COMMENT: HEEDING THE EQUAL PROTECTION CLAUSE IN THE CASE OF *STATE V. LIMON* AND IN OTHER INSTANCES OF DISCRIMINATORY ROMEO AND JULIET STATUTES[*]

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I. INTRODUCTION

Matthew Limon, a developmentally disabled teenager, was recently sentenced to 206 months' imprisonment and sixty months' supervised release.[1] One might think that such a sentence - amounting to over seventeen years in prison—would be imposed only for acts such as murder, manslaughter, forcible rape, or child pornography.[2] Limon, however, had performed one uncompleted, consensual instance of oral sex on another boy who lived with him at a school for the developmentally disabled.[3] Because he was prosecuted under Kansas' criminal sodomy statute rather than the state's unlawful voluntary sexual relations statute (or "Romeo and Juliet" law, as it is known), he received a sentence approximately fifteen times greater than he would have if the younger child had been female. The penalty for heterosexual sodomy— which is the only kind that qualifies under the latter scheme—is much less severe than the penalty imposed for homosexual (i.e., "criminal") sodomy in Kansas.[4] Presumably, the Kansas legislature has

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[*] While this article was in press, the case discussed herein came down substantially as delineated in this article. *See* Epilogue, below, for this article's continuing validity in the states of Alabama, California, Virginia, and Texas.

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1. *See* State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd,* 122 P.3d 22 (Kan. 2005) [hereinafter *Limon*] (discussing facts of case and unpublished district court decision).

2. In another Kansas case, State v. Peterman, No. 90120, 2004 WL 1878301, at *1 (Kan. Ct. App. Aug. 20, 2004) (unpublished table disposition), the defendant was convicted at trial on "three counts of attempted rape, solicitation to commit rape, and solicitation to commit sexual exploitation of a child." *Id.* at *2. He was sentenced, however, to consecutive terms totaling only 144 months' imprisonment. *Id.* Peterman had solicited a stranger's help in procuring girls, twelve years old or younger, to photograph for publication on the internet while they were being penetrated with various sexual devices. *Id.* at *1. When the defendant arrived at the stranger's house to take a girl to a hotel room, he brought with him nude pictures of small children, "clips, dildos and vibrators in varying sizes, lotions, and a small bottle of a drug that would be put in a drink for the girl so she wouldn't know what was happening." *Id.* at *1-2. He was arrested at that time. *Id.* at *2.

3. *Limon*, 83 P.3d at 232. Limon stopped the act when asked to do so by the other child.

4. KAN. STAT. ANN. § 21-3501(2) (2003) defines sodomy, in pertinent part, as: "oral contact of the male genitalia," while KAN. STAT. ANN. § 21-3505(a)(2) (2003) delineates criminal sodomy as "sodomy with a child who is 14 or more years of age but less than 16 years of age." Section 21-3505 "is a severity level 3, person felony" carrying a maximum penalty of 228 months' imprisonment and post-release supervision. § 21-3505 (c); KAN. STAT. ANN. § 21-4704 (a), (e)(2) (Supp. 2003). KAN. STAT. ANN. § 21-3522 (2003) reads, in part: "Unlawful voluntary sexual relations is engaging in voluntary . . . sodomy . . . with a child who is 14 years of age but

deemed that heterosexual teens who are merely experimenting with their sexuality deserve a break from the harsh criminal punishments an adult would receive for taking advantage of a minor, while homosexual teens do not merit this same consideration.[5]

This comment will, in Part I, delineate the precedents and analytical background on which *State v. Limon* was based. Part II will demonstrate that equal protection requires, via *Lawrence v. Texas*,[6] that Limon be qualified for sentencing under the unlawful voluntary sexual relations scheme that was, until recently,[7] only available to heterosexual teenagers in Kansas.

II. PRECEDENTS AND BACKGROUND TO *STATE V. LIMON*

A. Lawrence v. Texas

Lawrence v. Texas overturned a Texas statute making it a crime for two persons of the same sex to engage in sexual conduct.[8] The Court decided the case - which involved two adult men engaging in sex in one of the men's bedrooms - by determining that the men "were free as adults to engage in the private conduct" under the Due Process Clause of the Fourteenth Amendment.[9] The Court held that Constitutionally-protected liberty[10] allows

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less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex." Unlike § 21-3505, unlawful voluntary sexual relations is only "a severity level 9, person felony," with a maximum sentence of fifteen months' imprisonment. §21-3522 (b)(2); KAN. STAT. ANN. § 21-4704(a) (Supp. 2003). Limon met the voluntariness, age, and exclusivity requirements but not the heterosexual requirement of the voluntary sexual relations statute. *Limon*, 83 P.3d at 232. In addition, because he was convicted for criminal sodomy rather than for unlawful voluntary sexual relations, Limon must register as a sex offender under the Kansas offender registration act. KAN. STAT. ANN. § 22-4902 (2004). Detailed registration requirements are delineated at KAN. STAT. ANN. § 22-4904 (2003). Among other now-public information is Limon's race, blood type, place of employment, any anticipated future residence, and "documentation of any treatment received for a mental abnormality or personality disorder of the offender." *Id.* § 4907(a)(8), (9), (11), (12). Limon must meet all of the registration requirements until at least ten years after his prison sentence expires, or until approximately 2027. KAN. STAT. ANN. §4906(b) (Supp. 2004).

5. The Kansas legislature seems to believe that teen sex acts between those close in age are less harmful than those same acts when engaged in by people further apart in age—except when the participants are of the same sex. It is difficult to verify this, however, through Kansas' legislative history. *See Limon*, 83 P.3d at 246 (Pierron, J., dissenting) ("[T]he legislative history appears to have nothing in support of the provision at issue.").

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

7. Although the law has been changed to include homosexual acts in the unlawful voluntary sexual relations statute, this article will proceed as if it has not, because the change occurred as the article was in press, and the arguments are still valid as posed against the four states in the Epilogue, below.

8. *Id.* at 578-79.

9. *Id.* at 564.

homosexual persons the right to express their sexuality overtly, which can be just "one element in a personal bond that is more enduring."[11] Noting that condemnations of homosexual conduct are shaped by religious beliefs, respect for the "traditional" family, and personal conceptions of what behaviors are acceptable, the Court concluded that these considerations still did not answer the question before it.[12]

A large part of the analysis in *Lawrence* was devoted to the reasons the Court chose to decide the case on substantive due process rather than on equal protection grounds.[13] The *Lawrence* Court acknowledged that, in *Romer v. Evans*,[14] it struck down legislation based on sexual orientation as inconsistent with the Equal Protection Clause.[15] The state constitutional amendment at issue in *Romer* explicitly deprived gays, lesbians, and bisexuals of the protection of state antidiscrimination laws.[16] The Court found the amendment to be motivated by animosity toward those groups and to have no rational relation to a legitimate governmental purpose.[17] Although it found *Romer* to be a tenable basis for deciding *Lawrence* on equal protection grounds, the Court chose instead to decide the case on substantive due process grounds for fear that prohibitions such as those in *Lawrence* could be enforced against homosexuals simply by prohibiting both homosexual and heterosexual conduct.[18] Because the Court viewed a substantive analysis as the only way to address both due process *and* equal protection concerns, it chose to proceed in that fashion so as to provide the greatest protection to homosexual persons.[19]

In closing, the majority offered several disclaimers about *Lawrence's* applicability to people other than adults acting consensually and in private.[20] Without specifying what the outcomes in other cases would be, the Court cautioned that *Lawrence* does not involve, among other situations, minors, those who may not be able to consent (or be able to do so easily), public acts, or formal governmental recognition of homosexual relationships.[21]

In her concurrence, Justice O'Connor found the statute unconstitutional in terms of equal protection, rather than substantive due process.[22] She asserted that "'a bare . . . desire to harm a politically unpopular group,'"[23] calls for "a

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10. *See generally* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21 (2003) for a thorough discussion of the "potentially revolutionary" favoritism in the opinion of the word "liberty" over "privacy."

