6.

314. *State v. Murray*, 416 P.3d 1225, 1229 (Wash. 2018).

315. 204 A.3d 198, 203 (N.H. 2019).

316. *Id.* (citing Laconia, N.H., Code of Ordinances ch. 180, art. I, §§ 180-2, 180-4).

violated equal protection. The New Hampshire Supreme Court refused to apply heightened scrutiny, reasoning that the ordinance did not create a gender-based classification for two reasons. First, it prohibited public nudity by both men and women. Second, unlike with men, the court reasoned that “nudity in the case of women is commonly understood to include the uncovering of the breasts. The ordinance merely reflects the fact that men and women are not fungible with respect to the traditional understanding of what constitutes nudity.”<sup>317</sup> The court also rejected a First Amendment challenge to the ordinance, finding it to be a content-neutral “general prohibition on public nudity” that regulates the “manner in which activities may be carried out in that they cannot be carried out in the nude.”<sup>318</sup>

The dissent in *Lilley* disagreed with the majority that the ordinance did not create a gender-based classification that should trigger strict scrutiny under the provisions of the state constitution’s Equal Rights Amendment.<sup>319</sup>

That the ordinance classifies on the basis of gender is self-evident. The ordinance defines “nudity” differently for females and males. By the plain text of the ordinance, a person who appears in a public place showing “the female breast with less than a fully opaque covering of any part of the nipple” violates the ordinance; a male who appears in the same public place without such a covering does not. The challenged portion of the ordinance creates a public dress code which only one gender can violate. This is a gender-based classification.<sup>320</sup>

The dissent went on to argue that the majority’s reasoning “upend[ed] the safeguards of equal protection” by relying on a physiological difference between men and women.

[B]ecause women have a longer life expectancy than men, by the majority’s reasoning, a hypothetical law that mandates that women work four years longer than men in order to qualify for a pension, or prevents women from retiring until age 70 as opposed to age 66 for

---

317. *Id.* at 208 (internal quotations and citations omitted).

318. *Id.* at 213.

319. *Id.* at 218 (Bassett, J., dissenting); *see generally* N.H. CONST. pt. I, art. 2. (“Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex, or national origin.”).

320. *Id.* at 218-19.

men, or reduces a woman's social security benefits if she retires at the same age as a man, does not classify on the basis of gender.<sup>321</sup>

The dissent also noted that courts in other jurisdictions agreed with the proposition that differential definitions of nudity create sex-based classifications for equal protection purposes.<sup>322</sup>

After determining that sex-based classification was at issue, the dissent then went on to analyze whether that classification was narrowly tailored to serve a compelling governmental interest and concluded the answer was no. The city argued that the ordinance served public safety because topless women could cause a "disturbance which has the potential for violence."<sup>323</sup> It also maintained that "because people think of female breasts in a sexualized manner, topless women may present other beachgoers with a mental health issue."<sup>324</sup> And finally, the city claimed the ordinance "supported morals as determined by the city council."<sup>325</sup>

The dissent first cited Justice O'Connor's concurrence in *Lawrence* for the proposition that moral disapproval, without more, is insufficient to allow discriminatory classifications.<sup>326</sup> Although the dissent questioned whether the purported protection of public sensibilities were "grounded in prejudice and unexamined stereotypes" and reflected "archaic prejudice," it nonetheless assumed, for the sake of argument, that the city's other proffered justifications constituted compelling governmental interests.<sup>327</sup> It then reasoned that the ordinance was not narrowly tailored to achieve these interests because it would be "perfectly lawful for a post-pubescent female to wear pasties with tassels" in the city streets, whereas a "four-year-old girl playing on the beach wearing only shorts, or an adult woman sunbathing without a top in her own back yard, engages in unlawful behavior if her nipples are 'visible to the public.'"<sup>328</sup> The dissent also questioned whether "a less restrictive ordinance, perhaps one more narrow in time or place"—presumably one limiting toplessness to certain

---

321. *Id.* at 220.

322. *Id.* at 219 (citing *Tagami v. City of Chicago*, 875 F.3d 375, 379-80 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1577 (2018); *Craft v. Hodel*, 683 F. Supp. 289, 299 (D. Mass. 1988); *City of Tucson v. Wolfe*, 917 P.2d 706, 707 (Ariz. Ct. App. 1995); *Dydyn v. Department of Liquor Control*, 531 A.2d 170, 175 (Conn. Ct. App. 1987)).

323. *Id.* at 225.

324. *Id.* (internal quotations omitted).

325. *Id.*

326. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring)).

327. *Id.* at 224.

328. *Id.* at 225.

areas of the beach or at certain times, rather than outright banning it—could sufficiently address the city’s articulated concerns.<sup>329</sup>

In *State v. Legassie*, the Supreme Judicial Court of Maine invalidated the conviction of a twenty-one-year-old man who had sent a digital photo of his genitals to a fifteen-year-old-girl.<sup>330</sup> The statute under which he had been charged provided that a “person is guilty of indecent conduct if . . . [i]n a private place, the actor exposes the actor’s genitals with the intent that the actor be seen from a public place or from another private place.”<sup>331</sup> The court agreed with the defendant that the statute required indecent exposure in the physical presence of a victim and, therefore, that sending nude photos of himself did not fall within the statutory parameters.<sup>332</sup>

[T]he State’s interpretation . . . which could subject to criminal liability any individual seen exposing his or her genitals by another in person or in a photograph, would present serious constitutional problems because [the statute] contains no “affront or alarm” requirement. The State’s construction of [it] could therefore not only criminalize private behavior between consenting adults, but also subject to prosecution individuals who appear in photographs, which could burden well-established free speech and due process rights. *See Lawrence* . . . .<sup>333</sup>

Of course, the holding in *Legassie* does not mean that states cannot regulate adults sending sexually explicit photos or videos to minors. In fact, the Maine legislature enacted a law specifically criminalizing the dissemination of such images to people under the age of eighteen, a law the court in *Legassie* stated would not only be “more directly applicable” to the conduct in the case, but also weighed against the government’s proffered interpretation of the indecent exposure statute.<sup>334</sup>

In short, few jurisdictions have retreated from the pre-*Lawrence* approaches that indecent exposure may be criminally regulated. But the scope of such laws continue to be debated, largely for reasons having little to do with *Lawrence*’s central holding.

---

329. *Id.*

330. 171 A.3d 589, 592 (Me. 2017).

331. *Id.* at 594 (quoting ME. REV. STAT. ANN. tit. 17, § 854(1)(B) (2007)).

332. *Id.* at 595.

333. *Id.* at 596.

334. ME. REV. STAT. ANN. tit. 17, § 2911 (2011 & 2022 Supp.).

## 5. Voyeurism

Voyeurism, broadly speaking, is commonly defined as “the practice of obtaining sexual gratification from observing others.”<sup>335</sup> The law is concerned with such behaviors when they violate people’s privacy vis-à-vis actors who, without consent, watch another people as they undress or engage in sexual activities.<sup>336</sup> Courts have interpreted *Lawrence* broadly in the context of protecting people from voyeurs or so-called “peeping Toms” for the reasons the court explained in *Ex parte Metzger*:

The right of privacy also includes rights to bodily integrity and sexual privacy. A person’s fundamental interest in bodily integrity and sexual privacy have been recognized as liberty interests that are protected from unwarranted state interference by the Due Process Clause. . . . Those interests are invaded by a private actor who creates unconsented visual images of a person in a place such as a changing room or a bathroom where people are vulnerable, expose their bodies, and engage in highly private activities with the reasonable expectation they are not being photographed or recorded. A person’s bodily integrity and sexual privacy is also violated when someone inside their home usurps the person’s right to choose whether photographs may be taken of their intimate areas. . . . These types of “video voyeurism” “violate people’s sexual privacy by denying their autonomy. It effectively takes dominion over their bodies, intimate activities, and sexual interactions without permission. It hijacks their ability to decide who has access to their body, bedroom, or bathroom. It undermines people’s sense that they control their intimate lives. . . .” Likewise, “up-skirt” and “down-blouse” photographs violate sexual privacy by “undermining the victim’s decision to shield her genitalia and breasts from the public—consent and sexual autonomy are no longer in victims’ control. . . .”<sup>337</sup>

In light of these substantial rights, courts usually determined that the government has a compelling interest in protecting people from

335. *Voyeurism*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/voyeurism> [<https://perma.cc/FL56-TWR2>] (last visited Aug. 11, 2022); cf. *Voyeurism*, BLACK’S LAW DICTIONARY (11th ed. 2029) (“Gratification derived from observing the genitals or sexual acts of others, usu[ally] secretly.”).

336. *E.g.*, TEX. PENAL CODE § 21.15(b) (2015); *see also, e.g.*, 18 U.S.C. § 1801(a).

337. 610 S.W.3d 86, 103-04 (Tex. App. 2020) (citing *Lawrence* and quoting Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1909, 1914 (2019)) (other citations and internal alterations omitted).



voyeurism.<sup>338</sup> Statutes that are narrowly tailored to achieve those interests survive strict scrutiny analysis over First Amendment challenges.<sup>339</sup>

## 6. Revenge Porn

Judges apply similar logic to the criminal regulation of nonconsensual pornography as they do to voyeurism. So-called “revenge porn” involves the unauthorized distribution of “sexually intimate images or videos of another person online in an effort to mentally damage the other person, derail his or her career or relationships, and/or profit from the views of the image.”<sup>340</sup> Sometimes the distributed images are originally obtained consensually, such as when they are shared with sex partners, while other times they are obtained illegally by hackers or those engaged in illicit voyeurism.<sup>341</sup>

Nearly all states have enacted laws making it a crime to distribute such images without the consent of the person depicted.<sup>342</sup> But the two cases in the present study that cited *Lawrence* while evaluating the constitutionality of such laws both came from Texas. These courts both recognized that limits on such distribution constitute a content-based restriction on free speech and, therefore, apply strict scrutiny to evaluate the constitutionality of these laws.<sup>343</sup> But they also reasoned that the government has a compelling interest in protecting people from substantial invasions of privacy and that the Texas revenge porn laws were narrowly tailored to protecting this interest if limited to circumstances in which the persons depicted are identified, have reasonable expectations of privacy in the images, and do not consent to their distribution, provided that the distributor acts intentionally with regard to their disclosure and at least recklessly with regard to whether the

338. *Id.* at 104.

