

**“ROMEO AND ROMEO”:
AN EXAMINATION OF *LIMON V. KANSAS*
IN LIGHT OF *LAWRENCE V. TEXAS***

*Shulamit H. Shvartsman**

I. INTRODUCTION

It was viewed as a “historic ruling,”¹ a “sweeping, landmark victory,”² affirming gay rights³ and opening many doors,⁴ including establishing rights in the military,⁵ ending homosexual discrimination,⁶ and even paving the road to homosexual marriage.⁷

* J.D. candidate, May 2005, Seton Hall University School of Law; B.A. History, 2001, Binghamton University.

¹ Jerry Elmer, *A Victory for Gay Rights in Lawrence v. Texas*, 52 R.I. BAR J. 5, 5 (2003).

² Andrew Cohen, *Sodomy Ruling’s Ripple Effect* (June 26, 2003), at <http://www.cbsnews.com/stories/2003/06/26/news/opinion/courtwatch/main560593.shtml>. The Lambda Legal Defense & Education Fund claimed it was “the most significant ruling ever for lesbian and gay Americans.” Liberty Press, *Sodomy Law Struck Down, U.S. Supreme Court Finds Texas Homosexual Conduct Law Unconstitutional* (July 3, 2003), available at <http://www.libertypress.net/archives/ksjuly03.html> [hereinafter *Sodomy Law Struck Down*].

³ Elmer, *supra* note 1.

⁴ See Patti Waldmeir, *Big Eye on the Little Guy*, FIN. TIMES, Jan. 10, 2004, at 16. In a decision that has already become a major political issue for President Bush, the court ruled, in the broadest possible terms, that homosexuals have rights too. Up to a point, most of America would agree with that statement. But the ruling went beyond that point, opening the door – despite its disclaimers – to full legalisation of homosexual relationships, including gay and lesbian marriage.

Id.

⁵ Martha Lleder, *Lawrence Decision Launches Military ‘Gay’ Ban Challenges*, Concerned Women for America (July 16, 2003), at <http://www.cultureandfamily.org/articledisplay.asp?id=4275&department=CFI&categoryid=cfreport>.

⁶ This ruling effectively strikes down the sodomy laws in every state that still has them But its impact is even broader - for decades, these laws have been a major roadblock to equality. They’ve labeled the entire gay community as criminals and second-class citizens. Today [June 26], the Supreme Court ended that once and for all. *Sodomy Law Struck Down, supra* note 2 (quoting Ruth Harlow, Legal Director at

“The ruling closed the door on an era of intolerance and ushered in a new era of respect and equal treatment for gay Americans [It] is the most important civil rights decision handed down by the court in a generation.”⁸

The above statements describe the sentiment after *Lawrence v. Texas*,⁹ in which the United States Supreme Court held that it is no longer a crime to engage in homosexual sodomy.¹⁰ However, within a few months, it became obvious that the *Lawrence* decision “may turn out not to be quite the legal earthquake many anticipated.”¹¹ While the *Lawrence* decision has many possible implications, this Comment focuses on the impact the *Lawrence* decision will have on teenage homosexual sexual relations, specifically, what bearing the case is expected to have on Matthew Limon, a Kansas teenager incarcerated for 206 months for engaging in homosexual activity.¹²

Lambda Legal Defense and Education Fund and lead counsel on the *Lawrence* case) (alteration in original). See also Jack Siu, *365Gay.com Newsmaker of 2003: John Lawrence and Tyron Garner* (Dec. 21, 2003), at

<http://www.365gay.com/newscontent/2003Review/2003Newsmaker.htm>. The *Lawrence* decision “has become a powerful tool for gay people in all 50 states where gay [people] continue fighting to be treated equally. Sodomy laws criminalized oral and anal sex by consenting gay couples and in some states heterosexual couples but [were] used almost exclusively to justify discrimination against [homosexual people].” *Id.*

⁷ See *The Next Battle: Gay Marriage* (June 30, 2003), at <http://www.cbsnews.com/stories/2003/07/02/national/printable561385.shtml> (“The landmark *Lawrence v. Texas* decision, which threw out a Texas law banning sodomy and similar statutes in 13 states, was widely seen as the prelude to a discussion of gay marriage.”). “‘This ruling starts an entirely new chapter in our fight for equality for lesbians and gay men,’ Ruth Harlow . . . said.” *Sodomy Law Struck Down*, *supra* note 2. “Though not decided upon equal protection grounds, the majority decision still calls into question other legal limitations on the rights of homosexuals, including the right to state recognition of homosexual marriages, and the right to serve in the military.” NationMaster.com, *Encyclopedia: Lawrence v. Texas*, at <http://www.nationmaster.com/encyclopedia/Lawrence-v.-Texas> (last visited Apr. 18, 2004). See also Justice Scalia’s dissent: “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples” *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

⁸ Siu, *supra* note 6.

⁹ 539 U.S. 558.

¹⁰ *Id.*

¹¹ Joseph Landau, *Misjudged: What Lawrence Hasn’t Wrought*, THE NEW REPUBLIC, Feb. 16, 2004, at 16.

¹² Some fear that *Lawrence* will result in Limon’s release. “It appears that age-of-consent laws that differentiate between heterosexual and homosexual sex may be another casualty of the U.S. Supreme Court decision striking down Texas’ law banning homosexual acts.” *Lawrence Decision Opens Way for Legal Teen Sodomy*, Concerned Women for America (July 2, 2003), at <http://www.cultureandfamily.org/articledisplay.asp?id=4217&department=CFI&categoryid=cfreport>.

Shortly after his eighteenth birthday, Matthew Limon was caught engaging in consensual¹³ sexual activities with a minor.¹⁴ M.A.R., his “victim,” was just short of fifteen years of age at the time of the activity.¹⁵ Kansas criminalizes the engagement in sexual activities with a child under the age of sixteen.¹⁶ As a result, Limon was convicted under Kansas’s criminal sodomy statute,¹⁷ which defines criminal sodomy as “sodomy with a child who is 14 or more years of age but less than 16 years of age.”¹⁸ Limon’s sentence for this offense is seventeen years.¹⁹

Recognizing that teenage sexual experimentation should not be punished as severely as other statutory rape, Kansas has instituted a so-called “Romeo and Juliet” law,²⁰ which serves as a mitigating statute

¹³ “M.A.R. consented to the oral-genital contact; upon request of M.A.R., the defendant stopped oral contact with the victim.” Brief for Petitioner at 30a, *Limon v. Kansas*, 41 P.3d 303 (Kan. Ct. App. 2002) (No. 00CR36) at http://archive.aclu.org/court/limon_cert.pdf [hereinafter Brief for Petitioner]. The Brief for Petitioner will be cited because various documents in the case are not otherwise available (i.e., the Transcript of Hearing Upon Defendant’s Motion to Dismiss, Stipulation of Facts, Transcript of Trial to the Court, Transcript of Continuation of Sentencing, Memorandum Opinion, Order Denying Motion for Rehearing of Modification, and the Order Denying Petition for Review).

¹⁴ Linda Greenhouse, *Supreme Court Roundup; Justices Extend Decision on Gay Rights and Equality*, N.Y. TIMES, June 28, 2003, at 10. See also Brief for Petitioner at 3a, *Limon* (No. 00CR36).

¹⁵ Brief for Petitioner at 30a, *Limon* (No. 00CR36).

¹⁶ KAN. STAT. ANN. § 21-3505 (2002). Kansas, like many other states, has age of consent laws for sexual activities. See ALA. CODE § 13A-6-9 (2002) (age of consent is sixteen); TEX. PENAL CODE ANN. § 21.11 (2003) (age of consent is seventeen); VA. CODE ANN. § 18.2-63 (2003) (age of consent is fifteen); WASH. REV. CODE ANN. § 9A.44.093 (2003) (age of consent is eighteen). For an interesting discussion of age of consent laws and their implications, see Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313 (2003). See also *infra* Part V for discussion of consent.

¹⁷ KAN. STAT. ANN. § 21-3505.

¹⁸ *Id.* at § 21-3505(a)(2). Note that oral sex is a form of sodomy under this statute. *Id.*

¹⁹ See ‘Romeo & Juliet Law’ Gives Gay Teen 16 Years More in Prison than Heterosexual Would Serve, American Civil Liberties Union (Sept. 28, 2001), at <http://archive.aclu.org/news/2001/n092801a.html>.

²⁰ Unlawful Voluntary Sexual Relations, KAN. STAT. ANN. § 21-3522 (2002). This statute

is popularly known in Kansas as the ‘Romeo and Juliet Law.’ This refers to Shakespeare’s literary masterpiece whose central story concerns the love between a noble 13-year-old Veronese maiden, and a youthful Veronese nobleman just a few years older than she. The purpose of the statute is to recognize the judgment that consensual sexual activity between a young adult and not-quite adult, although wrong, is not as criminal as sexual activity between persons farther in age.

Brief for Petitioner at 6a-7a, *Limon* (No. 00CR36). This law “was passed in 1999 to

when both actors are close in age.²¹ To trigger the Romeo and Juliet law, the offender must be less than nineteen years of age, the offender must be less than four years older than the child, the child and the offender must be the only parties involved in the sexual act, and both members must be of the opposite sex.²² If all factors are met, then the statute applies, reducing the prison penalty from a maximum of seventeen years to a maximum of fifteen months.²³

Limon, at the time of the sexual conduct, had just turned eighteen;²⁴ the age difference between the two actors was just over three years; there is no allegation that anyone, other than Limon and M.A.R., was involved in the conduct.²⁵ Thus, all of the factors necessary to trigger Kansas's Romeo and Juliet law were present, except for one—M.A.R. and Limon were both males, thus not “members of the opposite sex.”²⁶ As a result, the Romeo and Juliet law did not apply,²⁷ and Limon was prosecuted and convicted under the harsher criminal sodomy statute.²⁸ The difference between the two punishments is almost sixteen years.²⁹

Limon has already served over three years of his prison sentence

separate consensual teenage sexual relationships from cases in which older adults exploited young children.” Chris Grenz, *Prospects for Change in Laws Appear Poor*, TOPEKA CAP. – J. (Kan.), Feb. 15, 2003, at 7, available at 2003 WL 6855385.

²¹ See Deb Price, *Courts Need to Apply Same Rules to All*, DETROIT NEWS, Jan. 13, 2003, at 7. Kansas has a “Romeo and Juliet’ law – a sort of get-out-of-jail-free card that many state legislatures give similarly aged sexually active teens while rightly applying serious penalties against adults who have sex with minors.” *Id.*

²² KAN. STAT. ANN. § 21-3522(a).

²³ KAN. STAT. ANN. § 21-3522. Greenhouse, *supra* note 14, at 10. See also Brief for Petitioner at 3, *Limon* (No. 00CR36).

²⁴ Greenhouse, *supra* note 14, at 10. See also Brief for Petitioner at 4a, *Limon* (No. 00CR36).

²⁵ See Brief for Petitioner at 39a, *Limon* (No. 00CR36).

²⁶ KAN. STAT. ANN. § 21-3522(a).

²⁷ “Well, unfortunately for Limon, Kansas’s Romeo and Juliet law is meant to be taken literally. It applies only to Romeos and Juliets, not to Romeos and Mercutios. It was explicitly written to exclude application in cases involving same-sex activity.” Michael Bronski, *The Other Matthew*, BOSTON PHOENIX, Feb. 20, 2003, at http://www.bostonphoenix.com/boston/news_features/other_stories/documents/02704491.htm.

²⁸ Limon was convicted under KAN. STAT. ANN. § 21-3505.

²⁹ See *‘Romeo & Juliet Law’ Gives Gay Teen 16 Years More in Prison than Heterosexual Would Serve*, *supra* note 19. Matt Coles, Director of the American Civil Liberties Union (“ACLU”) Lesbian & Gay Rights Project, which filed a friend-of-the-court brief on Limon’s behalf stated:

The only difference between a year in jail and 17 years is whether or not you’re gay Matt Limon will be 36 years old by the time he’s released, having spent half of his life in prison—while a heterosexual person would have been released before turning 19.

Id.

and has over a decade left to serve. Under *Bowers v. Hardwick*,³⁰ which held there is no fundamental right to engage in sodomy, Limon had a slim chance of release; however, Limon now may have new hope for an early release, in light of the United States Supreme Court's recent "landmark"³¹ decision in *Lawrence v. Texas*.³² The *Lawrence* decision overruled *Bowers v. Hardwick*³³ and has opened many doors, perhaps even in Limon's case.³⁴ Just one day after the *Lawrence* decision, the United States Supreme Court instructed the Kansas Court of Appeals to re-examine Limon's case.³⁵ Oral arguments took place on December 2, 2003;³⁶ however, in the following month, the Kansas Court of Appeals, in a 2-1 decision, affirmed his conviction.³⁷ Limon's attorney challenged this decision in the Kansas Supreme Court, which granted a petition for review on May 25, 2004.³⁸ Depending on the outcome in the Kansas Supreme Court, the United States Supreme Court may be the next venue to hear this case.³⁹

Initially, the Kansas Court of Appeals relied on *Bowers* when sentencing Limon;⁴⁰ because *Lawrence* overruled *Bowers*, *Lawrence* now serves as the new precedent.⁴¹ The United States Supreme Court

³⁰ 478 U.S. 186 (1986).

³¹ Charles Lane, *Justices Overturn Texas Sodomy Ban, Ruling is Landmark Victory for Gay Rights*, WASH. POST, June 27, 2003, at A01.

³² 539 U.S. 558.

³³ 478 U.S. 186.

³⁴ See Lane, *supra* note 31, at A01 (quoting Elizabeth Birch, executive director of the Human Rights Campaign, a leading gay rights organization, "This is an historic day for fair-minded Americans everywhere. This ruling opens the door for new advances toward full equality.").