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

12. *Id.* at 571.

13. *See infra* note 25.

14. Romer v. Evans, 517 U.S. 620 (1996).

15. *Lawrence*, 539 U.S. at 574.

16. *Romer*, 517 U.S. at 624.

17. *See id.* at 634, as discussed in *Lawrence*, 539 U.S. at 574.

18. *Lawrence,* 539 U.S. at 574-75.

19. *Id.* at 575.

20. *Id.* at 578.

21. *Id.*

22. *Id.* at 579 (O'Connor, J., concurring).

23. *Lawrence*, 539 U.S. at 580 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

more searching form of rational basis review"[24] even when such a grouping would normally not invoke heightened scrutiny.[25] Justice O'Connor persuasively argued that equal protection applied because the Texas statute treats the exact same acts differently based on the participants: the law made sodomy a crime only if engaged in by two people of the same sex.[26] Because those harmed by the law have a same-sex sexual orientation, she continued, the statute makes homosexuals unequal in terms of the law, branding them all as criminals.[27] Yet, "[m]oral disapproval of this group, like a bare desire to harm the group, . . . is insufficient to satisfy rational basis review under the Equal Protection Clause."[28] Classifications cannot be invented to disadvantage those burdened by the law.[29]

Justice Scalia, in his dissenting opinion in *Lawrence*, explicitly resisted the equal protection argument. In so doing, Justice Scalia drew a questionable distinction between the invalidation of antimiscegenation laws and of sodomy laws.[30] He argued that although in both cases only the race or sex of the *partner* was of concern (while the laws apply directly to *all* persons), heightened scrutiny was only appropriate in the case of antimiscegenation because those laws were "'designed to maintain White Supremacy.'"[31] As will become clear throughout this comment, heightened scrutiny is also appropriate for sodomy laws because they are designed to maintain heterosexual supremacy.

B. State v. Limon Timeline[32]

On February 28, 2000, Matthew Limon was charged in Kansas' Miami

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24. *Lawrence*, 539 U.S. at 580.

25. *Id.* at 579-80. Whether substantive due process or equal protection frames the analysis, three levels of scrutiny have traditionally been possible in reviewing laws under either clause. Strict scrutiny is applied when a suspect classification (*e.g.* race) or a fundamental right (e.g., privacy) is at stake. Here, the government must prove the law is necessary to achieve a compelling purpose. Intermediate scrutiny is used when classifications based on gender or legitimacy are involved. These laws will be upheld if they are substantially related to an important governmental purpose. The government usually has the burden of proof in this instance as well. Finally, minimal scrutiny (or "rational basis" scrutiny) is normally used for all other types of legislation. Such laws are upheld when rationally related to a legitimate governmental interest. The one challenging the law has the burden of proof in this last case. For a discussion of these levels of scrutiny as applied to *Lawrence*, *see* Justice O'Connor's concurrence, *id.* at 579-85.

26. *Id.* at 581-82 (citing TEX PENAL CODE ANN. §21.06 (a) (Vernon 2003)).

27. *Id.* at 581.

28. *Id.* at 582.

29. *Lawrence*, 539 U.S. at 583.

30. *See id.* at 600 (Scalia, J., dissenting).

31. *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967)).

32. The information compiled in this section was partially gleaned from the State of Kansas' judicial website, Kansas Judicial Branch, Case Inquiry System for the Kansas Appellate Courts, *available at* http://judicial.kscourts.org:7780/ (last visited Mar. 11, 2006), and *Timeline in Limon Sodomy Case*, ASSOCIATED PRESS NEWSWIRES, Sept. 4, 2004.

County District Court with one count of criminal sodomy, a felony.[33] Limon had just turned eighteen and the other boy had not quite reached fifteen[34] when the incident occurred. Limon got permission from the boy, then started to perform oral sex on the minor in their home.[35] When the boy asked Limon to stop, he did.[36] This was the only instance of sexual contact between the two boys.[37]

Limon was convicted on the sodomy count, and on August 24, 2000,[38] he was sentenced to over seventeen years' imprisonment plus five years' supervised release, and was required to register as a sex offender.[39] Limon received such a harsh sentence because he was prosecuted under Kansas' criminal sodomy statute rather than under the state's unlawful voluntary sexual relations statute.[40] The former encompasses any adult male who makes oral contact with the genitalia of a male child between fourteen and sixteen years of age.[41] The latter carries a much lighter potential punishment for voluntary sexual acts involving those fourteen through eighteen years old, including the acts described in Limon's case, but only if the participants are members of the opposite sex.[42]

Upon appeal, the intermediate Kansas court summarily affirmed Limon's sentence.[43] Soon thereafter, the Kansas Supreme Court denied the boy's petition for review.[44] Finally, the United States Supreme Court granted Limon's petition for certiorari to the Court of Appeals of Kansas.[45] The Court issued its opinion one day after its landmark *Lawrence* decision and in vacating the Kansas court's judgment, directed Kansas to consider Limon's case further "in light of *Lawrence v. Texas*."[46]

Back at the Kansas Court of Appeals, Limon continued to argue that the unlawful voluntary sexual relations statute[47]—or the "Romeo and Juliet" exception to the harsh penalties of the criminal sodomy law—is unconstitutional in its discrimination between heterosexual and homosexual

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33. *Timeline in Limon Sodomy Case*, *supra* note 32.

34. The conduct at issue occurred on February 16, 2000, one week after Limon's eighteenth birthday, and one month before the minor's fifteenth birthday. State v. Limon, 83 P.3d 229, 243 (Kan. Ct. App. 2004) (Pierron, J., dissenting), *rev'd*, 122 P.3d 22 (Kan. 2005). *See also* Arthur S. Leonard, Lawrence v. Texas *and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 199 (2004) (discussing the boys' ages at the time of the conduct).

35. Both boys resided at a school for developmentally disabled children. *Limon*, 83 P.3d at 232.

36. *Id.* at 243.

37. *See id.*

38. *Timeline in Limon sodomy case*, *supra* note 32.

39. *Limon*, 83 P.3d at 232; KAN. STAT. ANN. § 22-4902 (2004).

40. *See Limon*, 83 P.3d at 232-33.

41. KAN. STAT. ANN. § 21-3501(2) (2003), KAN. STAT. ANN. § 21-3505(a)(2) (2003).

42. KAN. STAT. ANN. § 21-3522 (2003).

43. State v. Limon, 41 P.3d 303 (Kan. Ct. App. 2002) (per curiam).

44. *See* Kansas Judicial Branch, *supra* note 32.

45. Limon v. Kansas, 539 U.S. 955 (2003) (mem).

46. *Id.* (citation omitted).