339. *Id.* at 105-06.

340. Seth Teleky, *You Know It When You See It: Punishments for and Regulation Against Revenge Porn*, 1 GEO. L. TECH. REV. 175, 175 (2016).

341. John A. Day, *A New Arrow in the Quiver to Fight Revenge Porn*, TENN. B.J., May/June 2022, at 38.

342. James J. Wilkerson, *Revenge Porn: State Laws, Constitutional Challenges, and the Progress of Federal Legislation*, 60 U. LOUISVILLE L. REV. 301, 302 (2021); Matt Stout, *In Less Than a Decade, Nearly Every State Has Outlawed ‘Revenge Porn.’ So Why Hasn’t Massachusetts?*, BOS. GLOBE (Feb. 6, 2022, 4:22 PM), <https://www.bostonglobe.com/2022/02/06/metro/less-than-decade-nearly-every-state-has-outlawed-revenge-porn-so-why-hasnt-massachusetts/> [https://perma.cc/FJN4-JP48]. A bill to make revenge porn a federal offense has not yet been enacted. See Stopping Harmful Image Exploitation and Limiting Distribution Act (SHIELD Act), S.412 118th Cong. (2023) The Senate passed this bill in July 2024, but the House did not act on it before the end of the legislative session.

343. *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 782 (Tex. App. 2021).

persons depicted consented to dissemination.<sup>344</sup> Consider the court's reasoning in *Ex parte Fairchild-Porche*:

First, in addition to the requirement that the disclosure be intentional, the lack-of-consent element narrows the Statute's reach to an actor who intentionally discloses visual material despite knowing or being aware of a substantial and unjustifiable risk that the depicted person did not effectively consent to the disclosure. In those cases, the actor has, at the very least, some objective fair warning that the sensitive and potentially harmful speech the actor is about to utter is contrary to the wishes of the person who might be harmed by it. Providing criminal penalties for speech made in disregard of this fair warning is a narrowly tailored means to deter that speech—and only that speech—thereby vindicating, to the greatest extent constitutionally permissible, the depicted person's expectation of privacy.

Second, the expectation-of-privacy element further narrows the Statute's scope, even without an express culpable mental state, because (1) the reasonable expectation of privacy requirement provides adequate protection; and (2) as a practical matter, the evidence needed to prove the circumstances under which the defendant obtained the material would necessarily satisfy a culpable mental state of knowledge. And, when this element is read with the lack-of-consent element, the Statute only punishes those who knew or were aware of but consciously disregarded a substantial and unjustifiable risk that the circumstances gave rise to a reasonable expectation by the depicted person that the material would be private.

Third, the identification element narrows the Statute's reach to those who knowingly or recklessly reveal the identity of the depicted person through disclosure. Such a requirement means that the Statute does not apply to a person who intentionally discloses visual material otherwise prohibited by the Statute if the depicted person is not identified or identifiable by future recipients . . . . Consequently, the Statute . . . is narrowly tailored to serve the government's compelling interest in protecting sexual privacy.<sup>345</sup>

Importantly, the initial dissemination of revenge porn is different than the subsequent sharing of images by third parties. According to the

---

344. *Id.* at 784.

345. *Id.* at 789-90.

Texas Court of Criminal Appeals’ decision in *Ex parte Jones*, for liability to attach to such actors, the third parties would have to have

(1) obtained the material under circumstances in which the depicted person had a reasonable expectation that the image would remain private; (2) knew or was aware of but consciously disregarded a substantial and unjustifiable risk that he did not have effective consent of the depicted person; and (3) knowingly or recklessly identified the depicted person and caused that person harm through the disclosure.<sup>346</sup>

The court acknowledged that such requirements exclude those “who receive intimate photos and forward them to others without knowing the disclosure lacks effective consent fall outside the statute’s narrowed scope,” but noted that copyright law and civil remedies may be available under such circumstances.<sup>347</sup>

#### 7. Knowing Transmission of STIs

In 1990, Congress enacted the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, which provides states with federal funding for the prevention and treatment of HIV/AIDS.<sup>348</sup> At that time, the HIV/AIDS epidemic was relatively young considering that the first known cases of AIDS occurred in 1981 and the virus that causes the disease was discovered two years later.<sup>349</sup> Additionally, “effective treatments for HIV had not yet been discovered” at that time.<sup>350</sup> Perhaps that is why the legislation required that states certify their criminal laws were adequate to prosecute individuals who knowingly exposed another person to HIV. This requirement led many states to enact “HIV-specific criminal exposure laws [that] impose criminal penalties on people living with HIV who know their HIV status and who potentially expose others

346. No. PD-0552-18, 2021 WL 2126172, at \*1 (Tex. Crim. App. May 26, 2021).

347. *Id.* at \*13.

348. Ryan White Comprehensive AIDS Resources Emergency Act, Pub. L. No. 101-381, 104 Stat. 576 (1990), (codified as amended at 42 U.S.C. §§ 300ff (2022)).

349. Robert C. Gallo & Luc Montagnier, *The Discovery of HIV as the Cause of AIDS*, 349 NEW ENG. J. MED. 2283 (2003).

350. FRADELLA, *supra* note 173, at 219 (citing Ctrs. for Disease Control & Prevention, *HIV and AIDS—United States, 1981-2000*, 50 MORBIDITY & MORTALITY WEEKLY REPT. 430 (June 1, 2001), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5021a2.htm> [<https://perma.cc/LHV9-S89P>]).

to HIV.”<sup>351</sup> As of 2021, thirty-five states had either specific laws targeting HIV transmission, broader laws covering transmitting of a broader range of sexually transmitted infections (STIs), or sentencing enhancements for other crimes when the transmission of certain STIs are involved.<sup>352</sup> Most of these laws require someone who knows they have an STI covered by the applicable statute to disclose that information to potential sex partners before engaging in certain sexual conduct.<sup>353</sup> But some laws may not even recognize consent after disclosure as a defense, as exemplified by Alabama’s statute criminalizing all persons with any STI from engaging in “any act which will probably or likely transmit such disease to another person.”<sup>354</sup>

The “prohibited conduct” contained in the *actus reus* of the offense includes more than vaginal or anal sex in many states, often including oral sex; needle-sharing; engaging in acts of prostitution; biting, spitting, and throwing bodily fluids, especially in correctional institutions; and donating blood, tissue, or bodily fluids. Four states also criminalize sharing sex objects/toys . . . . Thus, many states fail to differentiate between high-risk (e.g., vaginal or anal intercourse) [and] low-risk (e.g., oral sex) . . . . Consider, for instance, that there are no documented cases of HIV transmission from spitting. And few states take into account behaviors that significantly reduce the risk of transmission, such as condom use (a defense in only four states), antiretroviral therapy, or pre-exposure prophylaxis.<sup>355</sup>

There are good reasons to question the wisdom of such laws today—and not just because HIV medications have evolved such that the diagnosis is now widely considered to be a chronic, treatable disease.<sup>356</sup> For one thing, research suggests these law do little to change people’s

---

351. *HIV and STD Criminalization Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/policies/law/states/exposure.html> [<https://perma.cc/DF3H-NL9G>] (last updated Dec. 22, 2021).

352. *Id.*; see also, e.g., FLA. STAT. ANN. § 384.24 (1986 & 2022 Supp.); IDAHO CODE § 39-608(3)(a) (1988 & 2022 Supp.); NEB. REV. STAT. § 28-934 (2011 & 2022 Supp.); TENN. CODE ANN. § 39-13-109 (1994 & 2022 Supp.).

353. FRADELLA, *supra* note 173, at 219-20.

354. ALA. CODE § 22-11A-21(c) (1987 & 2022 Supp.).

355. FRADELLA, *supra* note 173, at 220 (citing J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS BEHAV. 997, 1000-03 (2014) (internal quotations omitted)).

356. Dallas Swendemana, Barbara L. Ingram & Mary Jane Rotheram-Borus, *Common Elements in Self-Management of HIV and Other Chronic Illnesses: An Integrative Framework*, 21 AIDS CARE 1321 (2009).

behavior.<sup>357</sup> But more importantly, these laws can be counterproductive to public health because they increase “stigma towards persons living with HIV,” reduce the “frequency of HIV testing since knowledge of status is required for culpability,” and perpetuate “inflammatory or ill-informed media coverage that may perpetuate misinformation regarding modes of HIV transmission.”<sup>358</sup> Thus, several scholars have called for the repeal or revision of knowing transmission laws to better serve public health interests and to prevent “overinclusive criminalization that potentially rises to the levels of due process violations.”<sup>359</sup> A few courts grappled with due process concerns in knowing transmission cases, one of which also addressed potential First Amendment concerns.

In *State v. Richardson*, the defendant knew he was HIV positive and nonetheless had sex with two different women.<sup>360</sup> The statute under which he was charged made it a crime for anyone who knows they are “infected with a life threatening communicable disease knowingly . . . [t]o engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease.”<sup>361</sup> The state argued that the statute required HIV-positive persons to be sexually abstinent because “any act of sexual intercourse or sodomy by an HIV-positive person, even utilizing a condom, creates some element of risk that the virus will be transmitted to the sex partner.”<sup>362</sup> The court rejected this interpretation as “constitutionally suspect” under *Lawrence* and instead read the plain language of the statute as creating a specific intent crime.

---

357. Carol L. Galletly & Stephen D. Pinkerton, *Preventing HIV Transmission Via HIV Exposure Laws: Applying Logic and Mathematical Modeling to Compare Statutory Approaches to Penalizing Undisclosed Exposure to HIV*, 36 J.L. & MED. ETHICS 577 (2008); Carol L. Galletly et al., *New Jersey's HIV Exposure Law and HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 AM. J. PUB. HEALTH 2135 (2012); Keith J. Horvath, Richard Weinmeyer & Simon Rosser, *Should It Be Illegal for HIV-Positive Persons to Have Unprotected Sex Without Disclosure? An Examination of Attitudes Among US Men Who Have Sex with Men and the Impact of State Law*, 22 AIDS CARE 1221 (2010).

358. Lehman, et al. *supra* note 355, at 999.

359. FRADELLA, *supra* note 173, at 221 (citing Isabel Grant, *Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions*, 54 MCGILL L.J. 389 (2009); Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550 (2011)).