³⁵ In a very brief decision, the Supreme Court simply stated: "On petition for writ of certiorari to the Court of Appeals of Kansas. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Appeals of Kansas for further consideration in light of *Lawrence v. Texas*, 539 U.S. [558] (2003)." *Limon v. Kansas*, 539 U.S. 955 (2003).

³⁶ *Appeal Begins for Teen Sentenced to Prison for Gay Sex* (Dec. 2, 2003), at <http://www.365gay.com/newscontent/120203limonAppeal.htm>.

³⁷ *Kansas v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

³⁸ *Kansas v. Limon*, No. 00-85898-AS, 2004 Kan. LEXIS 284, at *1 (Kan. May 25, 2004).

³⁹ See Stephanie Francis Ward, *Avoiding Lawrence: Courts Considering Last Year's Major Gay Rights Ruling are Treading Carefully*, 90 A.B.A.J. 16 (June 2004) (stating that the United States Supreme Court may take this case).

⁴⁰ The Kansas Court of Appeals relied on *Bowers*, now overruled, and held: "The impact of *Bowers* on [this] case is obvious . . . [T]here is no denial of equal protection when [homosexual] behavior is criminalized or treated differently . . ." Brief for Petitioner at 12a, *Limon* (No. 00CR36).

⁴¹ ". . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is

recognized *Lawrence*'s implication on Limon's case, thus instructing the Kansas Court of Appeals to reconsider *Limon v. Kansas*⁴² "in light of" *Lawrence*.⁴³ *Lawrence* and its ambiguous language, however, support several different interpretations, and the Kansas Court of Appeals chose a narrow version. Further, while opening the door, *Lawrence* leaves many unanswered questions. *Lawrence*, after all, stands for the proposition that consenting adults have the right to privacy to engage in homosexual acts.⁴⁴ It is questionable, and doubtful, that this right extends to minors.⁴⁵ Precisely what effect, if at all, *Lawrence* will have on *Limon* remains to be seen. Clearly, *Lawrence* has opened up some doors; nevertheless, many other barriers remain intact.⁴⁶ Whether the Kansas Supreme Court will interpret *Lawrence* broadly or narrowly will be evident in the future.⁴⁷ If interpreted broadly, Limon may have a chance to be released; however, *Lawrence* may not have any impact on Limon's case, other than its remand. Thus, it remains to be seen how far the *Lawrence* case will extend and whether it is, indeed, a "landmark victory . . . [which] opens the door for new advances toward full equality."⁴⁸

This Comment will address how *Lawrence* has affected and may

overruled." *Lawrence*, 539 U.S. at 578. Precedent is defined as "1. The making of law by a court in recognizing and applying new rules while administering justice. 2. A decided case that furnishes a basis for determining later cases involving similar facts or issues." BLACK'S LAW DICTIONARY 1214 (8th ed. 2004).

In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.

WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 288 (3d ed. 1914).

⁴² *Kansas v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002).

⁴³ *Limon v. Kansas*, 539 U.S. 955.

⁴⁴ See *Lawrence*, 539 U.S. at 578 ("[T]wo adults, who, with full and mutual consent from each other, engage[] in sexual practices common to a homosexual lifestyle . . . 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.").

⁴⁵ "It appears that age-of-consent laws that differentiate between heterosexual and homosexual sex may be another casualty of the U.S. Supreme Court decision striking down Texas' law banning homosexual acts." *Lawrence Decision Opens Way for Legal Teen Sodomy*, *supra* note 12. See also discussion *infra* Part IV.

⁴⁶ ". . . *Lawrence* may turn out not to be quite the legal earthquake many anticipated." Landau, *supra* note 11.

⁴⁷ The Kansas Supreme Court granted Limon's Petition for Review on May 25, 2004. *Kansas v. Limon*, No. 00-85898-AS, 2004 Kan. LEXIS 284, at *1 (Kan. May 25, 2004).

⁴⁸ See *supra* notes 31 and 34 and accompanying text.

affect *Limon*. Part II will explain the decision of *Limon v. Kansas*. Part III will explore the *Lawrence v. Texas* decision and its influence. Part IV will then compare the two cases, suggesting that *Lawrence* may not be as helpful as commentators first believed, as there are several material differences between the cases. Part V will then explore *Lawrence's* unanswered questions as they pertain to *Limon*, posing whether *Limon* can be reversed regardless.

In addition, this Comment highlights the importance of *Limon*. *Limon* is much more than a “test case.” It serves three independent purposes. First, *Limon* is essential in expounding the ambiguities of *Lawrence*. Second, *Limon* shows that even post-*Lawrence*, states can implement indirect regulation (i.e., higher age of consent laws) to prevent homosexual activity. If *Limon* is overturned, the decision would serve as a preventative measure against such intolerance. Lastly, *Limon* offers an opportunity to clarify *Romer v. Evans*,⁴⁹ and determine what standard of scrutiny applies to laws involving homosexual classifications.

II. LIMON V. KANSAS

In mid-February 2000, Limon and M.A.R., while residents of a group home for the developmentally disabled,⁵⁰ engaged in consensual sexual activity.⁵¹ M.A.R., the “victim,” was over fourteen years of age at this time, but under sixteen.⁵² Matthew Limon, the defendant, just turned eighteen.⁵³

Had Limon engaged in this activity with a female, the conduct would have triggered the Romeo and Juliet law, giving him a maximum prison sentence of fifteen months.⁵⁴ However, since Limon was a homosexual and engaged in sexual activity with another male, he did not receive protection under the Romeo and Juliet law. Kansas prosecuted Limon under the harsher criminal sodomy statute⁵⁵ and sentenced him to seventeen years in prison.⁵⁶ Limon

⁴⁹ 517 U.S. 620 (1996).

⁵⁰ Chris Grenz, *Kline Appears on National Talk Show*, TOPEKA CAP. – J. (Kan.), Oct. 1, 2003, at 7, available at 2003 WL 62492982. While the fact that the two males were mentally disabled might have been significant, it did not play a role in the opinion, and will not be explored in this Comment.

⁵¹ See Brief for Petitioner at 30a, *Limon* (No. 00CR36).

⁵² See *id.*

⁵³ See *id.* The incident occurred precisely two weeks after Limon turned 18 (Limon's date of birth is February 2, 1982; the date of the sexual activity was February 16, 2000). *Id.*

⁵⁴ Grenz, *supra* note 50, at 7.

⁵⁵ KAN. STAT. ANN. § 21-3505(a)(2).

⁵⁶ Grenz, *supra* note 50, at 7.

essentially received sixteen more years for choosing to experiment with a male rather than a female.⁵⁷

Although Limon's attorney tried to apply the Romeo and Juliet law to reduce Limon's sentence,⁵⁸ the district court refused to extend this protective statute to Limon because his partner was not of the opposite sex.⁵⁹ The district court reasoned that the legislature "in its wisdom" chose to make the mitigating statute only applicable to heterosexual activity.⁶⁰ The district court justified such actions, ruling that "classifications honestly designed to protect the public interests against evils which might otherwise occur are to be upheld unless they are unreasonable, arbitrary or oppressive."⁶¹ Applying this standard, the Kansas district court held that a state is empowered to protect children, and, if the state chooses, it can penalize heterosexual activity less severely than homosexual activity.⁶² Further, the district court upheld the Romeo and Juliet law on the basis that it does not "represent an invalid, illegitimate or improper exercise of the legislation of police power in the Kansas legislature."⁶³ Thus, the Kansas district court denied Limon's motion to dismiss the charges and apply the Romeo and Juliet law.⁶⁴

Following a bench trial,⁶⁵ the Kansas district court convicted Limon of one count of criminal sodomy, a "severity level 3 person felony."⁶⁶ Limon then sought a departure from the presumptive sentence to a prison term no longer than fourteen months, or in the alternative, a dispositional departure to probation.⁶⁷ The district judge denied this request, asserting, "[T]here is not good and sufficient reason . . . to grant a departure."⁶⁸ The district court judge accordingly sentenced Limon to the custody of the Department of Corrections for 206 months.⁶⁹

The Kansas Court of Appeals affirmed, per curiam, in a decision

⁵⁷ See *supra* note 29 and accompanying text.

⁵⁸ Brief for Petitioner at 36a, *Limon* (No. 00CR36).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.*

⁶³ *Id.* at 37a-38a

⁶⁴ Brief for Petitioner at 38a, *Limon* (No. 00CR36).

⁶⁵ Limon waived a jury trial. See *id.* at 27a.

⁶⁶ *Id.* at 29a.

⁶⁷ *Id.* at 21a. Limon argued that to impose this sentence would violate his Eighth Amendment right to be free from cruel and unusual punishments. *Id.*

⁶⁸ *Id.* at 17a.

⁶⁹ *Id.* at 18a.

without a published opinion.⁷⁰ Relying on *Bowers v. Hardwick*,⁷¹ the appellate court opined that homosexuals do not belong to a protected class, thus they do not receive the benefit of a strict scrutiny analysis.⁷² Further, this court claimed that “there is no present indication that the [*Bowers*] decision would be different today” or that the “United States Supreme Court or the Kansas Supreme Court would adopt the position taken by Limon.”⁷³

Limon appealed this decision to the Kansas Supreme Court, which denied his petition for review.⁷⁴ The petition presented the following issue for review:

Do laws that impose a 17-year prison sentence for consensual oral sex between teenagers of the same sex violate the Equal Protection Clause where the sentence would be no more than 15 months if the teenagers were members of the opposite sex?⁷⁵

The Kansas Supreme Court refused to hear this case, and thus did not address the question of whether the *Limon* decision violates the Fourteenth Amendment’s Equal Protection Clause.

Equal Protection Argument

In his brief for certiorari to the United States Supreme Court, Limon mainly argued that dramatically different penalties for identical acts of consensual sodomy between teenagers violates the Equal Protection Clause⁷⁶ because the “sexual orientation of the defendant, rather than the conduct, determines which statute, and therefore which penalty, applies.”⁷⁷ The penalties under the Romeo and Juliet law and sodomy statute not only differed, but the Romeo and Juliet statute set forth a *much* more lenient punishment.⁷⁸ Limon’s brief succinctly summarized the difference in treatment:

⁷⁰ Brief for Petitioner at 3a, *Limon* (No. 00CR36).

⁷¹ 478 U.S. 186.

⁷² Brief for Petitioner at 12a, *Limon* (No. 00CR36).

⁷³ *Id.* at 9a, 12a.

⁷⁴ *Id.* at 1a.

⁷⁵ *Id.* (note that there is no page number; please refer to “Questions Presented” section of Brief).

⁷⁶ *Id.* at 9-18.

⁷⁷ *Id.* at 3.

⁷⁸ Under the Romeo and Juliet law, the first and second offenses result in presumptive probation, and a third offense results in a maximum sentence of fifteen months. Under the criminal sodomy statute, a first offense carries a presumptive sentence of 55-61 months, a second offense carries an 89-100 months sentence, and a third offense carries 206-228 months penalty. Further, only a criminal sodomy statute violation is categorized as a sexually violent crime, which triggers mandatory sex offender status. Brief for Petitioner at 3-4, *Limon* (No. 00CR36).

“Heterosexual teenagers who engage in consensual oral sex are punished under the Romeo and Juliet law, while gay teenagers who engage in consensual oral sex are treated as child molesters and are punished under Kansas’s criminal sodomy law.”⁷⁹

Further, Limon’s brief raised the policy implication of this law: Kansas, by limiting the mitigating statute to members of the same sex, “subjects gay teenagers to additional criminal penalties that are based not on any difference in their actions but on the State’s moral disapproval of their sexual orientation toward members of the opposite sex.”⁸⁰ Limon added that, “[l]aws 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”⁸¹

In sum, Limon argued that the Romeo and Juliet law was unconstitutional because it violated the Equal Protection Clause. His reasoning consisted of three arguments: (1) the Romeo and Juliet law benefits only heterosexuals; (2) Kansas law subjects homosexual teenagers to a much harsher penalty that is not based on the conduct itself, but instead is based on the sex of the person with whom they engaged in this conduct; and (3) because the conduct may be the same, the determinative factor in the inquiry of whether one gets the benefit of the Romeo and Juliet law is sexual orientation.⁸² Although Limon recognized a valid purpose for the Romeo and Juliet law,⁸³ he argued that imposing harsher punishments based on sexual orientation does not advance legitimate state interests in promoting morality or protecting children.⁸⁴

Limon next reasoned that states cannot promote morality by punishing people for who they are.⁸⁵ While a state is

free to legislate to encourage people to *act* in ways the [s]tate believes are morally good and to discourage people from *acting* in ways the [s]tate believes are morally bad . . . it may not penalize one group of citizens more severely for the same acts merely

⁷⁹ *Id.* at 4.

⁸⁰ *Id.* at 10.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The Romeo and Juliet law’s main purpose is “[t]o recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age.” *Id.* at 7a.

⁸⁴ Brief for Petitioner at 13, *Limon* (No. 00CR36).

⁸⁵ *Id.* at 13 (citing various cases).

because it disapproves of who they are; and it may not avoid the Equal Protection Clause by saying that its disapproval is based in morality.⁸⁶

Limon submitted a brief seeking certiorari to the United States Supreme Court on October 10, 2002.⁸⁷ The case remained dormant until June 27, 2003. One day after the *Lawrence* decision, the United States Supreme Court granted a petition for certiorari to the Court of Appeals of Kansas “for further consideration”⁸⁸ Some viewed this action as “the first ripple effect of [a] landmark decision on gay rights.”⁸⁹ In spite of this optimism, in January 2004, the Kansas Court of Appeals, in a 2-1 decision, affirmed Limon’s conviction.⁹⁰ The Kansas Court of Appeals held that the United States Supreme Court’s decision in *Lawrence* did not apply to sexual acts involving children and that the court must grant deference to the legislature.⁹¹ The American Civil Liberties Union appealed the decision to the Kansas Supreme Court,⁹² which granted review on May 24, 2004.⁹³

How the Kansas Supreme Court will ultimately decide *Limon* and what impact *Lawrence* will have on it remains to be seen. One prediction is that *Lawrence* will not affect *Limon* at all, since *Lawrence* was decided on different grounds than those challenged in the *Limon* case, granting a right to privacy only to consenting adults.⁹⁴ Another prediction is that the *Limon* case will be greatly affected since *Lawrence* has “opened new doors” to many gay rights issues.⁹⁵

⁸⁶ *Id.* at 14 (citing *Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); *Romer*, 517 U.S. at 634; *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)). Prior to the *Lawrence* decision, there was a split in the lower courts over whether moral disapproval of homosexuality is a legitimate basis for discriminating. The *Lawrence* decision resolves that split. The Kansas Court of Appeals relied on *Bowers*, now overruled, and held: “The impact of *Bowers* on [this] case is obvious [T]here is no denial of equal protection when [homosexual] behavior is criminalized or treated differently.” *Id.* at 23.