47. KAN. STAT. ANN. § 21-3522 (2003).

sodomy.[48] The Court of Appeals, however, "essentially interpreted Limon's case in the same way it did before *Lawrence*."[49] Although the court conceded that its previous decision had been based on *Bowers v. Hardwick*,[50] a precedent that was clearly overturned by *Lawrence*,[51] it again affirmed Limon's conviction.[52] The court decided that "the challenged classification has a rational basis," and that the statute does not discriminate on the basis of gender.[53] The court justified its disregard for *Lawrence* by noting that the present case involves a child, which makes it "factually distinguishable from Lawrence."[54] It also pointed out that Limon asserted an equal protection argument, not a substantive due process argument; the latter served as the official grounds upon which *Lawrence* was decided.[55]

The concurrence in *Limon* noted that the court never applied an equal protection analysis to the Romeo and Juliet exception simply because *Bowers* had foreclosed that tack when the case first navigated through the Kansas courts.[56] Nonetheless, Judge Malone agreed in the concurrence that because *Lawrence* was decided on due process grounds, Limon's "many persuasive arguments that the classification under section 21-3522 should not survive judicial scrutiny even under the rational basis test and therefore violates the federal Constitution's Equal Protection Clause" are incorrect.[57] Judge Malone called the penal disparity between a sodomy conviction and a conviction under the Romeo and Juliet exception "alarming," but he implicated Kansas' sentencing guidelines and not the statute itself.[58] He called on the legislature to "address the inequity suffered by Limon and others in his position."[59] In deferring to the legislature and judicial precedent, the concurrence seemed disappointed in declaring that the higher courts, including the United States Supreme Court, have not indicated that they would adopt Limon's position.[60]

The dissent saw that the underlying principles of *Lawrence* and that case's overruling of *Bowers* are applicable to Limon's case.[61] Judge Pierron also felt

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48. State v. Limon, 83 P.3d at 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

49. Shulamit H. Shvartsman, "*Romeo and Romeo*"*: An Examination of* Limon v. Kansas *in Light of* Lawrence v. Texas, 35 SETON HALL L. REV. 359, 383 (2004).

50. Bowers v. Hardwick, 478 U.S. 186 (1985) (*Bowers*, 478 U.S. 186, had "refused to confer a fundamental right to engage in homosexual conduct." *Limon*, 83 P.3d at 232.).

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

52. *Limon*, 83 P.3d at 232.

53. *Id.* at 235. (No mention was made at that time of Limon's argument that the statute discriminates on the basis of sexual orientation).

54. *Id.* at 234.

55. *Id.* at 235.

56. *Id.* at 241 (Malone, J., concurring).

57. *See Limon*, 83 P.3d at 243.

58. *Id.* at 242-243.

59. *Id.* at 243 (Kan. Ct. App. 2004).

60. *Limon*, 83 P.3d at 243.

61. *Id.* at 244 (Pierron, J., dissenting).

the need to point out the precedential value of *Lawrence* to the seemingly obtuse majority and concurrence: "The United States Supreme Court has directed us to reconsider this case in light of *Lawrence*. I presume it wishes us to apply those principles to our case as appropriate."[62] The dissent disagreed that *Lawrence*'s warning that the case did not involve minors meant that that case was inapposite to Limon's. Judge Pierron noted that *Lawrence*'s disclaimer served as notice that the decriminalization of consensual homosexual sex between adults did not extend to the decriminalization of sex with minors.[63] Limon, he continued, did not request a decriminalization of his conduct; he merely wanted his sentence to be in line with those of heterosexual teens.[64] The dissent concluded that the Romeo and Juliet law is a violation of the Due Process Clause "referenced in the *Lawrence* decision," and would have remanded Limon's case to the trial court for resentencing under that statute as constitutionally rewritten.[65]

After the Kansas Court of Appeals' second decision, Limon promptly appealed, once again, to the Kansas Supreme Court.[66] This time, the state Supreme Court decided to hear the case and scheduled a hearing for August 31, 2004.[67] As this article went to press, that decision was still pending.[68]

III. HEEDING THE EQUAL PROTECTION CLAUSE AS A DEFINITIVE RESOLUTION TO *STATE V. LIMON*

Many arguments can be and were made for either a reduction in Limon's sentence or for the sentence's constitutional invalidity. These include equal protection, substantive due process, cruel and unusual punishment, and other grounds.[69] This Part will delineate the most cogent of these, namely, that Kansas' unlawful voluntary sexual relations statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[70] Matthew Limon should receive the same benefit afforded to heterosexual Kansas teens and be resentenced to no more than

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62. *Limon*, 83 P.3d at 243.

63. *Id.* at 244.

64. *Id.*

65. *Id.* at 249.

66. Kansas Judicial Branch, *supra* note 32.

67. *Id.*

68. This article went to press on September 26, 2005. Since then, the case has been decided. *See* Epilogue, below.

69. *See Limon*, 83 P.3d at 233-240. *See also* Brief Amici Curiae of the Nat'l Ass'n of Soc. Workers and the Kan. Chapter of the Nat'l Ass'n of Soc. Workers in Support of Defendant/Appellant Matthew Limon, State v. Limon (Kan. heard August 31, 2004) (No. 85898); Brief of Amici Curiae Kan. Pub. Health Ass'n et al., State v. Limon (Kan. heard August 31, 2004) (No. 85898). Several law review articles also expound these arguments; many of their points are detailed *infra*.

70. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

fifteen months' imprisonment.[71] Because he has already been imprisoned for about five years,[72] Limon should immediately be released when the Kansas Supreme Court hands down its decision.

A. Lawrence's Breadth Supports an Equal Protection Analysis in Limon's Favor

Because the United States Supreme Court remanded Limon's case to the Court of Appeals of Kansas in light of its *Lawrence* decision,[73] any analysis of the merits of Limon's case should be considered by first examining *Lawrence*. One of many interesting aspects of *Lawrence* is that the Court took a very broad path in ruling on the case. Rather than deciding that the Equal Protection Clause was sufficient to determine the statute's constitutionality, the Court neglected this narrower ground and instead used a Due Process Clause analysis to be sure that *Bowers* would not survive its scrutiny and that *Romer* would be read expansively.[74] *Lawrence* "confirmed the view that antigay sentiment was no more a rational basis [for discriminatory treatment] under the Due Process Clause than it had been under the Equal Protection Clause,"[75] when it emphasized the importance of *Romer* and nullified *Bowers*. Had the Court struck down the Texas sodomy law on equal protection, rather than substantive due process grounds, it would have left most state sodomy laws—which do not explicitly discriminate between heterosexual and homosexual conduct—intact.[76] That approach would also have left *Bowers*—a clear discourse on homosexual inferiority—as a continuing precedent.[77]

Although the Court officially named substantive due process as the basis for its decision, the opinion is replete with language expressing the Court's

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71. Unlawful voluntary sexual relations is only "a severity level 9, person felony," with a maximum sentence of fifteen months' imprisonment. KAN. STAT. ANN., § 21-3522 (b)(2) (Supp. 2004), Kan. Stat. Ann. § 21-4704(a) (Supp. 2004).

72. *Timeline in Limon Sodomy Case*, *supra* note 32.

73. Limon v. Kansas, 539 U.S. 955 (2003) (mem).

74. *See* Shvartsman, *supra* note 49, at 373-74; *supra* notes 13-19 and accompanying text; William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1023-25, 1039 (2004) (describing how *Lawrence* offers a "jurisprudence of tolerance" meaning "that traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals"); *see also* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1148 (2004) ("Instead of relying on a narrow equal protection rationale to strike down laws of the four states that targeted gay sex, the Court dramatically and unexpectedly revived substantive due process to strike down the laws of all thirteen states with sodomy laws.").