360. 209 P.3d 696, 701 (Kan. 2009) (suggesting that due process requires defendants to know they are infected with a qualifying STI and then intentionally engage in sexual activity with the specific intent to expose a victim to that disease).

361. *Id.* at 700 (quoting KAN. STAT. ANN. § 21-3435(a)(1) (1999) (recodified as amended at KAN. STAT. ANN. § 21-5424 (2011 & 2022 Supp.)).

362. *Id.* at 701.

According to the State, “there is no conceivable means by which the State could prove, apart from the act of sexual intercourse itself, that an HIV positive individual who knowingly engages in sexual intercourse with another acts with ‘intent to expose’ the other to the virus.” We disagree . . . . [C]ondom use can be germane to [a] defendant’s specific intent . . . . [And p]roof that [victims] did not knowingly consent to engage in sexual intercourse with an HIV-infected partner . . . would [also] be a circumstance in furtherance of establishing . . . specific intent to expose [someone’s] partners to HIV.<sup>363</sup>

At the preliminary hearing in the *Richardson* case, the prosecution established that neither woman was aware of the defendant’s HIV status; indeed, he affirmably misrepresented to them that he was free from all STIs.<sup>364</sup> The prosecution also established that the defendant did not use a condom while having sex with either woman.<sup>365</sup> Incredibly, though, the prosecution did not introduce “any of this information at trial” which resulted in the Supreme Court of Kansas overturning his conviction due to insufficiency of the evidence.<sup>366</sup>

Prosecutions for the knowing transmission of STIs that do not require specific intent do not have to clear the evidentiary hurdles that existed in *Richardson*. For example, the defendant in *State v. S.F.* was charged with violating a Missouri law that made it a felony for people who know they are HIV positive from acting “in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV . . . [t]hrough contact with blood, semen, or vaginal secretions in the course of oral, anal or vaginal sexual intercourse.”<sup>367</sup> After testing positive for HIV, the defendant engaged in sexual intercourse with a man to whom she did not disclose her diagnosis.<sup>368</sup> After being convicted, she appealed, arguing that the statute violated her rights “to free speech, privacy, and equal protection.”<sup>369</sup>

The Supreme Court of Missouri dispensed with the First Amendment argument as follows:

---

363. *Id.* at 704.

364. *Id.*

365. *Id.*

366. *Id.*

367. 483 S.W.3d 385, 387 (Mo. 2016) (quoting MO. REV. STAT. § 191.677 (2002)). Missouri amended that law in 2021. See MO. REV. STAT. § 191.677 (2021).

368. *S.F.*, 483 S.W.3d at 386.

369. *Id.*

[T]he statute seeks to prevent certain conduct that could spread HIV to unknowing or nonconsenting individuals. While individuals may have to disclose their HIV status if they choose to engage in activities covered by the statute, any speech compelled by [the statute] is incidental to its regulation of the targeted conduct and does not constitute a freedom of speech violation. “[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Because [the statute] regulates conduct and imposes only incidental burdens on speech, it does not violate the freedom of speech protections of the federal or state constitution.<sup>370</sup>

The court then dismissed the Fourteenth Amendment arguments with even more brevity: “Unlike the statute struck down in *Lawrence*, [the statute] does not criminalize *consensual, non-harmful* sexual conduct. [It] regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent to the conduct with knowledge of the risk of exposure.”<sup>371</sup>

*F. Post-Conviction Claims Filed by Sex Offenders (n = 28, 13.1% of Criminal Cases, 9.1% of Total Cases)*

After people are convicted of one or more qualifying sex offenses, they are typically subjected to a range of social controls in the name of preventing recidivism.<sup>372</sup> Because people convicted of either violent sex crimes or those with child victims are “the most vilified of criminal offenders,” they are often sentenced to disproportionately harsh legal restrictions compared to offenders convicted of other serious, but nonsexual crimes.<sup>373</sup> Notably, many of the conditions to which sex

370. *Id.* at 388 (quoting *Rumsfeld v. Forum for Acad. & Inst’l Rts., Inc.*, 547 U.S. 47, 62 (2006)).

371. *Id.* at 389; *see also* *State v. Musser*, 721 N.W.2d 734, 748 (Iowa 2006) (“Surely it cannot be disputed that one considering having sexual intercourse with another would want to know whether the other person is infected with HIV prior to engaging in such intimate contact. Consent in the absence of such knowledge is certainly not a full and knowing consent as was present in *Lawrence*.”).

372. *See generally* D. RICHARD LAWS, *SOCIAL CONTROL OF SEX OFFENDERS: A CULTURAL HISTORY* (2016) (tracing the development of how the law, and society more broadly, perceives sex offenders and the impact of those evolving views on the mechanisms used in the name of controlling their post-offense behaviors).

373. Karen Harrison, *Sentencing High-Risk Sex Offenders: Policy and Legislation*, in *THE OXFORD HANDBOOK OF SEX OFFENCES AND SEX OFFENDERS* 327-43 (Teela Sanders ed., 2017)

offenders are sentenced after they are released from a period of incarceration—such as registration and community notification requirements and restrictions on where they live and with whom they interact—are ineffective or even counterproductive, largely because they force offenders into criminogenic circumstances.<sup>374</sup> Research demonstrates that certain types of cognitive behavioral therapies and a range of informal social controls are far superior at facilitating rehabilitation and desistance than those to which offenders are typically sentenced.<sup>375</sup> Yet, judges routinely sentence those convicted of sex crimes to a range of post-incarceration restrictions of dubious efficacy, some of which have generated constitutional challenges from defendants. Perhaps

---

[hereinafter SANDERS, OXFORD HANDBOOK]; John C. Navarro, *Sex Offenders, Policies, and Social Control*, in POLITICAL AUTHORITY, SOCIAL CONTROL AND PUBLIC POLICY 155 (Cara E. Rabe-Hemp & Nancy S. Lind eds., 2019).

374. LAWS, *supra* note 372, at 121-156; Navarro, *supra* note 373, at 155-68; Kristen M. Zgoba, *The Aftermath of Sex Offender Registration and Other Controls*, in SANDERS, OXFORD HANDBOOK, *supra* note 373, at 344-60.

375. Kimberly R. Kras, *Informal Social Control of Sex Offenders: the Family and Other Forms of Support*, in SANDERS, OXFORD HANDBOOK, *supra* note 373, at 415-36; Friedrich Lösel & Martin Schmucker, *Treatment of Sex Offenders: Concepts and Empirical Evaluations*, in SANDERS, OXFORD HANDBOOK, *supra* note 373, at 392-414.



unsurprisingly, most of these challenges fail.<sup>376</sup> A few, however, have been successful when the central holding in *Lawrence* is implicated.<sup>377</sup>

Before exploring the cases, several noteworthy quantitative findings should be noted. First, judges rejected expansive readings of *Lawrence* in all but four (14.3%) of the cases in this category, whereas they applied the precedent narrowly in fourteen (50.0%) such cases, with the remaining ten (35.7%) involving neutral applications. Table 15 reveals three more findings: unlike in other categories, *Lawrence* was significantly more likely to be mentioned in passing in claims asserted by convicted sex offenders than it was to be key to a judicial opinion resolving such claims; cases presenting *Lawrence*-based arguments by sex offenders were far

376. *E.g.*, *In re W.M.*, 851 A.2d 431, 450-51 (D.C. 2004) (upholding statutory scheme of sex offender registration and notification over a due process challenge); *State v. Druktenis*, 86 P.3d 1050, 1078 (N.M. 2004) (rejecting due process and equal protection challenges to sex offender registration and notification scheme, noting that “the concern about restrictions as to those convicted of criminally heinous acts harming non-consenting victims, often children, is simply not comparable to the protection of the privacy and dignity of those involved in the intimate decisions and relationships protected in Supreme Court cases [like] *Lawrence*”); *cf.* *People v. Boston*, No. C086940, 2021 WL 5027416, at \*1 (Cal. Ct. App. Oct. 29, 2021), *review granted* (Jan. 26, 2022) (rejecting an equal protection challenge to a sentencing scheme making youthful forcible sex offenders ineligible for certain potential early release opportunities available to those convicted of other crimes, including homicides); *People v. McCullon*, No. B231429, 2012 WL 1548062, at \*1 (Cal. Ct. App. May 3, 2012) (rejecting equal protection challenge to felony punishment for failing to register as a sex offender when misdemeanor punishments are imposed for failing to register for drug, arson, and gang offenses).

Courts have even upheld the constitutionality of sex offender registration and notification statutes when applied to defendants who commit certain nonsexual offenses involving child victims, such as the kidnapping or false imprisonment of a minor by a nonparent, on the view that such offenses can be precursors to sex crimes against children. *People v. Knox*, 903 N.E.2d 1149, 1154 (N.Y. 2009) (“In deciding not to exclude defendants and others similarly situated from the category of ‘sex offenders,’ the Legislature could have considered not only that cases where the term is unmerited are few, but also that the process of separating those cases from the majority in which it is justified is difficult, cumbersome and prone to error.”); *People v. Johnson*, 870 N.E.2d 415, 426 (Ill. 2007); *cf.* *People v. Moi*, No. 1114-87, 2005 WL 1618124 (N.Y. Co. Ct. June 3, 2005) (upholding law under due process and equal protection facial challenges, but finding it unconstitutional as applied to the defendant, reasoning there was “no rational basis for having this defendant register as a sex offender when the crime for which he stands convicted has no sexual element whatsoever and Defendant has no history of committing sexual offenses”). Courts in other states, however, disagree with this proposition. *E.g.*, *Am. Civ. Liberties Union of N.M. v. City of Albuquerque*, 137 P.3d 1215, 1226 (N.M. Ct. App., 2006); *State v. Robinson*, 873 So.2d 1205, 1217 (Fla. 2004); *State v. Reine*, No. 19157, 2003 WL 77174 (Ohio Ct. App., Jan. 10, 2003), *dismissed* 795 N.E.2d 686 (Ohio 2003).