⁸⁷ *Id.*

⁸⁸ 539 U.S. 955 (2003).

⁸⁹ Charles Lane, *Gay Rights Ruling Affects Kan. Case; 17-Year Term in Teen Sex Case at Issue*, WASH. POST, June 28, 2003, at A08. See also Greenhouse, *supra* note 14 (“In an immediate application of its new protective approach to gay rights, the Supreme Court today vacated the sodomy conviction of a Kansas teenager who received a 17-year sentence for having oral sex with a younger boy.”).

⁹⁰ *Kansas v. Limon*, 83 P.3d 229.

⁹¹ *Id.*

⁹² Landau, *supra* note 11, at 16.

⁹³ See *supra* note 38.

⁹⁴ See *infra* Part IV.

⁹⁵ Waldmeir, *supra* note 4, at 16.

III. LAWRENCE V. TEXAS

Lawrence is “touted as the most important case for gay rights in a generation.”⁹⁶ It became the turning point in the *Limon* case, initiating its remand.⁹⁷ The Court of Appeals of Kansas, in deciding *Limon*, based its reasoning on the *Bowers* principal—that there is no fundamental right to engage in homosexual acts.⁹⁸ The significance of *Lawrence* lies in its reversal of *Bowers v. Hardwick*.⁹⁹ Therefore any discussion of *Lawrence* must begin with an examination of that case.

A. *Bowers v. Hardwick*

In *Bowers v. Hardwick*,¹⁰⁰ considered by some as an “embarrassment,”¹⁰¹ the Court upheld a Georgia statute criminalizing consensual sodomy¹⁰² and ruled that homosexuals do not have a fundamental right to privacy.¹⁰³ In 1986, the State of Georgia charged Hardwick with violating its criminal sodomy statute¹⁰⁴ after Georgia police discovered him in the bedroom of his home with another adult male.¹⁰⁵ Following a preliminary hearing, the district attorney decided not to prosecute the case.¹⁰⁶ Hardwick, however, brought suit in federal district court in Georgia, challenging the constitutionality of the statute that criminalized consensual sodomy.¹⁰⁷

Hardwick argued that the statute was unconstitutional because it placed him, as a homosexual, in imminent danger of arrest.¹⁰⁸ The district court granted the defendant’s motion to dismiss for failure to state a claim.¹⁰⁹ A divided Court of Appeals reversed, holding that the statute violated Hardwick’s fundamental rights because his

⁹⁶ Mary Alice Robbins, *High Court Set for Bowers Challenge*, FULTON COUNTY DAILY REP., Mar. 24, 2003.

⁹⁷ *Appeal Begins for Teen Sentences to Prison for Gay Sex*, *supra* note 36.

⁹⁸ Brief for Petitioner at 11a, *Limon* (No. 00CR36).

⁹⁹ 478 U.S. 186.

¹⁰⁰ *Id.*

¹⁰¹ See Robbins, *supra* note 96 (quoting Vivian Berger, professor emeritus at Columbia University Law School); see also Elmer, *supra* note 1, at 5 (“*Bowers v. Hardwick*, a dreadful ruling that easily earned its place in the pantheon of the all-time worst Supreme Court decisions, along with such other notable cases as *Dred Scott v. Sanford* . . . *Plessy v. Ferguson* . . . [and] *Lochner v. New York* . . .”).

¹⁰² GA. CODE ANN. § 16-6-2 (1984).

¹⁰³ *Bowers*, 478 U.S. 186.

¹⁰⁴ GA. CODE ANN. § 16-6-2.

¹⁰⁵ *Bowers*, 478 U.S. at 187-88.

¹⁰⁶ *Id.* at 188.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

homosexual activity is “private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.”¹¹⁰ The United States Supreme Court granted certiorari.¹¹¹

In a 5-4 opinion, the United States Supreme Court reversed the Court of Appeals.¹¹² The Court addressed the controversial issue of whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy, thus making Georgia’s criminal sodomy statute invalid.¹¹³ Taking into consideration a deep-rooted historical and religious sentiment against sodomy, and after listing every state’s current legislation on this topic, the Court held that there is no fundamental right to engage in acts of consensual sodomy.¹¹⁴ The Court justified this ruling as necessary because “it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes [The Court is] unwilling to start down that road.”¹¹⁵

Justice Blackmun’s dissent provided a contrary view, recognizing that the case was not about a fundamental right to engage in homosexual sodomy, but rather “‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”¹¹⁶ Justice Stevens wrote a separate dissent,¹¹⁷ in which he pointed to a paradox—“our prior cases thus establish that a State may not prohibit sodomy within ‘the sacred precincts of marital bedrooms,’¹¹⁸ or, indeed, between unmarried heterosexual adults.”¹¹⁹

¹¹⁰ *Id.* at 189.

¹¹¹ *Bowers*, 478 U.S. at 189. The Supreme Court granted certiorari “because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit.” *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 190.

¹¹⁴ *Id.* at 193-94.

¹¹⁵ *Id.* at 195-96; *see id.* at 196-97 (Burger, J., concurring) (“I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”). *See further id.* at 198 (Powell, J., concurring) (“I cannot say that conduct condemned for hundreds of years has now become a fundamental right.”). This policy argument, not to extend this rationale out of fear where it may lead, is seen again in *Lawrence*. “This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.” 539 U.S. at 601 (Scalia, J., dissenting).

¹¹⁶ *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

¹¹⁷ *Id.* at 214-20 (Stevens, J. dissenting) (joined by Justices Brennan and Marshall).

¹¹⁸ *Id.* at 218 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S.

Using this precedent, the Justice reasoned that it is rational to extend this protection to homosexual adults as well.¹²⁰ Justice Stevens argued, “it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.”¹²¹ The majority’s opinion in *Lawrence v. Texas*¹²² mostly referenced Justice Stevens’s dissenting opinion in *Bowers*.

B. *Bowers Overruled*

Commentators viewed *Lawrence v. Texas*¹²³ as a “landmark victory” for gay rights¹²⁴ that is “likely to become a milestone in U.S. law and culture.”¹²⁵ The case began almost by accident when Harris County Sheriff’s officers entered an apartment in Houston, looking for what a neighbor had told them was a man with a gun “going crazy.”¹²⁶ Instead, the officers found Lawrence engaging in sexual activities with Garner.¹²⁷ The police arrested the two men, held them in overnight custody, and charged and later convicted them of violating a Texas statute that prohibits sexual activity between members of the same sex.¹²⁸

The two men sought a trial *de novo* in Harris County Criminal

479, 485 (1965)).

¹¹⁹ *Id.* (Stevens, J., dissenting) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

¹²⁰ *Id.* (Stevens, J., dissenting).

¹²¹ *Id.* (Stevens, J. dissenting).

¹²² 539 U.S. 558.

¹²³ *Id.*

¹²⁴ Lane, *supra* note 31, at A01.

¹²⁵ Joan Biskupic, *Decision Represents an Enormous Turn in the Law*, U.S.A. TODAY, June 26, 2003, available at 2003 WL 5314286; see also Lane, *supra* note 31, at A01 (stating:

A court that charts a conservative path in so many areas of law reversed a 1986 decision that had hung darkly over the lives of gay men and lesbians—and reversed it with stunning vigor The ruling was anything but the narrow, cautious result many had expected in one of the most sensitive cases of the term. Its logic seemed to be not just that the Constitution prohibits the government from regulating homosexual activity, but that the Constitution protects any sexual activity between consenting adults, unless the government can show that it has a legitimate interest in controlling it.).

¹²⁶ Lane, *supra* note 31, at A01.

¹²⁷ *Id.*

¹²⁸ *Lawrence*, 539 U.S. at 563 (citing TEX. PENAL CODE ANN. § 21.06(a)). TEX. PENAL CODE ANN. § 21.06(a) (2003) provides that a “person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex,” and § 21.01(1) defines “deviate sexual intercourse” as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.”

Court, challenging the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of similar provisions in the Texas Constitution.¹²⁹ The Texas Court of Appeals rejected both claims.¹³⁰ A Court of Appeals, sitting *en banc*, heard the federal constitutional arguments of Lawrence and Garner.¹³¹ In a divided opinion, the Court of Appeals rejected these arguments and affirmed the convictions.¹³² The United States Supreme Court then granted certiorari.¹³³

The Court considered three questions upon review of the case: (1) whether the Texas law criminalizing sexual intimacy by same-sex couples violated the Equal Protection Clause of the Fourteenth Amendment; (2) whether the petitioners' criminal convictions for adult consensual sexual intimacy in the home violated their liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment; and (3) whether *Bowers v. Hardwick*¹³⁴ should be overruled.¹³⁵

Writing for the majority, Justice Kennedy analyzed the case using only the Due Process Clause.¹³⁶ The opinion explored the evolving case history of the right to privacy, beginning with *Griswold v. Connecticut*,¹³⁷ which established a right of marital privacy in the bedroom.¹³⁸ The Court then turned to *Eisenstadt v. Baird*,¹³⁹ which extended this right beyond the marital relationship.¹⁴⁰ Next, the Court cited *Roe v. Wade*,¹⁴¹ which extended Due Process protection to women by giving them the right to make fundamental decisions.¹⁴²

¹²⁹ *Lawrence*, 539 U.S. at 536. Ruth Harlow, lead attorney for Lawrence and Garner, and legal director for Lambda Legal Defense and Education Fund said: "We're pursuing this case because they were just astounded that the state of Texas could do this to them." Robbins, *supra* note 96.

¹³⁰ *Lawrence*, 539 U.S. at 563.

¹³¹ The two constitutional claims were Equal Protection and Due Process.

¹³² *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001).

¹³³ 537 U.S. 1044 (2002).

¹³⁴ 478 U.S. 186.

¹³⁵ *Lawrence*, 539 U.S. at 564.

¹³⁶ "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564.

¹³⁷ 381 U.S. 479 (1965).

¹³⁸ *Lawrence*, 539 U.S. at 564-66 (citing *Griswold*, 381 U.S. 479).

¹³⁹ 405 U.S. 438 (1972).

¹⁴⁰ *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt*, 405 U.S. 438).

¹⁴¹ 410 U.S. 113 (1973).

¹⁴² *Lawrence*, 539 U.S. at 565 (citing *Roe*, 410 U.S. 113).

Lastly, the Court relied on *Carey v. Population Services International*,¹⁴³ which addressed a statute forbidding sale or distribution of contraceptives to persons under sixteen,¹⁴⁴ and held that the reasoning of *Griswold* could not be confined to the protection of the rights of married adults.¹⁴⁵ Based on this line of reasoning, the Court concluded that Garner and Lawrence deserve the same protection.¹⁴⁶ The Court reasoned that if sodomy is legal between two consenting married adults, it must also be legal for non-married adults, including homosexuals.¹⁴⁷

After analyzing this case development, the Court presented evidence showing that the historical analysis on which the *Bowers* Court based its decision had changed drastically.¹⁴⁸ After a critique of *Bowers*, the Court concluded that its rationale does not “withstand careful analysis” and ruled that “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent . . . [It] should be and now is overruled.”¹⁴⁹

Justice O’Connor, a member of the *Bowers* majority, wrote a separate concurring opinion. She agreed with the judgment “that Texas’ sodomy law banning ‘deviate sexual intercourse’ between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.”¹⁵⁰ However, rather than relying on the Fourteenth Amendment Due Process Clause, as the majority did, Justice O’Connor based her conclusion on the Fourteenth Amendment Equal Protection Clause.¹⁵¹

¹⁴³ 431 U.S. 678 (1977).

¹⁴⁴ *Lawrence*, 539 U.S. at 566 (citing *Carey*, 431 U.S. 678).

¹⁴⁵ *Id.* at 566.

¹⁴⁶ *See id.* at 579 (“The case . . . involve[s] two adults who . . . engaged in sexual practices common to a homosexual lifestyle. 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.”).

¹⁴⁷ *See id.* at 567 (“The liberty protected by the Constitution allows homosexual persons the right to make this [sexual and relationship] choice.”).

¹⁴⁸ The Court cited the American Law Institute as well as European sources invalidating these types of sodomy laws. In addition, the Court put forth statistics showing that the twenty-four states with laws prohibiting this conduct at the time of *Bowers* have now been reduced to thirteen, four of which only enforce their laws against homosexual conduct. *See id.* at 569-74. Further, even in these states, people are not commonly prosecuted. *See id.* at 573.

¹⁴⁹ *Id.* at 577-78 (adding, in light of the harsh criticism of *Bowers*, that “[t]he present case does not involve minors The case does involve two adults” *Id.* at 578 (emphasis added)).

¹⁵⁰ *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring). The Georgia statute criminalizes all sodomy. *Id.*

¹⁵¹ *Id.* at 579-80 (O’Connor, J., concurring).