75. Eskridge, *supra* note 74, at 1039. "The state cannot discriminate against gay people simply because of their sexual orientation; invoking 'morality' does not save such discrimination."

76. *See* A. Jean Thomas, *The Hard Edge of Kulturkampf: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707, 719 (2004), for discussions of which states employ sodomy laws, how those laws are enforced, and against whom they are directed.

77. Eskridge, *supra* note 74, at 1062.

deep "concern with the subordination of gays as a group, rather than just the liberty of individuals."[78] Despite the continuing validity of statutes banning consensual adult conduct in other situations such as prostitution and adultery, the law at issue in *Lawrence* seemed to be prompted by animosity toward the group burdened by the law. That the Texas statute was motivated by prejudice toward gays and lesbians is what moved the *Lawrence* Court to decisive action.[79] The sweeping language in which the Court berated antigay hatred as manifested through this country's laws firmly suggests that *Lawrence* was meant as a first step toward full equality for homosexual persons in all aspects of American jurisprudence.[80]

In addition to the breadth with which the *Lawrence* Court spoke, the opinion also explicitly linked due process and equal protection, which, in turn, bodes well for Matthew Limon. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[81] This was an extremely important strategy for the Court to use,[82] and one that highlights "an appreciation of the mutual reinforcement of equality and liberty principles [that] has been gradually increasing for some time in the Court's constitutional jurisprudence."[83] In blurring the line between substantive due process and equal protection analyses, *Lawrence* is an

78. Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1177 (2004).

79. *See id.* at 1178-79.

80. *See id.* at 1182-83.

> Lawrence, it appears, has a penumbra. There is a rule contained therein that is not stated in the opinion, but that will govern future cases. There are precedents for this kind of signal from the Court. A week after it decided *Brown v. Board of Education*, a case where the Court also faced considerable political resistance, it similarly remanded a case involving the exclusion of black people from opera performances in an amphitheater leased from the state. That case did not involve any issue that was discussed in the Brown opinion, but it soon became clear that the Brown Court meant more than it was saying. The broader upshot is that all antigay laws are now under suspicion. The severest ones are unconstitutional. The courts will not smash the great edifice of antigay law in the United States with a single judicial blow, and it would be foolish for them to try. But the edifice is crumbling.

(footnotes omitted). *See also* Linda Greenhouse, *Supreme Court Roundup: Justices Extend Decision On Gay Rights and Equality*, N.Y. TIMES, June 28, 2003, at A10, ("While Mr. Limon's challenge to the Kansas law was based on equal protection, and the majority opinion in the Texas case was based not on that constitutional ground but on due process, it was evidently sweeping enough to encompass equal protection cases as well.") (citing Matthew A. Coles). "It's an example of how much is now going to open up . . . When the court finds that gay relationships are protected by the Constitution, it's answering the equality questions as well." *Id.* (quoting Matthew A. Coles).

81. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

82. "The Lawrence Court's explicit recognition of the 'due process *right to demand respect* for conduct protected by the substantive guarantee of liberty' and of the way in which that right is linked to '[e]quality of treatment' was an obviously important doctrinal innovation." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1934 (2004) (footnotes omitted).

83. Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1134 (2004).

even stronger argument for Matthew Limon's release than it would have been had it spoken exclusively to liberty or privacy concerns.

B. Lawrence *Requires That the Law at Issue in* Limon *be Scrutinized Carefully.*

Both Lawrence and Limon sought to be punished the same as heterosexuals for comparable acts.[84] Lawrence won his case using due process, and Limon lost via equal protection.[85] *Lawrence*, however, provides strong support for Limon's cause. *Lawrence* seemed to have treated the expression of sexuality as a fundamental right in many ways, and it did so using a due process analysis. Simultaneously, though, *Lawrence* appears to have increased the standard of scrutiny required in equal protection cases involving the rights of homosexual people. This higher standard of scrutiny, coupled with the Court's insistence that gay persons no longer be officially derogated, culminates in a requirement that Matthew Limon be released from state custody.[86]

On its surface, *Lawrence* clearly does not use a traditional fundamental rights analysis. To adequately justify the decision though, resort to such an analysis may be required.[87] Several clues in the often-cryptic *Lawrence* opinion point to a newly-recognized fundamental right for homosexual "adults to engage in a noncommercial, consensual, sexual relationship in private, where their activity involves no injury to a person or harm to an institution (like marriage) the law protects."[88] The Court directed the reader through several of its precedents that confer fundamental rights, although not all of these rights were officially

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84. In other words, Lawrence did not want to be punished at all because heterosexuals are not punished in Texas for consensual adult sexual acts conducted in the privacy of the home. There is no heterosexually-defined statutory equivalent to TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) which reads, in pertinent part: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Limon, however, would still have been punished if his act had been a heterosexual one, but only for a maximum prison term of fifteen months. KAN. STAT. ANN. § 21-3522 (2003), KAN. STAT. ANN. § 21-4704(a) (Suppp. 2003).

85. Shvartsman, *supra* note 49, at 384.

86. Even without a heightened standard of review, Limon should still go free. By endorsing *Romer*, *Lawrence* suggests that if any statute "has the effect of encouraging prejudice against gay people, it will diminish the weight that is given to the state's purposes when the Court balances those purposes against the burden the law imposes." Koppelman, *supra* note 78, at 1176.

87. The author thanks Robert Lipkin for his articulation of this idea.

88. Carpenter, *supra* note 74, at 1153. Alternatively, at least one scholar has argued that no new fundamental right was created, but that *Lawrence* offers even more freedom to engage in such acts than a fundamental rights analysis would provide via the Court's characterization of the issue as one invoking liberty interests. "Until *Lawrence*, every unenumerated rights case had to establish that the liberty at issue was 'fundamental,' as opposed to a mere liberty interest . . . In other words, with liberty as the baseline, the majority places the onus on the government to justify its statutory restriction." Barnett, *supra* note 10, at 35 (emphasis added).

described as fundamental at the time each case was decided.[89] The Court then connected this line of cases to the Texas statute in question[90] and concluded that the law is invalid.[91]

The *Lawrence* Court began its journey through substantive due process cases that have confirmed a fundamental right to various liberties with *Griswold v. Connecticut*.[92] *Griswold* was described as offering protection for the right to privacy in choosing to use contraceptives, although the Court had emphasized the marriage relationship as well as the protected space of the *marital* bedroom in doing so.[93] Next, *Eisenstadt v. Baird*[94] extended the right to use contraception to unmarried persons via the Equal Protection Clause.[95] Justice Kennedy, in writing the *Lawrence* opinion, also said that the *Eisenstadt* "Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights."[96] The *Lawrence* opinion described *Griswold* and *Eisenstadt* as providing background material for the decision in *Roe v. Wade*.[97] There, women's rights to abortions were secured through substantive due process.[98] In reading the *Lawrence* Court's description of the right protected in *Roe*, one can sense the expansive way in which the Court is prepared to describe Lawrence's due process rights:

> The [*Roe*] Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.[99]

The expansion of reproductive rights continued in *Carey v. Population Services Int'l*,[100] where the Court invalidated a law forbidding sale and distribution of contraceptives to those less than sixteen years of age.[101]