377. In *State v. LeBlanc*, No. 2020AP62-CR, 2021 WL 3234462 (Wisc. Ct. App. July 30, 2021), the court remanded a case for resentencing. It did not reach the question of whether the sentencing judge had relied on an improper factor, but noted “to provide guidance [on] remand” that in light of *Lawrence*, it would be improper if the judge imposed a harsh sentence in light of the defendant’s “permissive attitudes toward sexual practices.” *Id.* at \*5.

more common in the West than in other parts of the country; and consistent with many other categories, final case outcomes in favor of the prosecution were significantly more common than those favoring defendants, but not nearly by the same margin that existed in some other types of cases, such as those involving prostitution, obscenity, sexual assaults, and other sexual privacy claims. This held true even in “deep blue” states, where *Lawrence* was either neutrally or narrowly applied in these types of cases. Put differently, not a single case involving constitutional challenges by sex offenders brought in highly Democratic states interpreted *Lawrence* broadly.

Table 15: Variable Frequencies and Relationships to Treatment of *Lawrence* in Sex Offender Claims Cases

| Category                    | Treatment of <i>Lawrence</i><br><i>n</i> (%) |               |              |               | Chi-Square        | Sig.                             | Cramer's V |
|-----------------------------|----------------------------------------------|---------------|--------------|---------------|-------------------|----------------------------------|------------|
| <b>Depth</b>                | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 8.575<br>(2, 28)  | Fisher's<br>Exact<br>p=<br>0.008 | 0.553      |
| <i>Mentioned in Passing</i> | 10<br>(35.7%)                                | 9<br>(32.1%)  | 1<br>(3.6%)  | 20<br>(71.4%) |                   |                                  |            |
| <i>Key to Case</i>          | 0<br>(0.0%)                                  | 5<br>(17.9%)  | 3<br>(10.7%) | 8<br>(28.6%)  |                   |                                  |            |
| <b>Outcome</b>              | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 2.240<br>(2, 28)  | p ><br>0.050                     | N/A        |
| <i>Prosecution</i>          | 7<br>(20.0%)                                 | 13<br>(44.6%) | 3<br>(10.7%) | 23<br>(82.1%) |                   |                                  |            |
| <i>Defense</i>              | 3<br>(10.7%)                                 | 1<br>(3.6%)   | 1<br>(3.6%)  | 5<br>(17.9%)  |                   |                                  |            |
| <b>State Politics</b>       | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 12.90<br>(6, 28)  | Fisher's<br>Exact<br>p=<br>0.032 | 0.480      |
| <i>Deep Red</i>             | 4<br>(14.3%)                                 | 2<br>(7.1%)   | 2<br>(7.1%)  | 8<br>(28.6%)  |                   |                                  |            |
| <i>Light Red</i>            | 0<br>(0.0%)                                  | 2<br>(7.1%)   | 1<br>(3.6%)  | 3<br>(10.7%)  |                   |                                  |            |
| <i>Purple</i>               | 0<br>(0.0%)                                  | 0<br>(0.0%)   | 0<br>(0.0%)  | 0<br>(0.0%)   |                   |                                  |            |
| <i>Light Blue</i>           | 0<br>(0.0%)                                  | 0<br>(0.0%)   | 1<br>(3.6%)  | 1<br>(3.6%)   |                   |                                  |            |
| <i>Deep Blue</i>            | 6<br>(21.4%)                                 | 10<br>(35.7%) | 0<br>(0.0%)  | 16<br>(57.1%) |                   |                                  |            |
| <b>Region</b>               | <i>Neutral</i>                               | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 14.967<br>(6, 28) | Fisher's<br>Exact                | 0.517      |
| <i>Northeast</i>            | 3                                            | 1             | 0            | 4             |                   |                                  |            |

2025]

## LIBERTY AND PRIVACY

99

|                                      |                |               |              |               |                  |           |     |
|--------------------------------------|----------------|---------------|--------------|---------------|------------------|-----------|-----|
|                                      | (10.7%)<br>)   | (3.6%)        | (0.0%)       | (143%)        |                  | p=0.017   |     |
| <i>South</i>                         | 2<br>(7.1%)    | 3<br>(10.7%)  | 0<br>(0.0%)  | 5<br>(179%)   |                  |           |     |
| <i>Midwest</i>                       | 2<br>(7.1%)    | 2<br>(7.1%)   | 4<br>(143%)  | 8<br>(286%)   |                  |           |     |
| <i>West</i>                          | 3<br>(10.7%)   | 8<br>(28.6%)  | 0<br>(0.0%)  | 11<br>(393%)  |                  |           |     |
| <b>Judge's Sex</b>                   | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |           |     |
| <i>Male</i>                          | 7<br>(25.0%)   | 12<br>(42.9%) | 2<br>(7.1%)  | 21<br>(75.0%) | 4.781<br>(4, 28) | p > 0.050 | N/A |
| <i>Female</i>                        | 3<br>(10.7%)   | 1<br>(3.6%)   | 2<br>(7.1%)  | 6<br>(21.4%)  |                  |           |     |
| <i>Not Applicable (per curiam)</i>   | 0<br>(0.0%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 1<br>(3.6%)   |                  |           |     |
| <b>Judge's Race/Ethnicity</b>        | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |           |     |
| <i>White</i>                         | 8<br>(28.6%)   | 12<br>(42.9%) | 4<br>(14.3%) | 24<br>(85.7%) | 2.533<br>(4, 28) | p > 0.050 | N/A |
| <i>Nonwhite</i>                      | 2<br>(7.1%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 3<br>(10.7%)  |                  |           |     |
| <i>Not Applicable or Unknown</i>     | 0<br>(0.0%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 1<br>(3.6%)   |                  |           |     |
| <b>Judge's Political Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |           |     |
| <i>Nonpartisan</i>                   | 8<br>(28.6%)   | 10<br>(35.7%) | 3<br>(10.7%) | 21<br>(75.0%) | 2.297<br>(6, 28) | p > 0.050 | N/A |
| <i>Democrat</i>                      | 0<br>(0.0%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 1<br>(3.6%)   |                  |           |     |
| <i>Republican</i>                    | 2<br>(7.1%)    | 2<br>(7.1%)   | 1<br>(3.6%)  | 5<br>(17.9%)  |                  |           |     |
| <i>Unknown</i>                       | 0<br>(0.0%)    | 1<br>(3.6%)   | 0<br>(0.0%)  | 1<br>(1.6%)   |                  |           |     |

## 1. Vacating Sex Offender Status for Applicable Persons

In the wake of the *Lawrence* decision, people who had been placed on sex offender registries for convictions related to sodomy, including solicitation to commit sodomy and attempted sodomy, sought their removal from such registries. Courts denied such petitions for offenders

whose underlying convictions involved acts outside of *Lawrence*'s protections—cases involving violence, nonconsent, minors, or public acts.<sup>378</sup> Presumably, courts granted such requests for LGBTQ+ people who were declared criminal simply because they engaged in sex with another consenting adult in private, but there were no cases in the study to attest to this conclusion.

Given the legal necessity of the closet prior to *Lawrence* and the corresponding effect the closet had on cruising to meet other men,<sup>379</sup> the distinction between public and private acts is not always clear-cut.

---

378. *E.g.*, *In re Commitment of Cleaveland*, No. 09-12-00428-CV, 2014 WL 4364263, at \*7 (Tex. App. Sept. 4, 2014) (upholding a sexually violent predator determination and commitment for actions that involved biting a child on the buttocks, among others); *Guerra v. Lombardi*, 336 S.W.3d 167, 171 (Mo. Ct. App. 2011) (“Guerra also argues that he cannot be required to register as a sex offender because sexual acts between two consenting adults is constitutionally protected conduct pursuant to *Lawrence* . . . [but t]his argument fails [because the] victim was not an adult capable of consenting to sexual conduct.”); *Green v. State*, 692 S.E.2d 784, 785-86 (Ga. Ct. App. 2010) (upholding a conviction for failure to register as a sex offender for a sodomy conviction involving conduct with a minor); *People v. Westgarth*, No. D044716, 2005 WL 1540137, at \*4 (Cal. Ct. App. July 1, 2005) (upholding a lifetime placement on a sex offender registry for a defendant convicted of sex offenses involving oral and anal sex with a minor); *cf.* *State v. Green*, 706 S.E.2d 720, 721-22 (Ga. Ct. App. 2011) (declining, on procedural grounds, to reach the merits of whether an underlying sodomy charge was based on constitutionally protected activities).

Similar logic applies for acts that occurred in violation of prison rules. *E.g.*, *People v. Perez*, 961 N.Y.S.2d 51, 52 (Sup. Ct. App. Div. 2013) (upholding a high level of sex offender classification based on points for “repeated instances of prohibited sexual activity in prison” because such acts demonstrated the “defendant’s inability to refrain from forbidden sexual conduct [and, therefore,] was relevant to his potential for sexual recidivism”).

And, as previously discussed in the section on the continued viability of sodomy laws, *supra* at Part IV.A.1, courts uphold differential requirements for sex offender registration for those convicted of oral sex, compared to those convicted of vaginal sex, with minors. *Johnson v. Dep’t of Just.*, 341 P.3d 1075, 1084 (Cal. 2015) (“There is, in fact, much more than a speculative possibility that sexual predators are more successful in manipulating minors to engage in oral copulation, as opposed to sexual intercourse. Studies indicate that pubescent minors may be more receptive to engaging in oral sex, which does not risk pregnancy and which many such minors believe is lower in risk for sexually transmitted diseases.”); *People v. McDermitt*, No. C047482, 2005 WL 995520, at \*2 (Cal. Ct. App. Apr. 29, 2005) (same). *But cf.* *State v. Dykes*, 744 S.E.2d 505, 510 (S.C. 2013) (invalidating statutory provision mandating lifetime satellite monitoring of persons convicted certain sex crimes against minors—with any opportunity for judicial review to assess a risk of re-offending—as being “arbitrary” and not rationally “related to the legislature’s stated purpose of protecting the public from those with a high risk of re-offending”); *State v. Coman*, 273 P.3d 701, 709 (Kan. 2012) (resolving a statutory ambiguity by holding sex offender registration was not required for those convicted of misdemeanor criminal sodomy unless it involved a human under the age of eighteen, thereby exempting those convicted of bestiality from registration requirement).

379. See William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007 (1997).

2025]

## LIBERTY AND PRIVACY

101

Consider what occurred in *Keeney v. Fitch*.<sup>380</sup> St. Louis police conducted a sting operation at a rest stop.