C. Justice O'Connor's Concurrence and Limon

Because Matthew Limon brought an Equal Protection challenge, the majority's Due Process decision in *Lawrence* is not directly on point. Thus, in Limon's case, Justice O'Connor's concurrence in *Lawrence* may be the most pertinent part of the opinion because it addresses Equal Protection. In her concurrence, Justice O'Connor agreed with the majority that Texas's sodomy law is unconstitutional.¹⁵² As stated previously, however, rather than analyzing the case in terms of Due Process, as the majority did, Justice O'Connor based her conclusion on the Equal Protection Clause of the Fourteenth Amendment.¹⁵³

Justice O'Connor began her opinion by noting that the Equal Protection Clause of the Fourteenth Amendment mandates that "all persons similarly situated should be treated alike."¹⁵⁴ Next, using a rational basis standard of review, Justice O'Connor stated that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."¹⁵⁵ Justice O'Connor further explained that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."¹⁵⁶ The Justice remarked that, as a general rule, the Court will apply rational basis review and hold a law unconstitutional where it inhibits personal relationships.¹⁵⁷ Thus, she concluded, "Texas' sodomy law would not pass scrutiny under the Equal Protection Clause, regardless of the type of rational basis review that we apply."¹⁵⁸

Justice O'Connor had two main reasons to support her conclusion. First, she reasoned that because the Texas statute makes sodomy a crime only if the actors are of the same sex, it proves that Texas treats the same conduct differently based solely on the sexual orientation of the participants.¹⁵⁹ Second, Justice O'Connor distinguished *Lawrence* from *Bowers*, asserting that moral disapproval is an insufficient governmental interest to satisfy rational basis review

¹⁵² *Id.* at 585 (O'Connor, J., concurring).

¹⁵³ *Id.* at 579-80 (O'Connor, J., concurring).

¹⁵⁴ *Id.* at 579 (O'Connor, J., concurring) (citations omitted).

¹⁵⁵ *Id.* (O'Connor, J., concurring) (citations omitted).

¹⁵⁶ *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

¹⁵⁷ *Id.* (O'Connor, J., concurring).

¹⁵⁸ *Id.* (O'Connor, J., concurring).

¹⁵⁹ *Id.* at 581 (O'Connor, J., concurring).

under the Equal Protection Clause.¹⁶⁰ Because Texas banned only homosexual sodomy and not heterosexual sodomy, Justice O'Connor concluded that Texas, in effect, was acting solely out of moral disapproval of a politically unpopular group.

It would seem that an application of Justice O'Connor's Equal Protection analysis to *Limon* would lead to the conclusion that the Kansas Romeo and Juliet law is unconstitutional. As in *Lawrence*, *Limon* involves a much harsher penalty based solely on the sex of the participants, and the state relies on moral disapproval as a legitimate state interest to justify that penalty. Justice O'Connor, however, cautioned:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.¹⁶¹

Thus, Justice O'Connor declared that such statutes, which distinguish between homosexuals and heterosexuals, are not invalid *per se*, as long as they serve some legitimate state interest. As a result, Justice O'Connor's opinion, while influential, is not completely applicable to the *Limon* case because she differentiated this law from other circumstances where the law may be valid; for instance, laws involving minors.¹⁶² Further, even if applicable, Justice O'Connor's concurring opinion is not binding precedent because it is not the majority opinion.

¹⁶⁰ *Id.* at 582-83 (O'Connor, J., concurring).

¹⁶¹ *Id.* at 585 (O'Connor, J., concurring).

¹⁶² *Lawrence* also had a dissenting opinion. Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) argued that the majority's opinion is false because Texas's prohibition of sodomy neither infringes upon a "fundamental right," nor is it unsupported by a rational relation to what the Constitution considers a legitimate state interest. *Lawrence*, 539 U.S. at 594-99 (Scalia, J. dissenting). Further, Justice Scalia disagreed with Justice O'Connor, claiming that the Texas statute does not deny equal protection under the laws. *Id.* at 604-605 (Scalia, J., dissenting). Most interestingly, Justice Scalia remarks that "[t]oday's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . ." *Id.* at 602 (Scalia, J., dissenting). Justice Thomas also filed a dissent, remarking that this law is "uncommonly silly" and if it were up to him, he would repeal it; however, his dissent lies with the fact that there is no right to privacy in the Constitution or the Bill of Rights. *Id.* at 605 (Thomas, J., dissenting).

IV. LIMON AND LAWRENCE: A COMPARISON

Because Justice O'Connor based her opinion in *Lawrence* on Equal Protection, it appears more on point than the majority's Due Process analysis, and thus is more favorable to Limon's case; yet, it is important to note that it is a concurrence, and not binding precedent.¹⁶³ Because the *Lawrence* majority based its opinion on due process, liberty and privacy rather than on equal protection,¹⁶⁴ the precise effect the *Lawrence* decision will have on *Limon*, an equal protection case, remains to be seen.¹⁶⁵ While *Lawrence* undoubtedly helps Limon¹⁶⁶ and gay rights in general,¹⁶⁷ the due process and privacy arguments, on their own merit, are unlikely to justify his release.¹⁶⁸ As attorney Joseph Landau indicated, "[The] Kansas court was able to ignore the clear intention of the *Lawrence* ruling because, whereas *Lawrence* was decided on privacy grounds, *Limon* involved equal protection."¹⁶⁹ Further, he noted:

[T]he ACLU . . . did not assert the due process privacy right at the core of *Lawrence*, as doing so would have required challenging

¹⁶³ See Tjagsa Practice Note: *Criminal Law Notes: Instructors, The Judge Advocate General School*, 1992 ARMY LAW. 33, 34 (discussing *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992), where after the Court of Military Appeals granted review, the Court "ultimately declined to decide the case on that basis." Instead, "Chief Judge Sullivan and Senior Judge Everett found that the evidence was admissible as the product of a search supported by probable cause. This result is unfortunate. A decision on the granted issue would have provided practitioners with unequivocal guidance about MRE 313(b) and the 'clear and convincing evidence' standard." *Id.* at 34. The author adds, "Nevertheless, the Court of Military Appeals' decision in *Alexander* is worth examining because Judge Cox *did* decide the granted issue in his concurring opinion. Although this opinion is not binding precedent, it is remarkable in its approach."). See also Major Edward J. Kinberg, *USALSA REPORT: Hindsight—Litigation That Might Be Avoided*, 1989 ARMY LAW. 26, 30 ("While Judge Riismandel's concurring opinion may not be binding precedent, it certainly gives an idea of where the board may be heading in the future."). Further, Justice O'Connor's concurring opinion carries little precedential effect, since she was the sixth justice to vote against the Texas statute, and her vote was not required in overruling *Bowers*.

¹⁶⁴ "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." *Lawrence*, 539 U.S. at 575.

¹⁶⁵ Some commentators opine that the due process claim is broader than the equal protection, see *infra* note 304 and accompanying text.

¹⁶⁶ *Lawrence* is helpful since it overruled *Bowers*, as well as giving Limon "a new avenue to appeal his 17-year sentence." Robert B. Bluey, *Kansas Man Tests Supreme Court's Sodomy Ruling* (Oct. 27, 2003), at

<http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200310\CUL20031027a.html>.

¹⁶⁷ See *supra* text accompanying note 6.

¹⁶⁸ See *infra* text accompanying note 177.

¹⁶⁹ Landau, *supra* note 11.

the entire statutory rape law. Instead, it sought only to challenge the law's discriminatory application, arguing that the statute violated the boy's rights to equal protection. But this rationale handed Kansas an easy, if disingenuous, escape hatch.¹⁷⁰

This "escape hatch" is obvious in the *Limon* opinion, where the court pointed out, "Limon is not asserting a *Lawrence*-like due process challenge. Instead, Limon makes an equal protection challenge . . . , [and] the law and facts are distinguishable from *Lawrence*."¹⁷¹

It is difficult to say what effect *Lawrence* may have on Limon's case in the Kansas Supreme Court. While the Court in *Lawrence* relied on "fundamental propositions and discussions," it never declared that homosexual sodomy is a "fundamental right," nor did it subject the Texas law to a strict scrutiny standard of review that would otherwise have been appropriate if sodomy was a fundamental right.¹⁷² Thus, categorizing *Lawrence* as a "landmark" decision¹⁷³ may have been inappropriate. Rather, as many analysts realize, "*Lawrence* is emerging as a far less revolutionary legal precedent than first advertised"¹⁷⁴ Consequently, *Lawrence* may not support Limon's equal protection case after all.

Furthermore, while overruling *Bowers*, "the Court leaves strangely untouched its central legal conclusion,"¹⁷⁵ specifically, what standard of scrutiny should apply to such laws. The majority's due process analysis in *Lawrence*, as well as Justice O'Connor's concurrence, does not actually address Limon's equal protection argument.¹⁷⁶ In fact, there are various differences between *Lawrence*

¹⁷⁰ *Id.*

¹⁷¹ Kansas v. Limon, 83 P.3d at 234-35.

¹⁷² See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

¹⁷³ See Elmer, *supra* note 1.

¹⁷⁴ Warren Richey, *Gay Rights No Easy Sell in Courts; Despite High-Profile Victories, Gay-Rights Activists Have Lost Most Recent Cases*, CHRISTIAN SCIENCE MONITOR, Feb. 9, 2004, available at <http://lgrl.sitestreet.com/news/article.asp?id=1144>.

¹⁷⁵ See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

¹⁷⁶ Limon is challenging the Kansas statute based on equal protection. See *supra* text accompanying notes 75-77. In *Lawrence*, while the equal protection argument seems very simple at first . . . the Texas statute violates the equal protection clause because it criminalizes identical conduct when engaged in by same-sex couples but not when engaged in by opposite-sex couples. But the argument is not so simple at all. Gays are not a suspect class, and it was not at all clear that discrimination against gays would be subjected to heightened scrutiny under equal-protection analysis . . . the right to commit homosexual sodomy is not [a fundamental liberty interest]. If subjected to the lowest-level rational-relationship test, it is easy to imagine the High Court (or any court) conjuring excuses that anti-sodomy laws are

and *Limon*, which have led Kansas to argue that *Lawrence* is not controlling on *Limon*'s case.¹⁷⁷ *Lawrence* involved two consenting adults,¹⁷⁸ acting in private.¹⁷⁹ *Limon* involved a minor¹⁸⁰ under the age of legal consent,¹⁸¹ thus unable to consent,¹⁸² acting in a public facility.¹⁸³ Such differences have already become a barrier to *Limon*, as the Court stressed several of these distinctions.¹⁸⁴ Further, while many gay rights victories stemmed from the *Lawrence* decision,¹⁸⁵ a backlash is predicted.¹⁸⁶

rationally related to a legitimate governmental interest.

Elmer, *supra* note 1, at 6.

¹⁷⁷ “[T]he present case is legally distinguishable from *Lawrence* . . . [T]he *Lawrence* Court declared that private consensual homosexual acts between adults are protected by the Fourteenth Amendment’s Due Process Clause *Limon* makes an Equal Protection challenge As a result, the law and facts are distinguishable from *Lawrence*.” *Kansas v. Limon*, 83 P.3d at 234-35.

¹⁷⁸ *Lawrence*, 539 U.S. at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”).

¹⁷⁹ *Id.* (“The present case does not . . . involve public conduct . . .”).

¹⁸⁰ Brief for Petitioner at 3a, *Limon* (No. 00CR36).

¹⁸¹ M.A.R. was just short of fifteen years of age. Brief for Petitioner at 30a, *Limon* (No. 00CR36). Sixteen is the “age of consent” in Kansas. *United States v. Kelly*, No. 99-10100-01-WEB, 2000 U.S. Dist. LEXIS 5293, at *8 (D. Kan. Mar. 2, 2000).

¹⁸² *See infra* text accompanying note 225.

¹⁸³ *See supra* note 50 and accompanying text.

¹⁸⁴ *See infra* note 198 and accompanying text.

¹⁸⁵

The historic chain of events - equally stunning to conservative forces - began in June, when the Supreme Court overturned Texas’ anti-sodomy law, in effect decriminalizing gay sex in the last 13 states where such laws were on the books. Over the next few months, the Episcopal Church consecrated an openly gay bishop; Wal-Mart, the country’s largest private employer, extended its anti-discrimination policy to gays and lesbians; *Bride’s* magazine featured its first article on same-sex weddings; California lawmakers granted same-sex couples nearly all the rights of married spouses; and Massachusetts’ Supreme Judicial Court ruled gays had a constitutional right to marry.

Associated Press, David Crary, *Gains for Gay-Rights Movement*, WOODLAND DAILY DEMOCRAT (Dec. 27, 2003), available at

http://www.dailydemocrat.com/articles/2003/12/27/news/news9_.txt.

¹⁸⁶ *See id.*

Even while anticipating bitter struggles ahead, particularly over marriage, gay-rights activists interpreted the events as a sign that most of their goals would be achieved, and sooner rather than later. Foes of gay rights, conversely, hoped the landmark court rulings would provoke a backlash that at minimum would thwart recognition of same-sex marriages.

Id.; see also Laura Douglas-Brown, ‘Unprecedented’ Court Victories Mark 2003, *Backlash Builds Support for Constitutional Ban of Gay Marriage*, WASH. BLADE, Jan. 2, 2004, at <http://www.washblade.com/2004/1-2/news/national/victories.cfm> (“ . . . [B]acklash

A. First Signs of Backlash

Gay-rights activists hoped that the *Lawrence v. Texas* decision “would mark a turning point in the fight to end what they . . . [saw] as the second-class status of homosexuals in America.”¹⁸⁷ However, only eight months after the infamous decision, one observer noted: “*Lawrence* is emerging as a far less revolutionary legal precedent than first advertised Lower courts have issued [several] rulings since *Lawrence*, but only one was a victory for gay rights.”¹⁸⁸ Furthermore, that victory, *Goodridge v. Dept. of Public Health*,¹⁸⁹ which required recognition of same-sex marriage in Massachusetts, was not even based on a newly recognized right post-*Lawrence*, but rather, on a broad reading of the state constitution.¹⁹⁰ While the Massachusetts case is a great victory, in the broader scheme, “other judges who have been asked to apply—and expand upon—the *Lawrence* precedent have been anything but friendly to gay rights.”¹⁹¹ Rather, “in spite of the Massachusetts ruling, it is becoming increasingly clear to advocates and critics alike that *Lawrence* has not launched a straight-line march toward expansion of gay rights through litigation.”¹⁹² Recent lower court decisions that “limit or criticize *Lawrence* are beginning to suggest a more complicated path ahead for gay rights advocates, with detours and reversals likely—along with victories like the one in Massachusetts.”¹⁹³

Whereas *Goodridge* was viewed as the first post-*Lawrence* victory, *Lofton v. Secretary of the Department of Children and Family Services*¹⁹⁴ was seen as *Lawrence*’s first “setback.”¹⁹⁵ In *Lofton*, the Eleventh Circuit

to the sodomy decision began just days after the Supreme Court heard arguments in the case on March 26.”).