The *Lawrence* Court then discussed its decision in *Bowers v. Hardwick*.[102] There, the Court had upheld a state statute that criminalized sodomy.[103] Justice Kennedy noted that the *Bowers* majority framed the issue as whether homosexuals have a fundamental right to engage in sodomy.[104] He then

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89. Carpenter, *supra* note 74, at 1155 -56.
90. TEX. PENAL CODE ANN. § 21.06 (Vernon 2003).
91. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).
92. 381 U.S. 479 (1965).
93. *Lawrence*, 539 U.S. at 564-565.
94. 405 U.S. 438 (1972).
95. *Lawrence*, 539 U.S. at 565.
96. *Id.*
97. 410 U.S. 113 (1973).
98. *Id.*; *Lawrence*, 539 U.S. at 565.
99. *Lawrence*, 539 U.S. at 565.
100. 431 U.S. 678 (1977).
101. *Lawrence*, 539 U.S. at 566.
102. 478 U.S. 186 (1986).
103. *Id.* at 196.
104. *Lawrence*, 539 U.S. at 566.

promptly reframed the issue as "touching upon the most private human conduct, sexual behavior."[105] *Lawrence* said that because homosexual conduct and relationships are "within the liberty of persons to choose," states should not "define the meaning of the relationship or . . . set its boundaries absent injury to a person."[106]

After listing a host of reasons why the *Bowers* decision was unsound, *Lawrence* announced that "[t]wo principal cases decided after *Bowers* cast its holding into even more doubt."[107] Again, the feel of the Court's discussion of *Planned Parenthood of Southeastern Pa. v. Casey*[108] foretold the extensive way in which the Court was going to interpret the right then at stake:

> [T]he [*Casey*] Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[109]

That *Bowers* would deny homosexuals autonomy for these purposes was unacceptable to the *Lawrence* Court.[110]

Finally, Justice Kennedy reviewed *Romer v. Evans.*[111] As discussed above,[112] this case invalidated an amendment to a state constitution which would have specifically deprived homosexuals and bisexuals of protection under state antidiscrimination laws.[113] The amendment was thought to be drafted specifically to hurt those affected by it.[114] The *Lawrence* Court declined the petitioners' alternative argument in the case—that *Romer* provides a way to strike down the Texas statute—solely to ensure that it could explicitly address (and overrule) *Bowers.*[115]

The background cases to *Lawrence* involve fundamental sexual autonomy rights, even if their text does not always specifically explicate this. The way in

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105. *Id.* at 567.
106. *Id.* at 567.
107. *Id.* at 573.
108. 505 U.S. 833 (1992).
109. *Lawrence*, 539 U.S. at 573-74 (internal citations omitted).
110. *Id.* at 574.
111. 517 U.S. 620 (1996).
112. *See supra* notes 14-17 and accompanying text.
113. *See Lawrence*, 539 U.S. at 574.
114. *Id.* at 574.
115. *Lawrence,* 539 U.S. at 574-75.

which the Court discussed these cases reveals that they were considered to have described fundamental rights and that they were used as the bases upon which subsequent cases were decided, including *Lawrence* for that very reason.[116] The Court explained that the cases are interrelated, that they should be expanded, and that a fundamental liberty to engage in sexual conduct exists for homosexuals as well as for heterosexuals.[117] *Lawrence* finally acknowledged "the relation of gay life to the long-protected and traditional rights to family life and privacy."[118] Although the phrase "fundamental right" was not used in the *Lawrence* opinion, the Court clearly implied that Lawrence's right to engage in consensual sex was fundamental.[119]

In addition to securing a fundamental right for homosexuals to express their personal relationships and sexuality, *Lawrence* supports a higher than ordinary standard of scrutiny in cases, such as Matthew Limon's, that are decided on equal protection grounds.[120] Although *Lawrence* was a due process case while Limon's strongest argument is equal protection, the United States Supreme Court did remand Limon's case for the Kansas Court of Appeals to consider it in terms of its *Lawrence* decision.[121] This is a likely consequence of the fact that six of the United States Supreme Court Justices at the time of the *Lawrence* decision were sympathetic to the equal protection argument concerning sexual orientation discrimination that Justice O'Connor made in her concurrence.[122] That the *Lawrence* Court wrote in such a broad fashion about rights that are clearly fundamental calls for Kansas to use a heightened standard of scrutiny in Limon's case.[123] By linking its substantive due process analysis to equal protection concerns, the *Lawrence* Court demonstrated that

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116. Hunter, *supra* note 83, at 1117.

117. Carpenter, *supra* note 74, at 1156.

118. *Id.* at 1167.

119. Various commentators agree that this is the case, including, *e.g.*, Stephanie Francis Ward, *Avoiding* Lawrence, A.B.A.J., June 2004, at 16 (quoting District of Columbia lawyer William H. Hohengarten). *Cf.* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 n.82 (2004) ("[T]he majority's failure to specify a fundamental right does not imply the use of rational basis review[.]"). An alternative way to reach the ultimate holding in *Lawrence*—that the Texas statute is unconstitutional—was offered by the Institute for Justice. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (Kan. heard August 31, 2004) (No. 02-102). It persuasively reasoned that such determinations should be viewed through the lens of limits on governmental power rather than primarily in terms of which affirmative rights are fundamental. *Id.*

120. "[T]he Court never stated that people have a 'fundamental right' to engage in gay sex, and yet the Court put the state to a stricter burden of justification than would normally be required for a . . . case that does not involve a 'fundamental right.'" Leonard, *supra* note 34, at 209 (footnote omitted).

121. Limon v. Kansas, 539 U.S. 955 (2003) (mem).

122. Edward Stein, *Introducing* Lawrence v. Texas: *Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 286 (2004).

123. "[T]he Supreme Court's action of remanding certainly seems to signal that the post-*Bowers* equal protection analysis—assuming that anti-gay discrimination merits no heightened scrutiny in equal protection cases—is invalid under Lawrence." Leonard, *supra* note 34, at 201.

the fundamental right of *Lawrence* also demands heightened scrutiny when it is considered in an equal protection context.

Lawrence's fortification of *Romer* is also a direct call for a more heightened standard of review in Limon's case, because *Romer* invalidated a law that discriminated on the basis of sexual orientation and sexual conduct under an equal protection analysis.[124] *Romer* "announced a broad anti-caste or class principle, rendering sexual orientation classification suspect."[125] This is exactly the type of analysis for which Limon's case calls. Justice O'Connor's equal protection argument in the *Lawrence* concurrence demanded "a more searching" review[126] when a desire to harm an unpopular group motivates discrimination.[127] Because the majority supported Justice O'Connor's argument (although it wished to judge the case on more expansive grounds), and expanded *Romer*,[128] *Lawrence* and *Romer* should be used to invoke heightened scrutiny for laws, such as the one at issue in *Limon*, that classify people based on their sexual orientation.[129]

Even if the Supreme Court's lack of explicitness in using a "heightened standard of review" in "fundamental rights" cases can be used against Limon, he can still benefit from a raised standard of review because he is being sentenced based on his sexual preference. "In cases where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment."[130] The Kansas Supreme Court may not view Limon as being deprived of liberty because he is not free to have sex with a minor. It may be convinced, however, that he is "almost" deprived of a liberty interest because he does clearly have a right to express himself as a gay person, and is only requesting a sentence equal to one a heterosexual would receive for having sex with a minor. In the same sense, the Court might not see homosexuality as constituting a suspect class, though it could consider that this class has been treated as at least "almost" suspect in the United States Supreme Court's decisions. *Lawrence*, alone, calls for heightened scrutiny for a fundamental right in Limon's case, but, if the Kansas Supreme Court is not convinced of this, it should still grant Limon his requested relief. The minor in this case agreed to the act, the single incident occurred in the boys' home, and Limon suffers

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124. Romer v. Evans, 517 U.S. 620 (1996).

125. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION 714 (Thompson West 2004) (footnote omitted).

126. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

127. *Id.* (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); *see supra* text accompanying notes 22-29.

128. *See supra* text accompanying notes 16-17.

129. Stein, *supra* note 122, at 282-83.

130. Hunter, *supra* note 83, at 1135.

from a developmental disability.[131] His "almost" suspect class and "almost" deprivation of a liberty interest, coupled with the consequences he has already faced for his relatively benign conduct, are sufficient grounds for his release.

Even without a heightened standard of review, Limon should still go free. By endorsing *Romer*, *Lawrence* suggests that if any statute "has the *effect* of encouraging prejudice against gay people, it will diminish the weight that is given to the state's purposes when the Court balances those purposes against the burden the law imposes."[132]

C. Reactions to Limon *in terms of* Lawrence

Various commentators agree that "*Lawrence* and its associated jurisprudence require that the sentencing disparity" in *Limon* be overturned.[133] Kansas' "Romeo and Juliet" exception to the heavy sentences otherwise required for sex with minors cannot be limited to heterosexual acts. This is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.[134] Not only does *Lawrence* provide the background for striking down the Kansas statute, the law at issue in *Lawrence* was arguably less offensive to equal gay citizenship than the Kansas law.[135] While the petitioners in *Lawrence* were only jailed for one night,[136] Limon received a sentence amounting to over seventeen years in jail.[137]

Eskridge notes that several policy implications call for the invalidation of the unlawful voluntary sexual relations statute.[138] The discrimination the statute requires is fairly new, so invalidating the law will not disrupt any traditional values encompassed by treating homosexual teenagers as less worthy of lenient treatment than heterosexuals.[139] He also points out that nullifying the statute will not raise political stakes enough to make the task unworthy of the court's time.[140] Eskridge finds it "hard to imagine that even a fundamentalist Christian would find his identity implicated in maintaining this discrimination to the same extent that his identity is implicated in maintaining the same-sex marriage bar."[141] Another reason to put an end to the intense disparity of treatment between homosexual and heterosexual teens is the relatively small controversy the law's invalidation would likely produce.

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131. State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

132. Koppelman, *supra* note 78, at 1176.

133. Eskridge, *supra* note 74, at 1094.

134. *Id.* "Like Kansas, a lot of states exempt teenager-teenager sex from their sex-with-minors laws. Few states, however, limit their exemptions to straights only. So this is a novel and still-rare discrimination against gay people." (footnote omitted).

135. *See id.* at 1094-95.

136. Lawrence v. Texas, 539 U.S. 558, 563 (2003).

137. State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

138. Eskridge, *supra* note 74, at 1100; KAN. STAT. ANN. § 21-3522 (b)(2) (Supp. 2003).

139. Eskridge, *supra* note 74, at 1100.

140. Eskridge, *supra* note 74, at 1095.

141. *Id.*

Finally, Eskridge explains that the differentially applied legislation is unconstitutional because it cuts against rules prohibiting class-based legislation.[142]

Similarly, Koppelman views the upshot of *Lawrence* to be that "[i]f a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval."[143] He concludes that "*Lawrence* should be enough to get Limon out of jail. The singling out of gay youth for such remarkably harsh treatment would seem to pose a severe equal protection problem. Kansas must treat same-sex and opposite-sex statutory rape on equal terms."[144]

Shvartsman realizes that *Lawrence* concluded that homosexuality can no longer be a crime on its own.[145] "As a result, homosexual relations, even teenage relations, should not be subject to harsher penalties."[146]

The Kansas court system has had a much different reaction to its *Lawrence* precedent. In fact, it had not reacted to it much at all. The Court of Appeals of Kansas wrote that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[147] This reasoning is terribly flawed for several reasons.

First, as discussed above, *Limon* does appear to involve fundamental rights and does discriminate along rather suspect lines.[148] Because this is true, there needs to be more than just a rational relationship between the government's goal and the highly disparate effect on heterosexuals and homosexuals that the goal produces.[149] After *Lawrence*, Kansas must articulate a compelling reason to discriminate against homosexuals. Second, the reasons the court offers for Kansas' much harsher treatment of gay teens are not even rational, much less compelling.

The primary reason the court speculates that the Kansas legislature could have enacted section 21-3522[150] is "to prevent the gradual deterioration of the sexual morality approved by a majority of Kansans."[151] The statute is thought to "encourage and preserve the traditional sexual mores of society."[152] In other words, Kansas seems to be saying "gays are immoral, so we are going to

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142. *Id.* at 1100.
143. Koppelman, *supra* note 78, at 1180.
144. *Id.* at 1181 (footnotes omitted).
145. Shvartsman, *supra* note 49, at 397.
146. *Id.*
147. State v. Limon, 83 P.3d 229, 233-34 (Kan. Ct. App. 2004).
148. *See supra* Part III. B.
149. *See supra* note 25 for a discussion of standards of review in equal protection cases.
150. KAN. STAT. ANN. § 21-3522 (b)(2) (Supp. 2003).
151. *Limon*, 83 P. 3d at 236.
152. *Id.*

punish them more severely than heterosexuals." The court is likely correct in guessing that conservative morality is what prompted the legislature to enact special protections only for heterosexuals. However, that action is clearly illegal after *Lawrence*.

Because the *Lawrence* majority approved the concurrence's equal protection analysis,[153] it should be heeded in Limon's case.[154] In her concurrence, Justice O'Connor explicitly stated that moral disapproval is not a sufficient justification to treat heterosexual and homosexual sodomy differently, even under a rational basis standard.[155] "[T]he Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.'[156] Disadvantages cannot be imposed when based on "moral" animus toward homosexuals, even if the legislature insists that it is the conduct, and not the actors, that is being targeted.[157] Kansas' purported moral interest is insufficient to trump Limon's fundamental right to be treated equally.[158]

Related to its moral reasoning, the Court of Appeals of Kansas also said that the unlawful voluntary sexual relations statute is justified because homosexual sodomy "could disturb the traditional sexual development of children."[159] "[T]raditional sexual mores have played a significant role in the sexual development of children. During early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity."[160]

Despite the court's fear that gay and lesbian encounters will transform heterosexuals into homosexuals, "[a]ccording to current studies and professional understanding, a person's sexual orientation is already settled by the time he or she turns 14, which is when the Romeo and Juliet law first applies."[161] Moreover, a person's sexual *orientation* is not determined by that person's sexual *conduct*.[162] Furthermore, even explicit efforts to change sexual orientation have been shown to be ineffective.[163] Homosexual activity is not

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153. Some agree that an equal protection analysis would have made *Lawrence* a much more plausible opinion. *See*, *e.g.*, Lund & McGinnis, *supra* note 119, at 1573-74 (discussing Justice O'Connor's *Lawrence* analysis).

154. *See supra* text accompanying notes 18-19, and 80.