While sitting in his car, undercover, Detective Bayes observed Appellant sitting in his car. Appellant started a conversation with Detective Bayes and asked Detective Bayes to sit in Appellant's car with him. Detective Bayes agreed and got in Appellant's car with him at the rest stop. Appellant and Detective Bayes talked for about ten minutes. Appellant placed his hand on Detective Bayes's clothed groin area. Detective Bayes then identified himself as a police officer and placed Appellant under arrest.<sup>381</sup>

The defendant pled guilty to the misdemeanor offense of attempt sexual misconduct in the third degree, was sentenced to two years of probation, and was placed on the sex offender registry. After *Lawrence*, he filed an action for a declaratory judgment that he not be required to remain on the sex offender registry "because attempting to engage in homosexual relations [was] no longer a criminal offense."<sup>382</sup> A judge denied his request on the grounds that the conduct occurred in public, but an appellate court reversed, reasoning that the underlying acts no longer constituted a criminal offense and, as such, there was "no logical existent reason to require [him] to register on the sexual offender registry."<sup>383</sup> The court also rejected the state's attempts to bring the appellant's conduct outside of *Lawrence*'s designated parameters:

Respondents' characterization of Detective Bayes as a "victim" of sexual contact by Appellant, and their contention that Detective Bayes did not give Appellant permission to touch his groin, are disingenuous. Detective Bayes was participating in a sting operation to rid the rest stop of homosexual behavior in 1988 and he deliberately sat in his car at that location; got into Appellant's car with him and talked for over ten minutes; and when Appellant finally made a sexual overture to Detective Bayes, Detective Bayes revealed his true identity as a police officer and placed Appellant under arrest for attempted homosexual deviate intercourse. Such a course of events would be considered a success by Detective Bayes in his undercover sting operation to rid the area of homosexual behavior that night in 1988, and to characterize himself today as a

---

380. *Keeney v. Fitch*, 458 S.W.3d 838 (Mo. Ct. App. 2015).

381. *Id.* at 839.

382. *Id.* at 841.

383. *Id.* at 845.

victim of unwanted sexual touching by Appellant that night is incongruous.<sup>384</sup>

The court could have interpreted the underlying conduct in *Keeney v. Fitch* differently. Reasonable people might differ with both questions that the court resolved in the appellant's favor. Perhaps the court was genuinely moved by the unfairness of a gay man being on the sex registry under such circumstances. When petitioners are less sympathetic, however, concerns for public safety might mask homophobia, as *In re M.D.* arguably illustrates.<sup>385</sup>

*In re M.D.* concerned a petitioner who sought discharge from a secure facility to which he had been committed as a sexually dangerous person ten years earlier.<sup>386</sup> Experts disagreed about whether he was dangerous, but an appellate court upheld a lower court's determination that he was "likely to engage in further acts of sexually predatory conduct."<sup>387</sup> But one of the primary reasons for this conclusion was the fact that the petition had established a "sexual relationship with a young-looking resident in violation of the treatment program rules" during his in-patient treatment.<sup>388</sup> Although the justices on the Supreme Court of North Dakota signing onto the majority decision did not mention *Lawrence*, a dissenting justice noted that the sexual relationship actually involved two men who were consenting adults and, therefore, the petitioner's ongoing confinement was "based upon activity for which the State could not punish him criminally" under *Lawrence*.<sup>389</sup> After noting that, as with *Lawrence*, the case did not involve a minor, public conduct, prostitution, coercion, or any lack of consent, the dissent reasons as follows:

If M.D. had engaged in an 18-month-long heterosexual relationship with a consenting adult who was not "young-looking," rather than a homosexual relationship with a "young-looking" consenting adult, the fact that such a relationship existed, albeit against treatment rules, would have been insufficient to deny M.D.'s petition for discharge. It would not have established that M.D. is likely to engage in sexually predatory conduct. Changing the sexual orientation of

---

384. *Id.* at 846-47.

385. *In re M.D.*, 757 N.W.2d 559 (N.D. 2008).

386. *Id.* at 560.

387. *Id.* at 561.

388. *Id.* at 562.

389. *Id.* at 563 (Kapsner, J., dissenting).

the consenting adults does not make the evidence more substantial.<sup>390</sup>

## 2. Conditions of Release Burdening Intimate Relationships

In *State v. Lee*, after the defendant was convicted of assaulting and raping a romantic partner, the trial judge sentenced him to 108 months of imprisonment followed by lifetime community supervision.<sup>391</sup> Two of the terms of such supervision required the defendant to inform his community corrections supervisor and his treatment providers of any dating relationships and to disclose his status as a sex offender before engaging in any sexual activity with a partner.<sup>392</sup> On appeal, he challenged the latter condition as violating both his right to refrain from speaking and as depriving him of sexual intimacy rights under *Lawrence*.<sup>393</sup> The court rebuffed him without meaningful analysis, simply saying that his arguments “disregard[ed] his status as a parolee with reduced rights” while noting that “*Lawrence* did not analyze the reduced rights of a parolee . . . [whose] constitutional rights are subject to . . . infringements.”<sup>394</sup> Other courts have reached the same conclusion, but better explained their rationale for doing so:

We acknowledge that the condition significantly intrudes on Allen’s right to privacy and freedom of association. Intimate relationships between consenting adults are the quintessential zone of personal liberty protected from government interference under the substantive due process clause. . . . A government requirement that Allen obtain written consent obviously inhibits his freedom of association. Nevertheless, the intrusion is warranted because it is directly related to his offense and future criminality. The condition is narrowly drawn because it does not bar Allen from establishing intimate relationships or cohabitating with adult women, but merely requires disclosure to ensure that Allen’s partner is vigilant as to any possible recurrence of the crime. Also, the condition does not apply

---

390. *Id.* at 563-64; *see also* *Doe v. Sex Offender Registry Bd.*, 897 N.E.2d 992, 999 (Mass. 2008) (upholding, over an equal protection challenge, a sex offender classification system that used offenses committed by men against men more heavily in determining the risk of reoffending and level of dangerousness because “the strongest deviant sexual interests have empirically been found to be more prevalent among those offenders who victimize strangers, prepubescent children, non-consenting males, [or] vulnerable persons. . .”).

391. 460 P.3d 701, 705 (Wash. Ct. App.), *review denied*, 468 P.3d 622 (Wash. 2020).

392. *Id.*

393. *Id.* at 714.

394. *Id.*

to nonintimate relationships. The condition is specifically tailored to Allen because in this case he gained the opportunity to initiate sexual contact with the victim by way of his romantic relationship with the victim's mother. When granting the clemency of probation, the court may impose conditions designed to prevent the probationer from recommitting his offense without violating constitutional limits.<sup>395</sup>

### 3. Other Restrictions on People with Sex Offense Convictions

Courts have upheld other types of restrictions beyond those involving dating or sexual activity. In *Merryfield v. Sullivan*, the Sexual Predator Treatment Program prevented its patients from seeking pen pals for themselves.<sup>396</sup> Medical personnel explained that such a restriction helped to maintain “the therapeutic environment of the hospital” while simultaneously protecting the public by preventing “patients from assuming false identities and from victimizing or manipulating their correspondents, who might be children.”<sup>397</sup> Nonetheless, one patient challenged the pen pal restriction on First and Fourteenth Amendment grounds. The court began its analysis of the patient's substantive due process claim by saying, “[n]ot every deprivation of liberty or property is subject to a substantive-due-process challenge; the right must be fundamental.”<sup>398</sup> In support of that statement, the court cited *Washington v. Glucksberg* and Justice Scalia's dissent in *Lawrence*.<sup>399</sup> Those citations

395. *People v. Allen*, No. A106272, 2005 WL 552470, at \*7 (Cal. Ct. App. Mar. 9, 2005); *see also State v. Farris*, 492 P.3d 744, 750 (Or. Ct. App. 2021) (“Requiring defendant to alert his probation officer to ask permission before entering into another potentially sexual relationship is a reasonable mechanism to protect the public from defendant once again entering into an inappropriate relationship with someone he has cultivated trust. The condition serves the purposes of rehabilitation by helping to prevent defendant from reoffending through the guidance of his probation officer.”); *State v. Airhart-Bryon*, No. 78805-1-I, 2020 WL 1853477, at \*12 (Wash. Ct. App. Apr. 13, 2020), *review denied*, 474 P.3d 1052 (Wash. 2020) (noting that although *Lawrence* and *Obergefell* constitutionally protected sexual activity and romantic relations, neither case “involved convicted child molesters or restrictions that protected children” nor impacted the fact that the constitutional rights of probationers or parolees are diminished as a result of criminal convictions); *State v. Staples*, No. 78460-9-I, 2019 WL 7373500, at \*5 (Wash. Ct. App. Dec. 30, 2019), *review denied*, 464 P.3d 199 (Wash. 2020) (“Restrictions on privacy in community custody conditions are justified when reasonably necessary to protect the community. . . . The [dating restrictions] are justified here because of [defendant's] criminal sexual conduct towards both strangers and acquaintances.”).

396. No. 111204, 2015 WL 326652, at \*1 (Kan. Ct. App. Jan. 16, 2015).

397. *Id.* at \*2.

398. *Id.* at \*5.

399. *Id.* (citing 521 U.S. 702, 720-21 (1997); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting)).



are suspect. First, the former case was decided six years before the latter and *Lawrence*'s central holding calls into question whether substantive due process only protects fundamental rights since *Lawrence* did not use a fundamental rights framework.<sup>400</sup> Second, the citation relies on the dissent in *Lawrence*, rather than the majority's more expansive approach to constitutionally protected liberty interests. With these questionable citations framing the analysis, the court then applied a low level of scrutiny (despite the free speech and expression concerns raised) and upheld the restriction as being rationally related to the important governmental interest in protecting the public.<sup>401</sup> The court also noted that because patients were allowed to seek permissible pen pals through their therapists, the restrictions left open alternative methods of communication.<sup>402</sup>

*Merryfield* involved a patient whose rights could be restricted for nonpunitive reasons as part of involuntary confinement for treatment purposes after a judicial determination that he should not be free because he had some "mental abnormality" and was dangerous.<sup>403</sup> But even when people are released after serving custodial sentences for sex crimes, they are often restricted from engaging in certain activities, such as visiting strip clubs, adult bookstores, and certain establishments where sexual activities occur.<sup>404</sup> Courts routinely uphold such conditions over challenges, often distinguishing the core rights protected by *Lawrence* and other privacy cases from the behaviors that such restrictions target.