¹⁸⁷ Richey, *supra* note 174.

¹⁸⁸ *Id.*

¹⁸⁹ 798 N.E.2d 941 (Mass. 2003); see also Tony Mauro, *Rocky Path for Gay Rights Cases Despite Lawrence; High Court Logic in Landmark Ruling Rejected by Kansas, Florida Courts*, LEGAL TIMES, Feb. 9, 2004, at 1 (“The first post-*Lawrence* decision that seemed to justify that optimism came last November when the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health* that the state’s bar against same-sex marriage could not be constitutionally justified. *Lawrence* was cited repeatedly in that decision.”).

¹⁹⁰ Richey, *supra* note 174.

¹⁹¹ *Id.*

¹⁹² Mauro, *supra* note 189.

¹⁹³ *Id.* Further, in the post-*Lawrence* regime, there is even more of a conservative push in issuing an amendment to the Constitution limiting marriage to opposite sex. See Carl Hulse, *Senate Hears Testimony on a Gay Marriage Amendment*, N.Y. TIMES, Mar. 4, 2004, at 26.

¹⁹⁴ 358 F.3d 804 (11th Cir. 2004).

¹⁹⁵ Mauro, *supra* note 189, at 1.

Court of Appeals upheld Florida's ban on the adoption of foster care children by homosexuals.¹⁹⁶ The plaintiffs challenged the Florida statute on two grounds: *Lawrence's* right to privacy and Equal Protection.¹⁹⁷ The Eleventh Circuit, however, unanimously rejected both claims, interpreting *Lawrence* narrowly and differentiating the case from *Lawrence* because *Lofton* involved minors.¹⁹⁸ Further, the Eleventh Circuit criticized *Lawrence* in detail stating, "We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis."¹⁹⁹ Even further, the Eleventh Circuit charged that the "constitutional liberty interests on which the [*Lawrence*] Court relied were invoked, not with 'careful description,' but with sweeping generality."²⁰⁰

Thus, the Eleventh Circuit not only interpreted *Lawrence* narrowly,²⁰¹ but also rejected the notion that *Lawrence* granted homosexuals a fundamental right.²⁰² Further, the Eleventh Circuit held that *Lawrence* only required a rational basis standard of review,²⁰³ reasoning that the case involved minors as the basis to distinguish it from *Lawrence*.²⁰⁴ Lastly, the Eleventh Circuit gave great deference to the legislature.²⁰⁵

Two days following the *Lofton* decision "came another ruling that

¹⁹⁶ 358 F.3d 804.

¹⁹⁷ *Id.* at 809.

¹⁹⁸ *Id.* at 818.

Moreover, the holding of *Lawrence* does not control the present case. Apart from the shared homosexuality component, there are marked differences in the facts of the two cases. The Court itself stressed the limited factual situation it was addressing in *Lawrence* [Court cites *Lawrence*, 539 U.S. at 578 – "The present case does not involve minors."]. Here, the involved actors are not only consenting adults, but minors as well . . . Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.

Id. at 817; see also Mauro, *supra* note 189.

¹⁹⁹ *Lofton*, 358 F.3d at 817; see also Mauro, *supra* note 189.

²⁰⁰ *Lofton*, 358 F.3d at 817.

²⁰¹ The *Lofton* court interpreted *Lawrence* as simply holding that "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. The effect of this holding was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct." *Id.* at 815-16.

²⁰² *Id.* at 816 ("Nowhere, however, did the Court characterize this right as 'fundamental.'").

²⁰³ *Id.* at 817.

²⁰⁴ See *infra* note 210 and accompanying text.

²⁰⁵ *Lofton*, 358 F.3d at 827.

gave *Lawrence* a short shrift, this time from the Kansas Court of Appeals.²⁰⁶ This decision was *Kansas v. Limon*.²⁰⁷ In this case, as in *Lofton*, the Kansas Court of Appeals interpreted *Lawrence* narrowly, echoing the distinction made in *Lofton* that the law applies differently to minors than it does to adults.²⁰⁸

B. Limon: Adults vs. Minors

In *Lawrence*, for the first time, the United States Supreme Court recognized a privacy right for homosexuals to engage in homosexual activities.²⁰⁹ The Court, however, stipulated that this privacy right only extends to “consenting adults.”²¹⁰ Thus, one could make the argument that *Lawrence* grants a privacy right *only* to adults.²¹¹ This suggests an argument that *Lawrence*, by specifically excluding minors, has no impact whatsoever on *Limon*, a case dealing with underage sex.²¹² This movement, limiting *Lawrence* to situations involving adults, has already transpired in *Lofton*.

Additionally, the Kansas Court of Appeals latest *Limon* decision relied on this distinction. The Court of Appeals began its analysis by focusing on Justice Kennedy’s language in *Lawrence*: “The case does involve two adults, who with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”²¹³ Next, the Court of Appeals reasoned that *Lawrence*’s “major premise may be reconstructed to state: All adults may legally engage in private consensual sexual practices common to a

²⁰⁶ Mauro, *supra* note 189, at 1.

²⁰⁷ *Kansas v. Limon*, 83 P.3d 229.

²⁰⁸ Mauro, *supra* note 189.

²⁰⁹ See generally *Lawrence*, 539 U.S. 558.

²¹⁰ “The case does involve two *adults* who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” *Id.* at 578 (emphasis added).

²¹¹ “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 The case does involve two *adults*” *Id.* at 578 (emphasis added).

²¹² As University of California at Los Angeles law professor Eugene Volokh opined, “[i]f states have flexibility in deciding what is permitted for adults, it seems to me that they would, as a constitutional matter, have even more flexibility in what is permitted with children.” *Homosexuals Ask Supreme Court to Strike Down Homo “Pedophile” Laws*, THE WELCH REP., Oct. 14, 2002, at

http://www.welchreport.com/pastnews_c.cfm?rank=523. Therefore, because *Limon*’s case involves a minor, *Limon* may not receive the privacy protection that has been granted in *Lawrence*. Specifically, the fact that the Court mentioned such a caveat shows that the *Lawrence* “victory” may not encompass *Limon*.

²¹³ *Kansas v. Limon*, 83 P.3d at 234.

homosexual lifestyle.”²¹⁴ Thus, the Court of Appeals concluded, “Children are excluded from the proposition.”²¹⁵ Lastly, the Kansas court emphasized that “[b]ecause the present case involved a 14-year-old . . . child, it is factually distinguishable from *Lawrence*.”²¹⁶

The Kansas Court of Appeals further justified Limon’s conviction, noting that the unequal position of children, both physically and mentally, “make them a proper subject for legislative protection.”²¹⁷ The Court of Appeals emphasized that even laws operating in the “sensitive area of constitutionally protected rights” have been sustained when they were “aimed at protecting the physical and emotional well-being of youth.”²¹⁸ Drawing from cases such as *Prince v. Massachusetts*²¹⁹ where the United States Supreme Court held a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute’s effect on a First Amendment activity,²²⁰ the Court of Appeals concluded that “[p]rotective legislation is permissible even though based on a classification which may seem unreasonable.”²²¹

Using this rationale, the Kansas Court of Appeals added that through the legislature’s passing of the criminal sodomy statute and punishing homosexual teenage sex more severely than teenage heterosexual acts, it has acted reasonably as to prevent gradual deterioration of sexual morality, encourage and preserve traditional sexual mores of society, and not disturb traditional sexual developments of children.²²² The Court of Appeals essentially interpreted Limon’s case in the same way it did before *Lawrence*. In fact, the Court of Appeals construed Justice Kennedy’s language in *Lawrence* as a limitation, barring Limon’s release.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 235.

²¹⁸ *Id.* at 236.

²¹⁹ 310 U.S. 158 (1944).

²²⁰ *Kansas v. Limon*, 83 P.3d at 236. *See also* *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and physiological well-being of a minor’ is ‘compelling.’”) (citations omitted); *Ginsberg v. New York*, 390 U.S. 629 (1968) (sustaining a New York law protecting children from exposure to non-obscene literature).

²²¹ *Kansas v. Limon*, 83 P.3d at 236.

²²² *Id.* Further, the Court disapproved of Limon’s Brief, which marked M.A.R. as a homosexual or bisexual. The Court asserted that this label is “unfair” because the record reveals that he had only one same-sex encounter with Limon. The Court added, “[I]f M.A.R.’s sexual identity was not well defined before his homosexual encounter with Limon, M.A.R. might have become confused about his sexual identity.” *Id.* at 266-67.

C. Limon; *consent*

Likewise, by limiting this privacy right to adults, the Supreme Court in *Lawrence* essentially requires consent. While consent is presumed when the actors are adults, in cases involving children, consent is not presumed.²²³ Further, the Supreme Court notes that the *Bowers* Court employed flawed reasoning because early sodomy laws were not enforced against consenting adults acting in private, but “[i]nstead, sodomy prosecutions often involved predatory acts against those who could not or did not consent [such as]: relations between men and minor girls, [and] between adults involving force”²²⁴ By distinguishing between different levels of consent, the Supreme Court is essentially awarding preferential treatment to consensual relationships. This distinction is crucial to Limon’s case, since M.A.R., who was under the age of sixteen, could not legally have formed the requisite consent.²²⁵

However, while there are different considerations as to consent, the same basic issue underlies both cases: Kansas and Texas punish the same sexual act differently based solely on the sexual orientation of the participants.²²⁶ In both *Limon* and *Lawrence*, the defendants sought equal punishments for equal crimes.²²⁷ In *Lawrence*, this was achieved through the privacy protection of the Fourteenth Amendment.²²⁸ Limon argued an Equal Protection violation.²²⁹ Nevertheless, both cases essentially pose the same issue, leading to

²²³ See *infra* Part V.B discussing consent.

²²⁴ *Lawrence*, 539 U.S. at 561.

²²⁵ “[A] minor [is] therefore incapable of consent.” *Lawrence*, 539 U.S. at 569. See also discussion of consent *infra* Part V.

²²⁶ Limon’s attorney, Tamara Lange of the ACLU, pronounced, “[T]he case presents the same equal protection question that was central to the *Lawrence* decision.” Bluey, *supra* note 166. Ms. Lange stated further, “The Supreme Court made it very clear that you can no longer punish someone differently for being gay Yet Matthew Limon continues to sit in jail because when he was a teenager he had consensual sex with another male rather than a female.” *Appeal Begins for Teen Sentenced to Prison for Gay Sex*, *supra* note 36.

²²⁷ Lange [Limon’s attorney] said the issue comes down to fairness, something the Kansas law did not afford to Limon. She said it would be outlandish for a judge to sentence a homosexual teenager to a stiffer sentence than a heterosexual teenager if each robbed the same convenience store. If that is the case . . . there is no reason to impose a tougher sentence on Limon for having had sex. “It’s really about having equal punishment for equal crimes If you perform the same acts, you should have the same penalty.”

Robert B. Bluey, *Homosexuals Ask Supreme Court to Strike Down ‘Anti-Gay’ Laws* (Oct. 14, 2002) at <http://www.cnsnews.com/Culture/Archive/200210/CUL20021014a.html>.

²²⁸ See generally *Lawrence*, 539 U.S. 558.

²²⁹ Brief for Petitioner at 7-8, *Limon* (No. 00CR36).

the inquiry of whether the *Lawrence* decision directs Limon's release.

While in both cases the defendants filed a petition for certiorari to the United States Supreme Court,²³⁰ the Court granted a writ in *Lawrence* only.²³¹ The essential holding of *Lawrence* is that consenting adults have a privacy right to engage in homosexual acts.²³² On first appearance, this does not encompass *Limon*, where one of the participants was a minor and thus could not consent.²³³ However, the Court clearly recognized the possible effect of *Lawrence* on *Limon* by remanding the *Limon* case to the Kansas Court of Appeals just one day after deciding *Lawrence*.²³⁴ In fact, the Supreme Court met for this particular purpose.²³⁵ This was seen by some as "the first ripple effect" of *Lawrence*.²³⁶

The Court's action poses one question—why? If *Lawrence*, as the Court stated on several occasions, does not extend a privacy right to minors, why give Limon a second chance? One opinion is that the Court "clearly felt . . . that a great deal of injustice has been done to Matthew Limon [L]aws that punish lesbian, gay, and bisexual people far more harshly than heterosexuals for the same thing are simply discriminatory and wrong" ²³⁷ Another possibility is that the United States Supreme Court merely sent the case back because the Kansas district court based its reasoning in *Limon* on the *Bowers* decision, which had just been overruled.²³⁸ Lastly, perhaps the Court

²³⁰ *Id.* at 23; *Lawrence v. Texas*, 537 U.S. 1044 (2002).

²³¹ *Lawrence*, 539 U.S. at 564.

²³² See generally *id.*

²³³ "The Supreme Court's decision had to do with consenting adults,' [said Miami County Attorney David Miller]. 'The victim in this case was not of age to give consent.'" Tom Rizzo, *U.S. Supreme Court Remands Kansas Case Involving Underage, Gay Sex*, KAN. CITY STAR, June 28, 2003, at 1.

²³⁴ 539 U.S. 955 (2003).