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

156. *Id.*, *Id.,* at 583 (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)).

157. *See Romer*, 517 U.S. at 634.

158. *See* Carpenter, *supra* note 74, at 1158.

159. State v. Limon, 83 P.3d 229, 236 (Kan. Ct. App. 2004).

160. *Id.*

161. Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon at 5, State v. Limon (Kan. heard August 31, 2004) (No. 85898) (citing numerous references).

162. Brief Amici Curiae of the Nat'l Ass'n of Social Workers and the Kansas Chapter of the Nat'l Ass'n of Social Workers in Support of Defendant/Appellant Matthew Limon, *supra* note 161, at 6 (citing numerous references).

163. *Id.* at 7. Various sources show that homosexuality is normal and immutable. *See, e.g.*, DEAN HAMER & PETER COPELAND, THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR (1994); BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999).

innately harmful and participation therein—whether forced or voluntary—will not transform a heterosexual into a homosexual.[164] Kansas' lack of evidence to support its contention that the unlawful voluntary sexual relations statute helps keep straights straight is conspicuous.[165]

Another claimed rational basis for section 21-3522's[166] discrimination is the prevention of sexually transmitted diseases ("STDs").[167] Again, without citing any support for the contention, the Court of Appeals of Kansas asserted that "certain health risks are more generally associated with homosexual activity than with heterosexual activity."[168]

The connection between the classification the Romeo and Juliet law draws and the transmission of STDs is non-existent.[169] The statute is severely under-inclusive as a means to prevent infections since heterosexual vaginal intercourse is the leading cause of Human Immunodeficiency Virus transmission ("HIV").[170] Also, "[t]he risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals,"[171] and "the sheer number of heterosexual couples engaging in [anal intercourse] far outnumber the total population of men who have sex with men."[172] The exception is also exceedingly under-inclusive because it does not include a break in criminal penalties for two males engaging in oral sex, which is an almost impossible route of STD transmission[173] and was the exact fact pattern in *Limon*.[174] The same is true of two women engaging in cunnilingus.[175] The statute also manages to be both under- and over-inclusive in that it does not distinguish between those who practice safer sex (e.g., by use of condoms) and those who have unprotected sex; it also does not distinguish between those

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164. Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon *supra* note 161 at 8.

165. *Id.* at 5; *see Limon*, 83 P.3d at 236.

166. KAN. STAT. ANN. § 21-3522 (b)(2) (Supp. 2003).

167. *Limon*, 83 P.3d at 237.

168. *Id.* "[T]he Kansas Court of Appeals never cited any medical literature to support its claim, which suggests that the court was not relying on empirical evidence." Thomas, *supra* note 76, at 732.

169. Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon *supra* note 161 at 6.

170. *Id.* at 7 (citing sources).

171. *Id.* at 9.

172. Pamela Bean, *Containing the Spread of HIV Infection Among High-Risk Groups*, 21 AM. CLINICAL LAB. 19 (2002).

173. Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon *supra* note 161 at 9-10.

174. State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd* 122 P.3d 22 (Kan. 2005).

175. Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon *supra* note 161, at 10.

who are actually suffering from an STD and those who are not.[176]

An additional way in which Kansas claims its statute has a rational basis is by invoking its purported protection of "traditional sexual mores concerning marriage and procreation."[177] Homosexuality does not produce children, so only heterosexual teens are said to deserve a break from severe criminal punishments for sex acts.[178]

The reasoning that section 21-3522 is meant to encourage family relationships is utterly unsound. The statute is one defining criminal conduct,[179] not one that provides benefits to anyone, including heterosexual teens. All those who engage in the defined conduct are presumptively punished, therefore, by definition, none of the involved behavior is promoted by the state.[180] Moreover, none of the criminals are forced to marry or otherwise start families with their victims upon completion of their sentences.

Similar to the promotion-of-family argument is the assertion that the statute is rational because those who impregnate their victims should be released from custody earlier than those who do not.[181] "The legislature could well have concluded that incarcerating the young adult parent for a long period would be counterproductive to the requirement that a parent has a duty to provide support to his or her minor child."[182] Because "same-sex relationships do not generally lead to unwanted pregnancies," the argument goes, homosexual offenders should not be released as early as heterosexual criminals.[183]

Again, section 21-3522 is a *criminal* statute meant to prevent—not to encourage—the behavior defined therein.[184] The thought that statutory rape is *less* harmful if the younger teen becomes pregnant goes beyond irrationality to absurdity.[185] Furthermore, the statute encompasses both vaginal intercourse and heterosexual oral sex, but it excludes homosexual oral sex.[186] Kansas cannot claim the statute is meant to promote child caretaking when the law includes oral sex engaged in by those of the opposite sex, an act that does not lead to pregnancies (even when engaged in by heterosexuals).

The justifications that the State of Kansas offered in defense of its unlawful

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176. *Limon*, 83 P.3d at 11-12.

177. *Id.* at 237.

178. *Id.*

179. KAN. STAT. ANN. § 21-3522 (b)(2) (Supp. 2003).

180. *See* Brief Amici Curiae of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon at 4-5, State v. Limon, No. 85898 (Kan. heard August 31, 2004) (No. 85898).

181. *See Limon*, 83 P.3d at 237.

182. *Id.*

183. *Id.*

184. KAN. STAT. ANN. § 21-3522 (2003).

185. *See* Koppelman, *supra* note 78, at 1181 n.53.

186. "Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy . . . and the child and the offender are . . . members of the opposite sex." KAN. STAT. ANN. § 21-3522 (a) (Supp. 2003). "Sodomy" is defined, in pertinent part, as: "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia." KAN. STAT. ANN. § 21-3501(2) (Supp. 2003).

voluntary sexual relations statute were plainly irrational. The promotion of morality, traditional sexual development, public health, marriage, and responsible parenthood cannot be accomplished through discrimination against homosexuals as a class. No rational factor has been advanced that can legitimately distinguish between heterosexual and homosexual acts in this context, so Limon deserves the equal protection of Kansas' laws. Moreover, the state should be put to an even higher standard than mere rationality in Limon's case, which involves fundamental rights and a suspect class.

IV. CONCLUSION

"Laws that single out gay teenagers for special criminal sanctions legitimize other forms of discrimination against gay teenagers and contribute to pervasive social prejudice that has severe psychological consequences for all gay teenagers, whether or not they engage in the prohibited conduct."[187] In addition to triggering numerous public policy concerns, Kansas' actions in Limon's case have been plainly illegal.

Under the United States Constitution's Equal Protection Clause of the Fourteenth Amendment, Limon should immediately be released from prison. Matthew Limon has already been incarcerated approximately four times as long as he would have if he had committed the same act as a heterosexual rather than as a gay man. *Lawrence v. Texas* spoke out against blatant animosity toward homosexuals as manifested through law. Although that decision was superficially only decided in terms of substantive due process, it also prohibits discrimination against gays and lesbians in an equal protection context. The bare desire to create or maintain heterosexual supremacy, in any form, is no longer countenanced as a valid justification for any law.

The fundamental right of gay men such as Limon to express their sexuality on terms equal to those imposed upon heterosexuals can no longer be ignored. In fact, the governmental classification of homosexuality will come to demand—or already demands—a heightened scrutiny by the judiciary. The various reasons the State of Kansas has provided for its barefaced treatment of homosexuals as an underclass do not pass muster under the new *Lawrence* regime. In fact, Kansas' unequal treatment of its homosexual teenagers is illegitimate even under a rational basis standard of judicial review.