The purpose of [such] condition[s] of [Defendant's] probation is to manage some facets of his sexual conduct, for which he has been subjected to multiple criminal convictions and required to register as a sex offender. The core rights protected by the Fourteenth Amendment, as expressed in *Lawrence*, are fundamental personal choices related to family, relationships, and childbirth. . . . [Defendant], however, does not articulate how the ability to see nude dancers or to buy pornographic videos is central to his choices concerning family relationships or personal dignity. Further, the State notes that [Defendant's] conduct in this case involved accessing and viewing videos and images of his victim, suggesting

400. See Fradella, *supra* note 1, at 8-9.

401. *Merryfield*, 2015 WL 326652, at \*6-7.

402. *Id.*

403. See generally *Kansas v. Hendricks*, 521 U.S. 346, 356-60 (1997) (holding the indefinite, involuntary commitment of sexually violent offenders does not violate due process).

404. E.g., *Gouldsmith v. State*, No. 55A01-1605-CR-1022, 2017 WL 3165115, at \*5 (Ind. Ct. App. July 26, 2017).

that a restriction on [Defendant's] access to and consumption of sexually-related media is related to law enforcement needs. We accordingly find no error in this [condition] that prohibits [Defendant's] patronizing of adult bookstores, strip clubs, and the like.<sup>405</sup>

*G. Miscellaneous Types of Claims (n = 12; 5.6% of Criminal Cases, 3.9% of Total Cases)<sup>406</sup>*

As explored in Part IV.D.2, defendants sometimes try to use *Lawrence* to escape criminal liability for their violence against intimate partners. As previously explained, such cases did not raise genuine issues about the nature and scope of consent to sexual violence, but rather presented spurious claims of consensual BDSM activities in desperate attempts to explain injuries defendants had inflicted on their intimate partners.<sup>407</sup> Some defendants similarly attempted to use *Lawrence* as a constitutional shield in cases involving other crimes—namely those that did not involve any sexual component, while still others attempted to challenge judicial orders or procedures in criminal cases not involving sexually based offenses. The final twelve cases in this study presented such issues in ways that were either unique or comparatively rare (i.e., only two or three such cases compared to the higher numbers in the enumerated categories). This final section in Part IV explores the commonalities among some of these cases and Table 16 summarizes the frequencies of the variables as they manifest in these cases and their relationships to how courts applied *Lawrence*.

Table 16: Variable Frequencies and Relationship to Treatment of *Lawrence* in Miscellaneous Cases

| Category        | Treatment of <i>Lawrence</i><br>n (%) |               |              |               | Chi-Square       | Sig.                             | Cramer's V |
|-----------------|---------------------------------------|---------------|--------------|---------------|------------------|----------------------------------|------------|
| Type            | <i>Neutral</i>                        | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  | 9.267<br>(2, 24) | Fisher's<br>Exact<br>p=<br>.0004 | 0.621      |
| <i>Civil</i>    | 4<br>(16.0%)                          | 3<br>(12.0%)  | 5<br>(20.0%) | 12<br>(50.0%) |                  |                                  |            |
| <i>Criminal</i> | 11                                    | 1             | 0            | 12            |                  |                                  |            |

405. *Id.*

406. The miscellaneous category consisted of cases, half of which presented civil claims discussed in Fradella, *supra* note 1, at 86-100. This Article discusses the miscellaneous criminal and quasi-criminal cases.

407. *See supra* notes 156-172 and accompanying text.

2025]

## LIBERTY AND PRIVACY

107

|                                    |                |               |              |               |                   |                                   |       |
|------------------------------------|----------------|---------------|--------------|---------------|-------------------|-----------------------------------|-------|
|                                    | (45.8%)        | (4.0%)        | (0.0%)       | (50.0%)       |                   |                                   |       |
| <b>Depth</b>                       | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                   |                                   |       |
| <i>Mentioned in Passing</i>        | 15<br>(62.5%)  | 2<br>(8.3%)   | 3<br>(12.5%) | 20<br>(83.3%) | 8.160<br>(2, 24)  | Fisher's<br>Exact<br>p =<br>0.032 | 0.583 |
| <i>Key to Case</i>                 | 0<br>(0.0%)    | 2<br>(8.3%)   | 2<br>(8.3%)  | 4<br>(16.7%)  |                   |                                   |       |
| <b>Outcome</b>                     | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                   |                                   |       |
| <i>Prosecution</i>                 | 11<br>(45.8%)  | 0<br>(0.0%)   | 0<br>(0.0%)  | 11<br>(45.8%) | 16.233<br>(4, 24) | Fisher's<br>Exact<br>p=<br>0.001  | 0.582 |
| <i>Defense</i>                     | 0<br>(0.0%)    | 1<br>(4.2%)   | 0<br>(0.0%)  | 1<br>(4.2%)   |                   |                                   |       |
| <i>Not Relevant (Civil)</i>        | 4<br>(16.7%)   | 3<br>(12.5%)  | 5<br>(20.8%) | 12<br>(50.0%) |                   |                                   |       |
| <b>State Politics</b>              | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                   |                                   |       |
| <i>Deep Red</i>                    | 5<br>(20.8%)   | 1<br>(4.2%)   | 0<br>(0.0%)  | 6<br>(25.0%)  | 8.374<br>(8, 24)  | p ><br>0.050                      | N/A   |
| <i>Light Red</i>                   | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 1<br>(4.2%)   |                   |                                   |       |
| <i>Purple</i>                      | 1<br>(4.2%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 2<br>(8.3%)   |                   |                                   |       |
| <i>Light Blue</i>                  | 2<br>(8.3%)    | 0<br>(0.0%)   | 0<br>(0.0%)  | 2<br>(8.3%)   |                   |                                   |       |
| <i>Deep Blue</i>                   | 7<br>(29.2%)   | 3<br>(12.5%)  | 3<br>(12.5%) | 13<br>(54.2%) |                   |                                   |       |
| <b>Region</b>                      | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                   |                                   |       |
| <i>Northeast</i>                   | 4<br>(16.7%)   | 1<br>(4.2%)   | 3<br>(12.5%) | 8<br>(33.3%)  | 8.516<br>(6, 24)  | p ><br>0.050                      | N/A   |
| <i>South</i>                       | 6<br>(25.0%)   | 1<br>(4.2%)   | 0<br>(0.0%)  | 7<br>(29.2%)  |                   |                                   |       |
| <i>Midwest</i>                     | 2<br>(8.3%)    | 0<br>(0.0%)   | 2<br>(8.3%)  | 4<br>(16.7%)  |                   |                                   |       |
| <i>West</i>                        | 3<br>(12.5%)   | 2<br>(8.3%)   | 0<br>(0.0%)  | 5<br>(20.8%)  |                   |                                   |       |
| <b>Judge's Sex</b>                 | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                   |                                   |       |
| <i>Male</i>                        | 10<br>(41.7%)  | 4<br>(16.7%)  | 3<br>(12.5%) | 17<br>(70.8%) | 5.867<br>(4, 24)  | p ><br>0.050                      | N/A   |
| <i>Female</i>                      | 5<br>(20.8%)   | 0<br>(0.0%)   | 1<br>(4.2%)  | 6<br>(25.0%)  |                   |                                   |       |
| <i>Not Applicable (per curiam)</i> | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 1<br>(4.2%)   |                   |                                   |       |

| <b>Judge's<br/>Race/Ethnicity</b>            | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |              |     |
|----------------------------------------------|----------------|---------------|--------------|---------------|------------------|--------------|-----|
| <i>White</i>                                 | 14<br>(58.3%)  | 4<br>(16.7%)  | 3<br>(12.5%) | 21<br>(87.5%) | 5.562<br>(4, 24) | p ><br>0.050 | N/A |
| <i>Nonwhite</i>                              | 1<br>(4.2%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 2<br>(8.3%)   |                  |              |     |
| <i>Not Applicable<br/>or Unknown</i>         | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 1<br>(4.2%)   |                  |              |     |
| <b>Judge's<br/>Political<br/>Affiliation</b> | <i>Neutral</i> | <i>Narrow</i> | <i>Broad</i> | <i>Total</i>  |                  |              |     |
| <i>Nonpartisan</i>                           | 7<br>(29.2%)   | 1<br>(4.2%)   | 3<br>(12.5%) | 11<br>(45.8%) | 8.526<br>(6, 24) | p ><br>0.050 | N/A |
| <i>Democrat</i>                              | 2<br>(8.3%)    | 2<br>(8.3%)   | 1<br>(4.2%)  | 5<br>(20.8%)  |                  |              |     |
| <i>Republican</i>                            | 6<br>(25.0%)   | 1<br>(4.2%)   | 0<br>(0.0%)  | 7<br>(29.2%)  |                  |              |     |
| <i>Not Applicable<br/>or Unknown</i>         | 0<br>(0.0%)    | 0<br>(0.0%)   | 1<br>(4.2%)  | 4<br>(4.2%)   |                  |              |     |

1. Arguments that *Lawrence* Invalidates the Constitutionality of Criminal Offenses Other than Sex Crimes

The defendant in *State v. Theeler* was convicted of physically assaulting his girlfriend under a domestic violence statute that, at the time of the incident, limited its application to “persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.”<sup>408</sup> Relying, in part, on *Lawrence* and *Obergefell*, he argued the statute violated the constitutional guarantee of equal protection because it treated same-sex and opposite-sex partners differently.<sup>409</sup> The court agreed with him, reasoning that “the statute expose[d] him to greater punishment than a same-sex abuser would face if charged with simple assault” and that it “facially discriminate[d] against similarly situated classes without justification.”<sup>410</sup> But the court disagreed with the

408. 385 P.3d 551, 552 (Mont. 2016) (citing MONT. CODE ANN. § 45-5-206(2)(b) (2011)). The statute under review in this case has since been twice amended such that it currently applies to “spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship.” MONT. CODE ANN. § 45-5-206(2)(b) (2017 & 2022 Supp.)).

409. *Id.* at 552-53.