²³⁵ "The Supreme Court came in for a special session to order this review the day after the Texas (and Kansas) sodomy laws were deemed unconstitutional" Richard Heckler, *Kline's Tantrum*, TOPEKA CAP. -J. (Kan.), Sept. 18, 2003, at 4, available at 2003 WL 62492681. "The order was made in light of Thursday's ruling that struck down Texas' same-sex sodomy law, the Supreme Court announced. It was the only such order issued Friday, according to a court spokesman." Rizzo, *supra* note 233.

²³⁶ "The Supreme Court announced yesterday the first ripple effect of its landmark decision on gay rights, ordering a Kansas court to reconsider its approval of a 17-year sentence" Lane, *supra* note 89.

²³⁷ Dick Kurtenbach, Executive Director of the ACLU of Kansas and Western Missouri, opined this comment, see *Court Asked to Overturn 17-Year Prison Sentence of Bi Teen* (Aug. 11, 2003), at <http://www.365gay.com/NewsContent/081103romeoLaw.htm>.

²³⁸ "The Kansas court justified Matthew's conviction on the basis that the Supreme Court had upheld anti-gay sodomy laws in its 1986 *Bowers v. Hardwick*

acknowledged the significance and possible implications of Justice O'Connor's Equal Protection concurrence.

Whatever its reasoning, the United States Supreme Court has given Matthew Limon, who has already served over three years of his seventeen-year sentence, "hope" for a release.²³⁹ It remains to be seen if Limon has more than a hope in the aftermath of *Lawrence*, as *Lawrence*, after all, left many questions unanswered.

V. POST-LAWRENCE—REMAINING QUESTIONS

Decisions following *Lawrence*, including *Lofton* and the Kansas Court of Appeals decision on remand in *Limon*, reflect that although the *Lawrence* case may have been a "breakthrough," it is currently on "shak[y] ground[s]."²⁴⁰ The language of the *Lawrence* decision itself is partially to blame.²⁴¹ David Garrow, a legal historian at Emory University observes, "What judges seem to be saying is that Justice Kennedy may be too rhetorically poetic for his own good [I]t may sound winsome as moral commentary, but as blackletter constitutional law, [judges] are not impressed."²⁴² Furthermore, other than its "poetic" language, the opinion has other ambiguities, leaving several unanswered questions, specifically in Limon's case.

A. Minors

The *Lawrence* decision left various questions open. Some advocate that the Supreme Court, by expressly stating that the privacy right should be offered to adults, ensured that *Limon*, a case involving teenagers, would not be affected.²⁴³ In addition, proponents of the Romeo and Juliet law argue that it is a legitimate law to protect children; thus, the Kansas law has no relation to the law struck down

ruling,' said Tamara Lange, Limon's attorney from the ACLU's Lesbian and Gay Rights Project. 'Now that *Bowers* has been overturned, the Kansas Court of Appeals should recognize that this young man should not spend more time in prison just because he's bisexual.'" *Id.*

²³⁹ Limon's attorney, Tamara Lange of the ACLU, said: "[T]he fact that the Supreme Court remanded the case for further consideration should give Limon hope he will be released . . ." Bluey, *supra* note 166.

²⁴⁰ Mauro, *supra* note 189.

²⁴¹ *Id.* ("[T]he criticism already leveled at *Lawrence* has some analysts wondering whether the structure and language of Kennedy's majority opinion invited attack.")

²⁴² *Id.*

²⁴³ See Bluey, *supra* note 166. "Kansas Attorney General Phill Kline has defended Limon's prosecution. He has the support of 25 state lawmakers who filed a friend-of-the-court brief arguing that the *Lawrence* decision has nothing to do with pedophilia or any other laws regulating sex between adults and minors." *Id.*

in *Lawrence*.²⁴⁴ If that is the case, it seems paradoxical for the United States Supreme Court to give Limon another chance.²⁴⁵ A contrary opinion is that the Court, after overruling *Bowers*, simply remanded the case not to grant Limon a second chance, but to allow the appellate court to apply consistent precedent.²⁴⁶ Thus, the weight given to this particular point is unsettled.

A main argument for upholding Limon's conviction is that he engaged in this conduct with a minor.²⁴⁷ Throughout the majority and concurring opinions, the Supreme Court carefully noted that *Lawrence* did not extend to minors.²⁴⁸ A literal reading would imply that Limon's actions with M.A.R., a minor, are not protected, since different standards apply when dealing with the conduct of minors.²⁴⁹

²⁴⁴ See *infra* note 247 discussing differentiations between adults and minors.

²⁴⁵ The United States Supreme Court granted a petition for certiorari to the Court of Appeals of Kansas "for further consideration . . ." *Limon v. Kansas*, 539 U.S. 955 (2003). See also *Greenhouse*, *supra* note 14. "In an immediate application of its newly protective approach to gay rights, the Supreme Court today vacated the sodomy conviction of a Kansas teenager." Further, "in a one-sentence order, the justices told the Kansas Court of Appeals to reconsider the conviction and sentence in light of the Supreme Court ruling on Thursday that overturned a Texas sodomy law." *Id.*

²⁴⁶ See *supra* Part IV.C.

²⁴⁷ During oral arguments on December 3, 2003, Deputy Attorney General Jared Maag argued "that the Legislature has the authority to determine the punishment for minors who engage in sexual acts in order to teach moral values to children, including 'traditional family roles.'" Chris Grenz, *Court Takes on Gay Teen Sex Case*, TOPEKA CAP. -J. (Kan.), Dec. 3, 2003, at 8, available at 2003 WL 62495800. Kansas Attorney General, Phill Kline shares this viewpoint:

Kline said . . . that the American Civil Liberties Union is arguing that teenagers have a constitutional right to have sexual relations with anyone they want. [This] "is absolutely a remarkable assault on the authority of the family because when your daughter walks out the door and says, 'I'm going to meet my 40-year-old boyfriend' and you try to guide her and parent her, and say, 'No, that's not going to happen' and she holds up an ACLU card and says, 'Call my attorney,' we are living in a different type of America."

Grenz, *supra* note 50. Kline further stated that "if the state loses a sodomy case currently before a state appeals court [i.e., *Limon*], Kansas marriage laws and laws against sex with children will be nullified." Associated Press, John Hanna, *KANSAS: Kline Says Marriage, Consent Laws in Danger; ACLU Disputes Claim* (Sept. 16, 2003), available at <http://lgrl.sitestreet.com/news/print.asp?id=458>.

²⁴⁸ *Lawrence* specifically stated, "This case does not involve minors, persons who might be injured or coerced . . . It does involve two *adults* who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle." *Lawrence*, 539 U.S. at 561 (emphasis added).

²⁴⁹ See *supra* note 212 and accompanying text. Further, just as states can justify laws such as refusing to furnish alcohol to children but not adults, "lawmakers could have several reasons for setting up different sodomy penalties." Associated Press, John Hanna, *Kan. Court Backs Harsher Sodomy Sentence* (Jan. 30, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A63810-2004Jan30.html>.

A more careful inquiry, however, may suggest that this literal interpretation is not unquestionably what the Supreme Court intended.

Courts generally recognize that minors enjoy fewer sexual rights than adults.²⁵⁰ When the *Lawrence* Court stated the decision does not extend to minors, it may simply have affirmed this general principle. The Court reiterated that there is a privacy right to engage in homosexual relationships in the home and that “the State cannot demean their [homosexuals’] existence or control their destiny by making their private sexual conduct a crime.”²⁵¹ Yet, this does not mean that this protection *must exclude* teenagers.²⁵² While teenagers may have no more privacy rights after *Lawrence* than before, the *Lawrence* decision does not necessarily serve to *limit* minors’ rights.

Therefore, a state can still monitor and set up rules regulating relationships between minors; however, homosexual minors may still enjoy the benefits derived from this ruling. Prior to *Lawrence*, homosexual activity was illicit and illegal. After *Lawrence*, homosexual activity is neither and thus should not warrant stricter punishment. Under this reading of *Lawrence*, Kansas can punish Limon for engaging in consensual sexual behavior with a child under the Kansas criminal sodomy statute,²⁵³ but may not punish him for longer than a heterosexual teenager.²⁵⁴ This, in essence, is the heart of Justice O’Connor’s Equal Protection argument.

Thus, although *Lawrence* specifically addresses adults and seems to exclude minors from the general decision,²⁵⁵ it is likely to support *Limon’s* case, at least minimally. Although it is recognized that in

²⁵⁰ For the notion that minors do not enjoy a constitutional sexual privacy right is quite common, see *In re T.A.J.*, 62 Cal. App. 4th 1350 (Cal. Ct. App. 1998). “Minors have no privacy right to engage in consensual sexual intercourse [D]ue to age and immaturity, minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.” *Id.* at 1361.

²⁵¹ *Lawrence*, 539 U.S. at 578.

²⁵² See *supra* note 250 and accompanying text.

²⁵³ KAN. STAT. ANN. § 21-3505 (2002).

²⁵⁴ See *Appeal Begins for Teen Sentenced to Prison for Gay Sex*, *supra* note 36. Dick Kurtenbach, Executive Director of the ACLU of Kansas and Western Missouri stated:

Contrary to Attorney General Phill Kline’s many efforts to confuse the real issues behind this case, we’re not saying the state shouldn’t protect teens or punish those who break the law. We are only asking that the state treat gay teens the same as it does straight teens Matthew Limon isn’t asking for a get out of jail free card – he’s saying he should have been convicted and punished . . . [and received the same protection under]– the Romeo and Juliet law.

Id.

²⁵⁵ See note 210 *supra* and accompanying text.

general, minors have less privacy rights than adults, this does not mean that the benefits homosexuals will receive from *Lawrence* cannot extend to minors. While minors continue to possess less sexual and privacy rights than adults, it does not necessarily follow that only homosexual adults are free to engage in homosexual conduct. Even though the Court stated that the decision does not include minors, it did not say that the decision *cannot* include minors. It is difficult to predict, however, how far courts will—and should—extend these benefits. Nevertheless, it can be conceded that Limon’s prospects seem greater post-*Lawrence* than in the *Bowers* regime.

B. Age of Consent

The next potential hurdle, also relating to the age of the participants, is consent. The Court assumed consent was present in *Lawrence*,²⁵⁶ however, in *Limon*, consent poses a problem. M.A.R., the “victim,” was fifteen years of age. The age of consent in Kansas is sixteen.²⁵⁷ M.A.R. was under the age of consent,²⁵⁸ meaning that although the acts were consensual,²⁵⁹ M.A.R. could not have effectively, or legally, “consented” to them.²⁶⁰

Consent began as a legislative determination that established at what age a female was capable of consenting to engage in sexual acts.²⁶¹ Lawmakers enacted early statutory rape laws and age of consent laws “to protect young females’ virginity in order to ensure their eligibility for marriage.”²⁶² In the late nineteenth and early twentieth centuries, “reformers and families used statutory rape laws both to protect and to control the sexuality of working class girls

²⁵⁶ See note 232 *supra* and accompanying text.

²⁵⁷ See note 16 *supra* and accompanying text.

²⁵⁸ See note 15 *supra* and accompanying text.

²⁵⁹ See note 13 *supra* and accompanying text.

²⁶⁰ “Under the old statute and similar ones in other states, it has always been held that the female child below the age prescribed is utterly without capacity to consent.” *State v. Frazier*, 54 Kan. 719 (1895). Therefore, “there can be no such thing as fornication with a female child under the age of consent If she cannot consent, then any person lewdly touching her commits an assault, and an assault is always an unlawful act.” *Id.*

²⁶¹ See DONALD E.J. MACNAMARA & EDWARD SAGARIN, *SEX, CRIME, AND THE LAW* 67 (Free Press 1977) (“‘Statutory rape’ usually refers to . . . a consensual act in that both parties agreed but one legally regarded as a form of rape because the age and presumed immaturity of the female did not give her the legal right to offer consent.”).

²⁶² Britton Guerrina, *Comment: Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1259 (1998). See also *Michael M. v. Super. Ct.*, 450 U.S. 464, 472 n.7 (1981).

laboring in the new urban centers.”²⁶³ The necessity for these laws, however, is still present in modern times. Two policy goals explain why legislatures retain a statutory age of consent: “(1) to prevent teenage girls from consenting to sex in an uninformed manner, thereby exposing themselves to physical and emotional harm; and (2) to deter men from preying on young females and coercing them into sexual relationships.”²⁶⁴ Both of these goals seek to deter risks from sexual relationships, such as pregnancy, disease, and emotional harm.²⁶⁵ To prevent such harms, age of consent laws serve as a deterrent to older men from taking advantage of younger females.²⁶⁶

Historically age of consent laws existed primarily to protect young females. Prior to *Lawrence*, Kansas’s age of consent laws did not explicitly encompass homosexuals.²⁶⁷ Because homosexual sodomy was illegal, neither adults nor teenagers could legally consent to it. In the post-*Lawrence* regime, however, because sodomy is effectively legal, the possibility exists that states can continue to prevent homosexual conduct, at least for teenagers, through indirect regulation, accomplished by enacting a higher age of consent.²⁶⁸ Though sodomy is legal, by enacting a very high age of consent (i.e., twenty-one, as England and Australia have done), a state can effectively preclude sodomy in a great part of its population. This type of regulation, in operation, goes beyond simply “protecting

²⁶³ Guerrina, *supra* note 262, at 1259.

²⁶⁴ *Id.* at 1259-60.

²⁶⁵ *Id.* at 1260.

²⁶⁶ See *supra* note 260 and accompanying text.

²⁶⁷ See chart of age of consent laws in the United States, at <http://www.ageofconsent.com/ageofconsent.htm> (last visited Aug. 24, 2004).