On a most basic level, that a developmentally disabled boy received a prison term that requires him to spend one year in jail for each year that he has already lived just *feels* wrong. Had this occurred one week earlier, Limon would not have been considered an adult yet and would probably not have been qualified for sentencing under the criminal sodomy statute at all. His prosecution was based on a single, concededly consensual act. To prevent further harm to this gay man in particular, and to continue the positive

187. Petition for Writ of Certiorari at 10, Limon v. Kansas, 539 U.S. 955 (2003) (mem) (No. 02-583).

momentum of *Lawrence v. Texas* more generally, the Kansas Supreme Court must release Matthew Limon.

V. EPILOGUE

On October 12, 2005, as this article was in press, the Kansas Supreme Court decision finally came down, and the previous Kansas decisions were overturned.[188] The Court did not agree that the case deserved heightened scrutiny, noting that "the United States Supreme Court has not recognized homosexuals as a suspect classification;" it had also not explicitly recognized a fundamental right to same-sex sexual conduct.[189] Nonetheless, the Kansas court held that "the State does not have a rational basis for the statutory classification created in the Romeo and Juliet statute."[190] The court considered and rejected six possible state interests in discriminating between heterosexual and homosexual teens in the statutory rape context.[191] In concluding that the statute did not pass muster even under a rational basis standard of review under either Kansas' or the federal Equal Protection Clause, the court offered severance of the phrase "and are members of the opposite sex" from the Romeo and Juliet statute[192] as a remedy.[193]

Although Kansas[194] has now overturned one of the few remaining discriminatory Romeo and Juliet statutes, four other states still have similar laws in effect. In Texas' Indecency With a Child statute, Texas allows as a defense that 1) the actor is no more than three years older than the child, 2) the child volunteered for the act, 3) the actor was not registered as a sex offender at the time of the conduct, 4) the actor had not already been convicted under the same statute, *and* 5) the actor is of the opposite sex of the child.[195] Again, Texas has deemed homosexual actors as unworthy of the more benign treatment that heterosexual teens receive under its exception to the Indecency With a Child statute.

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188. State v. Limon, 122 P.3d 22 (Kan. 2005).

189. *Id.* at 29.

190. *Id.* at 24.

191. These were:

> (1) the protection and preservation of the traditional sexual mores of society; (2) preservation of the historical notions of appropriate sexual development of children; (3) protection of teenagers against coercive relationships; (4) protection of teenagers from the increased health risks that accompany sexual activity; (5) promotion of parental responsibility and procreation; and (6) protection of those in group homes.

Id. at 33-34.

192. KAN. STAT. ANN. § 21-3522 (2005) will now read, in part: "Unlawful voluntary sexual relations is engaging in voluntary . . . sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved."

193. *Limon*, 122 P.3d at 38.

194. *Id.*

195. TEX. PENAL CODE ANN. § 21.11 (Vernon 2001).

In Alabama, heterosexual vaginal intercourse[196] and homosexual anal intercourse[197] involving an adult and a willing teenager are both Class B felonies. However, Alabama provides a defense to the heterosexual crime, but not the homosexual crime.[198] If the people performing the heterosexual act are less than two years apart in age, the criminal statute does not apply, but there is no such exception in the sodomy statute.[199]

Like Alabama, California differentiates between sexual intercourse and "sodomy." California's statutory rape law[200] deems intercourse between two young people who are no more than three years apart in age a misdemeanor. It defines sodomy as "contact between the penis of one person and the anus of another person."[201] The sodomy statute provides a blanket punishment of up to and including imprisonment for one year.[202] There is no exception provided for young people who have committed sodomy that would reduce the penalty to a misdemeanor as does the statutory rape law for heterosexual acts.

Finally, Virginia also employs a discriminatory Romeo and Juliet exception. It has a statute dedicated specifically to the treatment of sex acts with children between thirteen and fifteen years old.[203] The overall rule for adults is that consensual "carnal knowledge" of a child this age is a Class four felony.[204] "Carnal knowledge" includes vaginal intercourse, oral sex, anal intercourse, and other acts.[205] An exception is carved out for when the accused is a minor, but only if the act is sexual intercourse, just one of the types of "carnal knowledge."[206] If the younger child is more than three years younger than the older child, the older child has only committed a Class six felony when they have vaginal sex.[207] If they are less than three years apart, the act becomes a Class four misdemeanor.[208] Again, only the act of sexual intercourse is given the lighter treatment.

The potential result that the Virginia statute could bring is perhaps even more absurd and unfair than what is possible in the other states discussed herein. A nineteen-year-old who has vaginal sex with a thirteen-year-old will be guilty of a Class four felony in Virginia. A seventeen-year-old who does the same will only have committed a Class six felony. If the older child is fifteen,

196. ALA. CODE § 13A-6-62 (1975).
197. ALA. CODE § 13A-6-64 (1975).
198. ALA. CODE § 13A-6-62 (1975).
199. ALA. CODE § 13A-6-64 (1975).
200. CAL. PENAL CODE § 261.5 (West 2000).
201. CAL. PENAL CODE § 286 (West 1999).
202. § 286(b)(1).
203. VA. CODE ANN. § 18.2-63 (West 2005).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. § 18.2-63.

then it would become a misdemeanor. However, even if the two minors are the same age, they will once again be guilty of a Class four felony if the act is other than vaginal intercourse. Oral sex of any kind, penetration with inanimate objects, and anal intercourse are all Class four felonies in this instance, whether the actors are the same or opposite sexes. Of course, homosexual acts could never receive the better treatment, because they will never qualify as "sexual intercourse." In Virginia, therefore, if a thirteen year-old-girl touches another thirteen-year-old girl's vagina with her tongue, no matter how briefly, she has committed a felony. The fifteen-year-old boy who impregnates one of those thirteen-year-old girls, even if he gives her sexually transmitted diseases or causes other horrific effects, will only have committed a misdemeanor under Virginia law.

All of the arguments against Kansas' discriminatory Romeo and Juliet exception can and should be made against the discriminatory statutes in Texas, Alabama, California, and Virginia. The Equal Protection Clause and *Lawrence v. Texas*[209] require the exceptions be applied equally to homosexual and heterosexual acts. Even if those states would agree with Kansas that their statutes do not merit heightened judicial scrutiny, they would not pass muster even under a rational basis standard[210] and should be held unconstitutional.

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209. 539 U.S. 558 (2003).

210. The same types of untenable arguments offered in support of the now defunct discrimination in Kansas have been offered in support of the other laws. An example of one such argument can be found in the case of Bennett v. State, 677 S.W.2d 121 (Tex. Ct. App. 1984). In that prosecution for the sexual abuse of a child, the lawyer for the government made several unsupported arguments that the defendant's "conduct could have the effect of turning the complainants into homosexuals." *Id.* at 124. In part, he asserted:

> A boy of fourteen years of age has not married. He has not developed a family. He has not established his status in life.
>
> . . . .
>
> You know that young boys are very impressionable. A young boy has not developed his sexuality. He has not developed his complete self-esteem. You know that he may be hurt. You know that the foundation upon which his future relationships with people depend [sic] is not completely formed. You know that his ability to enter into heterosexual relationships which would be successfully fulfilled, the potential of that relationship is basically founded on what happens to him during his formative age.

Id. at 124-25.