410. *Id.*

defendant that his conviction had to be reversed. Rather, the Supreme Court of Montana invoked the severability clause in the statute and excised the phrase “with a person of the opposite sex,” thereby leaving the crux of the statute and the defendant’s conviction intact.<sup>411</sup>

*Theeler*, at least, involved a classification on the basis of sexual orientation that implicated *Lawrence*. It stands in contrast to the defendant’s attempt to escape criminal liability for fraud in *State v. Garcia*, which had nothing to do with the line of substantive process cases to which *Lawrence* belongs. In *Garcia*, a fifty-two-year-old teacher duped an eighty-four-year-old widower with Parkinson’s disease “into believing that she was his loving partner and thereby, gained access to his bank accounts and depleted over \$50,000.”<sup>412</sup> She challenged her conviction for fraud, arguing that “false statements regarding romantic interests and affections” could not underly fraud charges because they concern “both the right to free speech protected by the First Amendment and the due process right to privacy relating to marriage and familial relationships under the Fourteenth Amendment.”<sup>413</sup> Her “undeveloped” brief relied on *United States v. Alvarez* for the first of these constitutional claims and on *Lawrence* for the second.<sup>414</sup> The court criticized the defendant for failing to “adequately explain how these cases [were] applicable to her case,” noting that “merely providing a summary that describes the rights protected under *Alvarez* and *Lawrence*” was insufficient to allow the court to determine how those cases affect the validity of the defendant’s fraud conviction.<sup>415</sup> Given the facts of the case, it is difficult to imagine how such arguments could have been persuasively developed.<sup>416</sup>

Courts similarly rejected arguments that *Lawrence* should be interpreted as creating any right to the “use, possession, manufacture, or delivery of marijuana,” to drive under the influence, to serve alcohol to minors, to carry a concealed weapon, to engage in disorderly conduct, or to cause fatal injuries to a baby while trying to give birth to it via a self-

---

411. *Id.* at 554.

412. *State v. Garcia*, No. 33,249, 2017 WL 1372808, at \*1 (N.M. Ct. App. Mar. 28, 2017).

413. *Id.* at \*4.

414. *Id.* at \*4 n.2 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating the Stolen Valor Act as a content-based restriction on free speech, thereby overturning the defendant’s conviction for falsely stating he had been awarded the Congressional Medal of Honor)).

415. *Id.*

416. *See also* *Turner v. State*, No. 10-06-00055-CR, 2007 WL 475420, at \*2 n.2 (Tex. App. Feb. 14, 2007) (noting that the defendant cited *Lawrence* in his attempt to escape criminal liability for theft but not engaging in any analysis of the claim).

delivery process.<sup>417</sup> One court dismissed an argument that *Lawrence* somehow rendered the death penalty for capital murder constitutionally invalid under the Eighth Amendment simply because the Court in *Lawrence* had cited international law, and capital punishment is disfavored among other democratic nations.<sup>418</sup>

## 2. Criminal Procedure Arguments Invoking *Lawrence*

Prosecutors charged the defendant in *Ex parte Bleimeyer* with injuring a child and endangering a child for allegedly having starved her five-year-old.<sup>419</sup> One of the conditions of her pretrial release was that she needed to let the court know if she became pregnant. She challenged that condition, arguing that it interfered with her Fourteenth Amendment rights during the first trimester of any prospective pregnancy. The court rejected that contention because the condition required only notification to the court, but did not otherwise interfere with her rights to make decisions about such a pregnancy.<sup>420</sup> Additionally, the condition constituted a reasonable restriction on any privacy rights because it would

417. *Commonwealth v. Elansari*, No. 2235 MDA 2015, 2016 WL 6092949, at \*2 (Pa. Super. Ct. Oct. 18, 2016) (“Although the use and possession of marijuana certainly is a personal decision, it is not such an ‘intimate choice’ as to affect one’s ‘individual dignity . . .’” (internal citations omitted)); *State v. Beecraft*, No. 2006AP982-CR, 2006 WL 3842171, at \*2 (Wisc. Ct. App. Dec. 28, 2006) (“[Defendant] has provided no legal authority for treating, for purposes of the liberty interest protected by the Fifth and Fourteenth Amendment, marijuana use in one’s home the same as adult-consenting sexual conduct in one’s home.”); *see also* *State v. Russell*, 890 A.2d 453, 463 (R.I. 2006) (stating that none of the leading privacy cases were “remotely . . . relevant” to the issue of whether one can be lawfully convicted of disorderly conduct for having thrown furniture out the window in one’s home during a fit of rage); *Florance v. State*, No. 05-08-00707-CR, 2009 WL 1267350, at \*7 (Tex. App. May 8, 2009) (rejecting a claim that the right to privacy as interpreted in *Lawrence* prevented the state from criminalizing serving alcohol to a minor in the home of someone who is not the parent, guardian, or spouse of the minor); *State v. Cicione*, No. 1307019559, 2014 WL 4656426, at \*3 (Del. Super. Ct. Sept. 16, 2014) (noting there were no protected liberty interests in a claimed right to drive or claimed right to use drugs); *State v. Griffin*, No. 1004021962, 2011 WL 2083893, at \*8 n.64 (Del. Super. Ct. May 16, 2011) (concluding that, unlike the sodomy law invalidated in *Lawrence*, Delaware’s prohibition of carrying a concealed weapon even in one’s own home furthered a legitimate, if not “weighty,” governmental interest in protecting police officer safety); *Commonwealth v. Pugh*, No. CR2007-1323, 2009 WL 890988, at \*1 (Mass. Super. Ct. Jan. 26, 2009) (“[T]here is no claim in this case that principles of substantive due process under either state or federal law forbid the Commonwealth from prosecuting a woman for inflicting fatal injuries on a viable and near full term fetus during the birthing process.”), *rev’d on other grounds*, 969 N.E.2d 672 (Mass. 2012).

418. *Newton v. State*, 78 So. 3d 458, 475 (Ala. Crim. App. 2009).

419. *Ex parte Bleimeyer*, No. 01-16-00838-CR, 2017 WL 586509, at \*1 (Tex. App. Feb. 14, 2017).

420. *Id.* at \*2.

place the court “in a better position to protect that child, a member of the community, from the moment of its birth.”<sup>421</sup>

The connection to *Lawrence* was even more attenuated in *State v. Aalim*, a case in which the defendant had been charged with aggravated robbery with a firearm.<sup>422</sup> Because he was sixteen-years-old at the time of the offense, he was charged in juvenile court, but the case was transferred to adult criminal court where he was sentenced to four years in prison pursuant to the terms of a plea agreement after the court denied his motion to dismiss challenging the constitutionality of mandatory transfers from juvenile court.<sup>423</sup> He appealed, arguing that the statutorily mandated transfer of juveniles charged with armed robberies violated both due process and equal protection.<sup>424</sup> The Ohio Supreme Court dispensed with the former claim because both the federal and state constitutional guarantees of due process had been adopted prior to the creation of the juvenile court system; those provisions, therefore, could not “have created a substantive right to a specific juvenile-court proceeding.”<sup>425</sup> A dissenting justice, however, noted that the Supreme Court had sometimes refused to rely on history and tradition when determining the scope of substantive due process rights.<sup>426</sup> The majority agreed, but noted that such departures were limited to cases presenting privacy or liberty claims as they related to marriage, family, procreation, bodily integrity, and private sexual intimacy between consenting adults.<sup>427</sup> The court then upheld the mandatory transfer over the defendant’s equal protection claim, reasoning it was “rationally related to the legitimate governmental purpose of increased punishments for serious juvenile offenders.”<sup>428</sup>

## V. CONCLUSION

One of the more surprising results of this study, at least to its author, was just how few state court decisions relied on *Lawrence*. Indeed, only 441 cases—both civil and criminal, published and unpublished alike—even cited *Lawrence* between the date it was decided and the end of 2021.

421. *Id.*

422. 83 N.E.3d 883, 887 (Ohio 2017).

423. *Id.* at 888.

424. *Id.* at 888-89.

425. *Id.* at 891 (“Therefore, an amenability hearing [in juvenile court] cannot be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” (internal citations omitted)).

426. *Id.* at 916 (O’Neill, J., dissenting).

427. *Id.* at 891 (“Importantly, the [C]ourt has been far more skeptical of creating new rights based on substantive due process in criminal-procedure cases.”).

428. *Id.* at 896.

In contrast, Westlaw's KeyCite feature indicates that 1,124 state court cases cited *Roe v. Wade* during the first twenty years after it was decided. The relatively low number of citations to *Lawrence* in state courts adds long-term validity to the observations of those who previously noted *Lawrence*'s comparatively limited impact in the first decade after it was decided.<sup>429</sup>

A second salient finding from this study is that judicial demographic characteristics were, for the most part, not significantly related to how judges treated *Lawrence*. The sex of a judge approached (but just missed) statistical significance at the 0.05 alpha level such that female judges were nearly 2.5 times more likely to apply *Lawrence* expansively than their male counterparts.

The only salient extra-legal factor to rise to the level of statistical significance concerns the geographic region in which cases were decided. Across all types of civil and criminal cases, state courts in the South, Midwest, and West applied *Lawrence* more narrowly than state courts in the Northeast. The differences in the ways that courts in the Northeast and the South treated the precedent were particularly pronounced as Tables 5 and 9 both illustrate. I discussed the potential reasons for this geographical divide in the 2023 article analyzing the civil cases in this study.<sup>430</sup> Before presenting some final thoughts, it is worthwhile to reiterate the key qualitative results with an eye toward what they might portend for the future.

#### A. Salient Findings from Qualitative Analyses of Case Categories

##### 1. Laws Targeting Sodomy, Fornication, Adultery, and Prostitution

*Lawrence* provided constitutional protection to noncommercial sexual activity that occurs in private between consenting adults. A handful of courts extended *Lawrence*'s holding to invalidate criminal laws against fornication and adultery, although the scant number of decisions doing so over the past twenty years suggests that authorities have largely abandoned prosecution of these offenses.<sup>431</sup>

429. Johnathan M. Black, *Sexual Privacy After Lawrence v. Texas*, 10 GEO. J. GENDER & L. 297, 330 (2009); Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1237 (2007); Justin Reinheimer, Note, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 505 (2008); Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TUL. J.L. & SEXUALITY 53, 82 (2017).