²⁶⁸ As early as 1967, Europe, arguably more progressive than the United States in terms of gay-rights (as cited in *Lawrence*, see note 148 *supra* and note 274 *infra*), passed the Sexual Offences Act, making prohibitions on homosexual behavior unenforceable. This Act applied only in England and Wales; Scotland joined in 1980 and Northern Ireland in 1982. At the time, the age of majority was eighteen; the age of consent for heterosexuals was sixteen; the age of consent, however, for homosexuals was twenty-one. For the first time since the Act of 1967, the issue of consent was debated in 1994, when several nations lowered the age to eighteen. In England, this issue is still being debated. See Arabella Thorp, ‘Age of Consent’ for Male Homosexual Acts, *Research Paper 98/68*, HOUSE OF COMMONS LIBRARY, HOME AFFAIRS SECTION, June 19, 1998, at 9, at <http://www.parliament.uk/commons/lib/research/rp98/rp98-068.pdf> [hereinafter Research Paper]. The Research Paper was prepared in response to Ann Keen’s proposed amendments to the *Crime and Disorder Bill [HL]* [Bill 167 of 1997-98], which sought to lower the age of consent for male homosexual acts from 18 to 16. This Research Paper discusses the amendments to the *Criminal Justice and Public Order Act 1994*, which lowered the age of consent from 21 to 18, and examines the events leading up to the changes proposed currently. In addition, it also provides an overview of some of the issues that may arise in considering lowering age of consent laws.

children.”²⁶⁹ By enacting a higher age of consent, a state aims to prevent an activity it believes to be morally reprehensible. Such state actions bear greater resemblance to the “embarrassing” era of *Bowers* than to the current progressive *Lawrence* regime. Thus, *Limon* is important, not only because it serves as a “test case” to see how far *Lawrence* will extend,²⁷⁰ but also because it can serve as a preventative measure against a backlash that could essentially outlaw homosexual activities of young adults through the enactment of higher age of consent laws.²⁷¹ Further, this decision’s importance will be more than experimental. In fact, “[a]dvocates and opponents of same-sex sodomy laws agree on one thing: The [C]ourt’s ruling on the issue could be a milestone in how sexual orientation and traditional views of marriage and family are treated under the law.”²⁷² The *Limon* decision could fill in the holes of *Lawrence*, addressing whether sexual orientation deserves heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.²⁷³

1. The European Model

A similar issue regarding homosexual consent laws has recently been debated in Europe.²⁷⁴ While sodomy has been legal in Europe

²⁶⁹ See *Kansas v. Limon*, 83 P.3d at 235-37.

²⁷⁰ See *supra* note 89.

²⁷¹ This possibility has been made apparent: in oral arguments to the Kansas Court of Appeals on December 3, 2003, the Deputy attorney general argued that the “[Legislature] has the right to set polices regarding teen sex – even if lawmakers treat gays differently from heterosexuals.” Grenz, *supra* note 247. The Legislature has “the authority to determine the punishment for minors who engage in sexual acts in order to teach moral values to children, including ‘traditional family roles.’ . . . [T]he different penalties for same-sex teenage couples would promote marriage, encourage procreation and discourage the spread of disease.” *Id.*

²⁷² Geraldine Sealey, *Imprisoned Teen Challenges Kansas ‘Romeo and Juliet’ Law*, ABC NEWS, Jan. 17, 2003, at

<http://www.abcnews.go.com/sections/us/DailyNews/teensodomy030117.html>.

²⁷³ “The Supreme Court has not reached the question of whether sexual orientation warrants strict or intermediate scrutiny. Some have argued it serves heightened scrutiny,” said Ed Stein, a professor of sexual orientation, gender and the law at Benjamin N. Cardozo School of Law in New York.” *Id.* See also Section C *infra* discussing *Romer*.

²⁷⁴ While cases arising in and decided by European courts bear little precedential value, European decisions may still carry some weight. The Court in *Lawrence* engaged in a discussion over how Europe has treated homosexuals:

[A]lmost five years before *Bowers* was decided, the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right The court held [in *Dudgeon v. United Kingdom*] that the laws

since 1967,²⁷⁵ some nations only recently lowered the age of consent for homosexuals to the same age as for heterosexuals.²⁷⁶ European

proscribing the conduct were invalid under the European Convention on Human rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

Lawrence, 539 U.S. at 573 (internal citations omitted).

²⁷⁵ *Id.* at 569-71.

²⁷⁶ *Hungary*: Paragraph 199 of the Hungarian Penal Code sets an age of consent of eighteen for sexual relations between persons of the same sex, and 14 for those between persons of the opposite sex. *ILGA-Europe Welcomes Hungarian Constitutional Court Age of Consent Ruling*, Sept. 5, 2002, at http://www.ilga-europe.org/m7/media_releases/2002-09-05-HUConsent.htm. It was repealed on September 5, 2002. *Id.* The Code received challenges beginning in September 1993, when three organizations (Lambda Budapest Gay Society, Homeros Society, and the Hungarian Jewish Lesbian and Gay Group) addressed a petition to the Constitutional Court challenging the constitutionality of the law. *Id.* Challenges continued in 1996 and in 1998, and three cases since 1998. However the Constitutional Court repeatedly postponed reaching a decision. *Id.*

In 2000 the issue was taken up at European level, when the Parliamentary Assembly of the Council of Europe passed a Recommendation calling inter alia for the repeal of remaining discriminatory age of consent laws in Europe, and citing Hungary amongst the countries which still maintained such laws. The Hungarian Court's ruling follows the repeal of laws discriminating on the basis of sexual orientation in Lithuania (2000 - although the new law has still to come into force), Estonia (2001), and Romania (2001).

Id.

Romania:

Until 14 November 1996 same-sex relationships in Romania were illegal under Article 200 of the penal code. On that date Article 200 was amended so that the complete ban was lifted, but replaced with provisions that were almost as oppressive and discriminatory. Subsequent efforts by the Romanian government to ameliorate Article 200 were frustrated by the Romanian Parliament. On June 22nd 2001 the Romanian government issued an ordinance abrogating Article 200. While this ordinance had the immediate effect of suspending the use of Article 200 in the courts, it remained subject to the approval of the Romanian Parliament and President. This has finally now taken place, with the adoption of Government Emergency Ordinance no. 89/ 21 June 2001 by the Chamber of Deputies on December 18, 2001, and by the Senate on December 20, 2001, and the approval of the President of Romania on January 14, 2002. Article 200 included a number of measures, including a discriminatory age of consent, a discriminatory definition of what constitutes a public place, provisions relating to same-sex acts causing "public scandal", and provisions limiting the rights of freedom association and expression of lesbians, gays and bisexuals. The discriminatory age of consent law in Romania was repealed on February 4, 2002.

Repeal of Laws Criminalizing Same-Sex Relationships in Romania Steps up Pressure for Repeal of Discriminatory Laws in Cyprus, Hungary and Bulgaria, Feb. 4, 2002, at http://www.ilga-europe.org/m7/media_releases/2002-02-04-RomaniaRepeal.html.

nations offered several justifications for the different age of consent for homosexuals.²⁷⁷ First, nations were concerned with the need to protect boys and young men.²⁷⁸ This concern arose out of sentiment that a higher age of consent is justified, since many young men have not yet achieved a settled sexual orientation.²⁷⁹ Second, some lawmakers felt that a function of criminal law is to protect young men from contracting diseases as a result of homosexuality.²⁸⁰

Advocates of lowering the age of consent, however, made several counterarguments. First, the current age (eighteen) did not effectively stop young gay men from engaging in sexual activity.²⁸¹ Second, the European nations did not provide any evidence that proved that the higher age of consent actually results in reducing homosexual orientation.²⁸² Third, because homosexual teenage sex is criminalized, it “encourages a life of secrecy and deception for young gay people . . . [which] makes them vulnerable to blackmail.”²⁸³ Fourth, because sexual activity is illegal, the law discourages young

Cyprus: In July 12, 2002, after much pressure, Cyprus introduced an equal age of consent for homosexuals and heterosexuals:

In order to remain on course for accession the Cyprus government reluctantly compromised to raise the age of consent between heterosexuals from 16 to 17 and to lower the age of consent between homosexuals from 18 to 17. Eliminating the discriminatory age of consent law is a major achievement. It is however “sad that the changes are brought about in response of EU pressure rather than being motivated because homosexuals’ rights are human rights” says ILGA-Europe member, Alecos Modinos, Gay Liberation Movement of Cyprus.

Cyprus Harmonises Age of Consent, July 12, 2002, at http://www.ilga-europe.org/m7/media_releases/2002-07-12-CYConsent.htm.

While Europe pressures new nations to grant homosexuals full equality, “[t]hese developments highlight yet again the shameful double standards operated by those EU member states, Austria, Greece, Ireland, Portugal and the UK, which still maintain discriminatory laws.” Kurt Krickler, *Romania Repeals Anti-Gay Law*, Feb. 2002, at <http://www.ilga-europe.org/docs/newsletters/2002-1/Romania.htm>.

Lastly, Australia also recently saw such a victory. In New South Wales, the age of homosexual sex was lowered to 16 (from the prior age of 21), on May 29, 2003. *Australian State Lowers Age of Consent for Homosexual Sex*, May 29, 2003, at <http://www.lifesite.net/ldn/2003/may/03052910.html>.

²⁷⁷ Note the similarities between the old European “justifications” and the ones in the *Limon* opinion. *Kansas v. Limon*, 83 P.3d at 235-38 (justifying higher age of consent 1. to protect children; 2. because a minor may not yet have settled into a sexual orientation; and 3. for the prevention of disease).

²⁷⁸ See *Research Paper*, *supra* note 268.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 10.

²⁸¹ *Id.* at 14 (citing *Why Introduce an Equal Age of Consent?* Outright Scotland, 1994).

²⁸² *Id.*

²⁸³ *Id.*

gay men “from seeking advice about sexually transmitted diseases.”²⁸⁴ Finally, because of the psychological impact of such laws, “[o]ne in five young gay men has attempted suicide at some time.”²⁸⁵ Tony Blair, current Prime Minister of England, who at the time of the debate held the position of Shadow Home Secretary, added:

[The issue] is not at what age we wish young people to have sex. It is whether the criminal law should discriminate between heterosexual and homosexual sex. It is therefore not an issue of age, but of equality. By supporting equality, no one is advocating or urging gay sex at 16 any more than those who would maintain the age of consent for heterosexual sex advocate that girls or boys of 16 should have sex. It is simply a question of whether there are grounds for discrimination. At present, the law discriminates.²⁸⁶

2. Indirect Regulation in the United States

In the United States, where homosexuality and sodomy only recently began to receive federal constitutional protection through *Lawrence*, there exists a possibility that backlash will result in states enacting stricter laws to deter this conduct. Even though states can no longer prevent adults from engaging in homosexual sodomy, states may attempt to continue to prevent it among teenagers and young adults, as Europe has done through higher age of consent laws. One could argue that the Romeo and Juliet law discriminates in the same fashion as the enactment of different ages of consent. Although the Romeo and Juliet law does not specifically provide a higher age of consent for homosexuals, it has a similar discriminatory effect because it reduces the penalty only if the actors are heterosexuals. Both methods serve as means of indirect regulation of homosexual activities. Limon does not argue that statutory rape should go unpunished, or that states should do away with the age of consent;²⁸⁷ Limon simply advocates that there should not be different standards and penalties if the actors are homosexuals rather than heterosexuals.

Limon should prevail on this point for several reasons. First, if

²⁸⁴ *Research Paper*, *supra* note 268, at 14.

²⁸⁵ *Id.*

²⁸⁶ *Id.* Blair further stated:

[P]eople are entitled to think that homosexuality is wrong, but they are not entitled to use criminal law to force that view upon others That is, also, why the so-called compromise of 18 is misguided. What is the rationale behind maintaining the stigma but a different age? . . . [I]t is wrong to treat a man as inferior because his sexuality is different.

Id.

²⁸⁷ *See supra* Part II.

courts allow a different penalty for homosexual conduct, they would prevent some of the benefits homosexuals hoped to achieve from their victory in *Lawrence*, since, once again, they would be subject to discrimination.²⁸⁸ Even more vital, through upholding the Romeo and Juliet law, sodomy and homosexuality will still be illegal for a substantial part of the population. Further, by providing a harsher penalty for homosexuality, courts will be implying that homosexual behavior is illegitimate and illicit.²⁸⁹ This implication would be contrary to the new progressive vision of *Lawrence*.²⁹⁰ In essence, *Limon* could serve as a pretextual means to counteract *Lawrence*.

Additionally, the purpose of the Romeo and Juliet law is to punish certain relationships, however, not at the expense of teenage experimentation.²⁹¹ A refusal to extend the Romeo and Juliet law to homosexuals deters homosexual teenagers from sexual exploration more than it deters heterosexual teenagers. If the purpose of consent laws is to punish abuse by older men seeking to take advantage of younger, more vulnerable (mainly female) actors, this purpose can still be accomplished even if states interpret the Romeo and Juliet law to apply to all people equally, even homosexuals. Further, while age of consent laws serve to protect the vulnerable, Kansas does not put forth any evidence that homosexual teenagers are any more vulnerable than heterosexual females.²⁹² Therefore, Kansas is discriminating against homosexuals simply because it does not approve of their conduct, which the post-*Lawrence* regime does not allow.

Interestingly, unlike European nations that justified such laws as protecting vulnerable young men,²⁹³ Kansas justifies upholding *Limon*'s punishment, and the Romeo and Juliet law, by maintaining that if forced to undo the law, the change would promote other

²⁸⁸ As recognized in *Lawrence*, discrimination against homosexuals in law leads to discrimination elsewhere. See *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

²⁸⁹ See *supra* text accompanying notes 281-285.

²⁹⁰ "The movement of this issue is all in one direction: toward greater acceptance, and legal protection, for gays." Fred Michmershuizen, *Equal Rights for Gays*, N.Y. TIMES, Dec. 8, 2002, at 28.

²⁹¹ See *supra* text accompanying note 20.

²⁹² One argument for having a higher age of consent for homosexual males is that males mature later, about two years later than females, thus, there is some justification that the average sixteen-year-old male is more confused than the average sixteen-year-old female. *Research Paper*, *supra* note 268, at 38.