430. See Fradella, *supra* note 1, at 105-08.

431. See *supra* notes 61-103 and accompanying text.



*Lawrence* specifically limited its holding with the following language: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”<sup>432</sup> It should come as no surprise, then, that judges have overwhelmingly refused to extend *Lawrence* in cases with facts that fall within the ambit of one of these specific exclusions. In fact, sodomy laws that remain “on the books” continue to be criminally enforced when applied to acts of bestiality, prostitution, and those that occur in public,<sup>433</sup> as well as to related inchoate offenses, such as solicitation to commit sodomy under circumstances implicating one of *Lawrence*’s exclusions.<sup>434</sup> Notably, the definition of what constitutes “in public” is broad, reaching consensual activity that occurs outdoors in remote areas where discovery by third parties is theoretically possible, albeit unlikely, as well as sex that occurs in inmates’ cells in correctional institutions.<sup>435</sup>

## 2. Obscenity, Pornography, and the Sale of Adult-Oriented Materials

Defendants who attempted to extend *Lawrence* to the protection of child pornography possession universally failed in convincing judges to do so. And although the possession of pornography involving adults is constitutionally protected, appellate courts give trial court judges some latitude to consider what is depicted in such pornography when imposing sentences for other offenses.<sup>436</sup>

Courts are divided, however, on whether *Lawrence* should invalidate laws banning the sale of sex toys and related adult materials. Some courts interpreted the case as offering protection for such sales, reasoning that the government cannot constitutionally intrude into the privacy of sexual behaviors during which such materials might be used; other courts hold that because *Lawrence* offers no protection to any commercial activities, its holding does not reach the sale of adult-related goods.<sup>437</sup> But because such devices can be used in private, the former interpretation better aligns with *Lawrence*’s central holding.

---

432. *Lawrence v. Texas*, 539 U.S.558, 578 (2003).

433. *See supra* notes 64-67 and accompanying text.

434. *See supra* notes 71-75 and accompanying text.

435. *See supra* notes 69-70 and accompanying text.

436. *See supra* notes 114-117 and accompanying text.

437. *See supra* notes 118-131 and accompanying text.

### 3. Sexual Assault and Statutory Rape

Courts unanimously agreed that *Lawrence* does not shield criminal liability for any sexual acts to which all participants did not willingly consent. That, however, did not stop those accused of sexual assaults from trying to make such arguments in vain. Still, some courts found that *Lawrence* limits the types of arguments that prosecutors can make during sexual assault trials. Specifically, testimony about the particular proclivities of a criminal defendant may be improper if it reveals details about constitutionally protected sexual activities.<sup>438</sup>

Judges similarly enforced sex offenses whenever the activities involved a minor under the age of consent.<sup>439</sup> Indeed, no court overturned a statutory rape law or conviction on the basis that *Lawrence* somehow protected the activity in question. Importantly, although *Kansas v. Limon* is cited as an example of the ways in which enforcement of statutory rape laws disproportionately burdens LGBTQ+ youth, *Limon* appears to have been an anomaly, as no other cases revealed such a blatantly discriminatory, narrow application of *Lawrence* to sodomy or statutory rape cases involving minors.<sup>440</sup>

Finally, most courts uphold laws that criminalize private sexual activity between adults when a power imbalance calls into question whether consent was truly voluntarily granted. Thus, most defendants fail when asserting that *Lawrence* invalidates statutory factors vitiating consent, including unconsciousness, intoxication, cognitive deficits, and certain relationships such as between teachers and their students, health care providers and their patients, and spiritual leaders and their congregants. Still, in a handful of isolated cases, judges curiously extended *Lawrence*'s scope to encompass private sexual activity between persons over the applicable age of consent even when the nature of their relationship called into question whether consent was granted as a function of coercion or undue influence.<sup>441</sup> Courts doing so, however, render anomalous decisions that not only deviate from the overwhelming majority of cases in other jurisdictions, but also from precedents within the same state.<sup>442</sup>

---

438. See *supra* notes 134-172 and accompanying text.

439. See *supra* notes 174-212 and accompanying text.

440. See *id.*

441. See *supra* notes 214-240 and accompanying text.

442. Compare *Paschal v. State*, 388 S.W.3d 429, 434 (Ark. 2012) (setting aside a teacher's conviction for sex with a student over the age of consent), with *Talbert v. State*, 239 S.W.3d 504, 511 (Ark. 2006) (upholding a pastor's conviction for sex with a congregant over the age of consent).

#### 4. Privacy and Other Sex Crimes

Contrary to some bloviated prognostications that *Lawrence* would usher an end to a range of sex crimes that have strong, long-standing moral foundations, no courts have relied on *Lawrence* to invalidate laws against bigamy,<sup>443</sup> incest,<sup>444</sup> and lewdness/public sexual indecency.<sup>445</sup> That being said, some statutes criminalizing lewd or lascivious conduct give rise to vagueness concerns that could be addressed through careful legislative drafting.

By contrast, *Lawrence*'s vision of privacy in the sexual sphere led numerous courts to offer protection to those who are the victims of nonconsensual voyeurism or the knowing distribution of revenge porn despite constitutional challenges to laws criminalizing such conduct. That being said, third parties who receive intimate media and forward them to others without knowing the disclosure did not have the consent of the person depicted likely falls outside the scope of criminal liability.<sup>446</sup>

Similarly, laws criminalizing the knowing exposure to STIs have routinely withstood constitutional challenges, presuming they had a scienter requirement. Courts repeatedly found that *Lawrence* offers no protection for sexual conduct where consent may have been tainted by nondisclosure of a STI, primarily because *Lawrence* specifically excluded situations where persons might have been injured.<sup>447</sup>

#### 5. Post-Conviction Claims Filed by Sex Offenders

For the most part, *Lawrence* has not had any palpable impact on either the custodial sentences to which sex offenders were sentenced or the regulations under which they must live after being released from incarceration. Indeed, courts seemed loath to vacate the convictions of people who were convicted of sodomy for any actions that do not fit squarely within the confines of *Lawrence*. Thus, an overwhelming majority of people seeking to be removed from sex offender registries, for instance, were unsuccessful if their conduct involved violence, nonconsent, minors, or public acts that were not a product of police stings that targeted closeted gay men. Courts similarly upheld most probation or parole restrictions placed on sex offenders—even those that restricted dating and sexual activity that would normally be constitutionally

---

443. See *supra* notes 244-256 and accompanying text.

444. See *supra* notes 257-277 and accompanying text.

445. See *supra* notes 278-334 and accompanying text.

446. See *supra* notes 335-371 and accompanying text.

447. See *supra* notes 348-371 and accompanying text.

protected, provided they were rationally related to legitimate law enforcement efforts designed to prevent reoffending.<sup>448</sup>

### B. *Final Thoughts*

In 2011, law professor J. Kelly Strader concluded his thoughtful analysis of *Lawrence*'s limited impact on criminal law by distilling its holding to one that prohibits the criminalization of acts on the basis of majoritarian morality in the absence of additional harms.<sup>449</sup> The data from the present study support his view insofar as courts have used *Lawrence* to invalidate very few criminal laws or convictions other than those targeting fornication and adultery.<sup>450</sup> Often, criminal courts simply find *Lawrence* inapplicable without engaging in any analysis of the purported harmfulness of defendant's actions. Indeed, some judges went out of their way to give *Lawrence* such a narrow interpretation that they refused to invalidate sodomy laws or convictions if there were any bases to avoid doing so, such as when inmates masturbated or engaged in consensual sexual activities inside their prison cells.<sup>451</sup> By contrast, judges routinely interpreted *Lawrence* as requiring nothing more than any rational basis beyond the alleged immorality of the conduct in question in order to uphold criminal laws and convictions which, in turn, led to few, if any, changes in the ways that sex crimes—including prostitution, incest, bigamy, lewdness, public sexual indecency, sexual assault, statutory rape, voyeurism, revenge porn, and the knowing transmission of sexually transmitted diseases—and other criminal offenses are prosecuted, or the ways that sex offenders are treated.<sup>452</sup>

Law professor Carlos Ball wrote eloquently on the striking disparity between judicial hesitancy to make constitutional rulings on liberty grounds and judicial confidence in making constitutional rulings rooted in equality principles.<sup>453</sup> He attributed some of that disparity to how *Brown v. Board of Education* became one of the most celebrated U.S. Supreme Court decisions of all time,<sup>454</sup> whereas several due process precedents—especially *Lochner v. New York* and *Roe v. Wade*—were

448. See *supra* notes 372–405 and accompanying text.

449. Strader, *supra* note 196, at 106 (noting that “majoritarian morality will no longer justify the decision to send a person to jail”).

450. See *supra* notes 322–335 and accompanying text.

451. See *supra* note 330 and accompanying text.

452. See *supra* notes 356–368 and accompanying text.

453. Carlos A. Ball, *Why Liberty Judicial Review Is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011).

454. *Id.* at 4 (citing *Brown v. Bd. of Educ.*, Topeka, Kan., 347 U.S. 483 (1954)).

among the Court's more controversial decisions.<sup>455</sup> Ball also noted that equality review is often perceived as reinforcing democratic ideals, whereas liberty review is viewed as antidemocratic.<sup>456</sup> Although he went on to spend the rest of his article explaining why liberty review was just as constitutionally valid as equality review, the Court's retreat in *Dobbs* from *Lawrence*'s approach to liberty suggests that a majority of the justices who currently sit on the Court consider liberty review to be highly suspect. In fact, the majority told us so in no uncertain terms:

"Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing . . . ."

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution.<sup>457</sup>

To be sure, the Court in *Dobbs* did not declare substantive due process protections of liberty to be dead. But it clearly resituated such interests back into the realm of history and tradition in ways that *Lawrence* and *Obergefell* had largely eschewed. In light of this recoiling, it seems likely that judges will be more hesitant to give *Lawrence* an expansive substantive due process reading beyond its clear implications for limiting the criminalization of private sexual intimacy between consenting adults.<sup>458</sup>

---

455. *Id.* (citing *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating a law that prohibited bakers from working more than sixty hours per week on due process grounds); *Roe v. Wade*, 410 U.S. 113 (1973) (holding due process protects a woman's right to choose to have an abortion during the first trimester of pregnancy), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)).

456. *Id.* at 4-5.

457. *Dobbs*, 597 U.S. at 239 (internal citations omitted).

458. For instance, *Dobbs* presages that courts will not embrace Kevin Kennedy's suggestion that substantive due process should protect a right to "a life-sustaining climate" because that is "fundamental to a free and ordered society." Kevin Kennedy, *Watching the World Burn: Substantive Due Process and the Right to A Sustainable Climate*, 93 TEMP. L. REV. ONLINE 61, 62 (2021) (quoting *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248-50 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020)).