²⁹³ See *supra* text accompanying notes 278-280.

crimes such as bestiality, child abuse, and pedophilia.²⁹⁴ Some even link pedophiles with the movement to lower the age of consent.²⁹⁵ Further, to a lesser extent, Justice Scalia's dissent points to similar arguments where he fears the "homosexual agenda."²⁹⁶ There is little rationale, however, for these fears. Limon is not seeking to lower the age of consent in general;²⁹⁷ he is simply seeking the same punishment as he would have received had he been a heterosexual.

²⁹⁴ See Judith A. Reisman, *Crafting Bi/Homosexual Youth*, 14 REGENT U. L. REV. 283, 318-20 (2001/2002) (discussing a "homosexual political manifesto" and "homosexual campaign to recruit children." . . . The author cautions: "The homosexual movement has long advocated ending age of consent laws" and that "as a result of such cult proselytizing in schools and nationwide, many homosexual groups are *now* 'chock-a-block full of young people.' 'Adult advisors' also answer . . . the next phase, 'to attract young people to the gay movement in large number.' Child 'initiates' (many who die early of AIDS) are courted, given a pseudo-home and family, welcomed, wooed, held and embraced."). The author further cautions against this "homosexual agenda," quoting Harris Mirkin, an associate professor of political science at the University of Missouri-Kansas City: "With more research, some scholars say, it may be only a matter of time before modern society accepts adult-child sex, just as it had learned to accept premarital sex and homosexual sex. Children are the last bastion of the old sexual morality." *Id.* at 326.

²⁹⁵ See Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 REGENT U. L. REV. 267, 268 (2001/2002) ("Research confirms that homosexuals molest children at a rate vastly higher than heterosexuals, and the mainstream homosexual culture commonly promotes sex with children."). *Id.* Further, "[h]omosexual leaders repeatedly argue for the freedom to engage in consensual sex with children, and blind surveys reveal a shockingly high number of homosexuals admit to sexual conduct with minors." *Id.* In addition, "the homosexual community is driving the worldwide campaign to lower the legal age of consent." *Id.* Lastly, the author suggests, "[t]he Holy Grail of the pedophile movement is the lowering or elimination of all age of consent laws." *Id.* at 277. The author, a judge, also considers homosexuality as "a sexual deviancy often accompanied by disorders that have dire consequences for our culture." *Id.* at 267.

²⁹⁶ Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activist directed at eliminating the moral opprobrium that has traditionally attached to homosexuals conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.

Lawrence, 539 U.S. at 602 (Scalia, J., dissenting) (emphasis in original). For more on the "homosexual agenda" see Peter LaBarbera, *11 Ways You Can Fight the Homosexual Agenda*, A CWA RESOURCE, July 1, 2003, available at

<http://www.cwfa.org/images/content/11ways.pdf> (providing suggestions such as "[e]ducate your family, co-workers, and friends about the homosexual agenda; Speak out against 'sexual orientation' laws; Lobby corporation shareholder activism.").

²⁹⁷ See *Appeal Begins for Teen Sentenced to Prison for Gay Sex*, *supra* note 36.

Pedophiles will still be punished; the Romeo and Juliet law does not protect them. Further, these arguments were put forth in *Lawrence* and explicitly rejected by the United States Supreme Court.²⁹⁸ Therefore, while age of consent laws and mitigating statutes such as Kansas's Romeo and Juliet law are valid and reasonable ways to regulate teenage sexual exploration and activities, Kansas has not put forth compelling justification why such protections should not extend to homosexual teenagers as well. Thus, applying this analysis, Kansas's Romeo and Juliet law should be ruled unconstitutional. Although minors do not have an absolute privacy right and thus may not receive *Lawrence's* complete Due Process protection,²⁹⁹ *Lawrence* declared that homosexuality is no longer a crime. As a result, homosexual relations, even teenage relations, should not be subject to harsher penalties. It follows that *Lawrence v. Texas*³⁰⁰ and *Kansas v. Limon*³⁰¹ should be used to invalidate such discriminatory laws on the basis that they are unconstitutional.

Therefore, even though *Limon* may have several differences from *Lawrence*, *Limon* must derive similar benefits.³⁰² Although it was only the concurring opinion in *Lawrence* that advanced the Equal Protection argument, the majority did not reject this argument. In fact, the majority recognized it as "tenable."³⁰³ Likewise, the fact that the Supreme Court decided *Lawrence* upon Due Process grounds, rather than Equal Protection, does not necessarily serve as a limitation.³⁰⁴ Even prior to *Lawrence*, the Equal Protection Clause had

²⁹⁸ See *supra* Part II.

²⁹⁹ See *supra* Part II.

³⁰⁰ See *supra* Part IV.

³⁰¹ *Kansas v. Limon*, 83 P.3d at 236.

³⁰² See Greenhouse, *supra* note 14. "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." *Id.* (citing Matthew Coles, with the ACLU gay and lesbian rights project). "It's an example of how much is now going to open up," Coles added, "[w]hen the court finds that gay relationships are protected by the Constitution, it's answering the equality questions as well." *Id.*

³⁰³ *Lawrence*, 539 U.S. 574.

³⁰⁴ See Elmer, *supra* note 1.

In bringing *Lawrence* to the Supreme Court, the gay-rights forces found themselves on the horns of an exquisite dilemma . . . Should the gay rights side argue substantive due process, a disfavored doctrine that had been soundly rejected in *Bowers*? Or should they argue equal protection despite the uphill battle in trying to get to any form of heightened scrutiny? Many *amicus curiae* [sic] briefs were filed with the Supreme Court. Interestingly, the one filed by a wide range of lesbian and gay legal advocacy groups, including, among many others, the National Lesbian and Gay Law Association, Gaylaw, the Lesbian and

been successfully used to protect homosexual rights.³⁰⁵ As set forth below, however, homosexual challenges to the Equal Protection Clause also contain many uncertainties.

C. Romer: Equal Protection

Because the Court decided *Lawrence* on Due Process privacy grounds, the decision gave the Kansas Court of Appeals an “escape hatch” through which it could refuse to apply *Lawrence* to *Limon*, as *Limon* involved an Equal Protection challenge. Although *Limon* is distinguishable from *Lawrence* in this respect, *Limon* can serve not only as an interpretation of *Lawrence*, but also as a clarification of the ambiguities of another breakthrough case, *Romer v. Evans*.³⁰⁶

Gay Law Association of Greater New York, the Lesbian and Gay Law Association of Los Angeles, chose to argue *only* on equal protection grounds. In their *amicus* brief, the lesbian and gay lawyers associations made a calculated tactical decision that the substantive due process argument was too risky and, consequently, argued equal protection only.

Id. (emphasis in original). Elmer further added:

[T]he Court had a narrow ground upon which it could have struck down the Texas statute, equal protection. Justice O'Connor was right—the law did discriminate based on gender. In deliberately choosing *not* to rely on equal protection, but rather to ground its ruling on substantive due process, the Court went against its own general rule of avoiding difficult constitutional issues if there are simpler ways of deciding a case. Moreover, the Court was explicit in explaining that the *reason* it chose not to rely on equal protection is that then Georgia-style anti-sodomy laws would not come within the ambit of the decision. That is, the Court *wanted* to reach out and make a far broader ruling than was, strictly speaking, necessary. Equally important, is the Court's decision to rely on substantive due process may breathe a bit of fresh life into the languishing doctrine.

Id. at 9. See also Greenhouse, *supra* note 14. “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.” *Id.* Further, this is “an example of how much is now going to open up . . . [w]hen the court finds that gay relationships are protected by the Constitution, it's answering the equality questions as well.” *Id.*

³⁰⁵ See *Romer*, 517 U.S. 620 (invalidating an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships,” and deprived them of protection under state anti-discrimination laws). The Supreme Court concluded that the provision was “born of animosity toward the class of persons affected” and further that “it had no rational relation to a legitimate governmental purpose.” *Id.* at 634, cited in *Lawrence*, 539 U.S. at 584 (“In *Romer* . . . we refused to sanction a law that singled out homosexuals for ‘disfavored legal status.’ . . . The same is true here. The Equal Protection Clause ‘neither knows nor tolerates classes among citizens.’” (citations omitted)).

³⁰⁶ 517 U.S. 620.

The level of scrutiny applicable to sexual orientation has long been debated. In 1996, the United States Supreme Court came close to addressing this issue.³⁰⁷ In *Romer v. Evans*,³⁰⁸ the Court, for the first time, invalidated discrimination based on sexual orientation.³⁰⁹ *Romer* involved a challenge to a proposed amendment to the Colorado constitution.³¹⁰ The amendment repealed all state and local laws that prohibited discrimination against homosexuals, as well as prohibit future protective laws.³¹¹ *Romer* asserted that even when a justification is presented as a purported moral basis for a law, animus against gays and lesbians is not a valid justification.³¹² Further, while the United States Supreme Court did not openly reach the question of whether sexual orientation deserves heightened scrutiny under the Equal Protection Clause, “it held that the proposed amendment failed to pass constitutional muster even under rational review, a weaker standard of judicial scrutiny.”³¹³ Thus, although the standard lacked clarity and the Court seemed to apply only a rational basis standard of review, the decision indicated some judicial willingness to use the Equal Protection Clause to protect homosexuals from discrimination.³¹⁴

Several scholars have interpreted *Romer* as proposing “that the Court is . . . applying a . . . heightened standard of review to sexual orientation classifications, one either equivalent to the intermediate scrutiny standard of review it applies to sex classifications, or a standard in between mere rational review and intermediate scrutiny.”³¹⁵ The Supreme Court, however, has never explicitly declared which standard applies, contributing to uncertainty. If *Limon* does make its way back to the Supreme Court,³¹⁶ the Court can finally declare which standard of scrutiny applies. Thus, *Limon* can

³⁰⁷ See Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L. REV. 471, 483 (2001). Note that in *Rowland v. Mad River Local School District*, in a dissent to a denial of a writ of certiorari, Justice William Brennan, joined by Justice Thurgood Marshall, argued that “discrimination against homosexuals . . . raises significant constitutional questions under . . . equal protection analysis.” 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting). However, because this is a dissent, it has no precedential value.

³⁰⁸ 517 U.S. 620.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 623.

³¹¹ *Id.*

³¹² *Id.* at 644.

³¹³ Stein, *supra* note 307, at 483.

³¹⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.7.4., at 759 (2d ed. 2002).

³¹⁵ See Stein, *supra* note 307, at 483.

³¹⁶ See *supra* text accompanying note 39.

serve to settle this ongoing dispute.

The significance of both *Lawrence* and *Limon* cannot be understated; scholars have seen a “historic parallel” in the early judicial reaction to *Lawrence* to that of *Brown v. Board of Education*.³¹⁷ Fifty years ago, in the aftermath of the legendary case of *Brown v. Board of Education*³¹⁸—which declared segregation of public schools unconstitutional—some judges “interpreted *Brown* narrowly, ignored it, or even defied it – until the Court forcefully ruled in *Cooper v. Aaron*³¹⁹ in 1958 that its *Brown* mandate could no longer be resisted.”³²⁰ Likewise, today “[we are] in very much a 1956-type historical setting, where the previous paradigm of inequality is suddenly upended and a surprising new mandate of full equality is ordered”³²¹ *Limon* may parallel the effect of *Cooper* by resolving the ambiguities of *Lawrence*³²² and thereby prevent states from indirectly regulating homosexuals, fill in the blanks of *Romer v. Evans*,³²³ and release Mathew Limon from his seventeen-year jail term.

VI. CONCLUSION

Lawrence was thought to be a sweeping victory; it opened up doors in the gay movement and granted a number of rights, all which seemed unattainable under the previous *Bowers* regime. New hope now exists for advocates of gay marriage, gay adoption, and various other homosexual issues. While the Court in *Lawrence* clearly extended a right to engage in homosexual activity to adults, *Limon* poses an even more controversial issue—should this right extend to minors?

Such an issue is crucial at this point in time: the *Limon* case is a “test case” to determine how far *Lawrence* will be interpreted. A positive outcome will not only grant teenagers the freedom to live a homosexual lifestyle, but also send out a positive hope for the future, allowing them to feel accepted rather than criminal. Furthermore, *Limon* can serve as a preventative measure for a state backlash that could minimize *Lawrence*’s triumph; *Limon* can prohibit states from raising the age of consent for homosexual activity, as Europe has done. A decision favoring *Limon* will send out the message that

³¹⁷ Mauro, *supra* note 189, at 1.

³¹⁸ 349 U.S. 294 (1954).

³¹⁹ 358 U.S. 1 (1958).

³²⁰ Mauro, *supra* note 189, at 1.

³²¹ *Id.*

³²² 539 U.S. 558.

³²³ 517 U.S. 620.

Lawrence, is in fact, a “sweeping” victory for gay rights.

Further, even if *Lawrence* does not directly control *Limon*, independent grounds exist for Limon’s immediate release. The Romeo and Juliet law, as applied, is unconstitutional because it grants heterosexuals more protection than homosexuals, even though they have committed the same crime. Therefore, in *Limon*, the Kansas Supreme Court, once again, has the opportunity to extend the *Lawrence* decision to protect young adults, and in the revolutionary aftermath of *Lawrence*, it may have to do so.

Finally, the *Lawrence* victory so far has been less than triumphant, with many setbacks, including *Limon*. Whether courts should interpret *Lawrence* broadly or narrowly has still not been decided, and lower courts are currently divided on this issue. Eventually, one of these cases interpreting *Lawrence* narrowly may make its way back to the United States Supreme Court. *Limon* may be a good case for the Court to decide because it poses an opportunity to clarify *Lawrence*’s analysis, as well as articulate that a heightened standard of scrutiny should apply in laws differentiating between heterosexuals and homosexuals. Depending on the Supreme Court’s composition at the time of consideration, however, the Court may expand *Lawrence* or further limit it.