

LAWRENCE, MILL, AND SAME-SEX RELATIONSHIPS: ON VALUES, VALUING, AND THE CONSTITUTION

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I. INTRODUCTION

Recently, several commentators have suggested that *Lawrence v. Texas*² is best understood as incorporating Mill's harm principle from *On Liberty*.³ They are correct that Mill likely would have approved of the decision, although they are incorrect in two important respects: (1) they misconstrue Mill's harm principle by understating its reach and force, and (2) they misunderstand *Lawrence* by interpreting it to stand merely for their diluted version of the harm principle. While the full ramifications of *Lawrence* will not be clear for some time, the decision at the very least suggests that same-sex relations and relationships, like different-sex relations and relationships, have positive worth, and that states are not free to stigmatize members of the lesbian, gay, bisexual and transgender (LGBT) community. Were *Lawrence* merely incorporating Mill's harm principle, the decision would have stopped well short of incorporating these elements and instead would have had a much different focus. Courts and commentators do themselves and the law more generally a disservice when misconstruing the import of the decision, since *Lawrence* simply cannot plausibly be interpreted to represent the view attributed to it by them.

Part II of this Article discusses Mill's harm principle from *On Liberty*, explaining what that principle covers and why Mill believed that it should be adopted. This part also discusses *Lawrence*, making clear why the decision cannot plausibly be explained as simply incorporating Mill's harm principle. Part III discusses some post-*Lawrence* decisions, noting that some courts' misinterpretations of that decision have not involved a failure to appreciate some of the subtle ways in which *Lawrence* goes beyond the harm principle but, instead, have involved more fundamental mistakes—essentially ignoring *Lawrence*, the harm principle and local law in order to impose undeserved burdens on members of the LGBT community. The Article concludes that the Court must reaffirm the principles of *Lawrence* at its earliest opportunity to prevent continuing invidious discrimination on the basis of sexual orientation and identification.

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² 539 U.S. 558 (2003).

³ JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publishing Co, Inc. 1978) (1859).

II. ON LIBERTY AND LAWRENCE

Commentators suggest that *Lawrence* incorporates Mill's harm principle from *On Liberty*. Certainly, there are passages in *Lawrence* which are reminiscent of that work and further, a central element of the opinion discusses the liberty⁴ protected by the Due Process Clause of the Fourteenth Amendment. However, there are at least two respects in which this attribution is at the very least misleading. First, these commentators offer a watered-down version of the principle proposed in *On Liberty* and, second, they ignore large parts of *Lawrence* in order to justify the claim that the decision incorporates this modified version of Mill's harm principle. While *Lawrence* is not as clear as might have been desired and the Court has done little to clarify its meaning since then,⁵ opportunities to do so notwithstanding,⁶ these accounts are nonetheless disappointing for their failure to account for key features of the opinion.

A. ON LIBERTY

In *On Liberty*, John Stuart Mill set out an important and extremely influential non-interference principle which precludes interference by government and society in those areas of life which only concern individuals themselves. Mill writes, "The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."⁷ Thus, Mill suggests that the only conduct for which an individual is appropriately subject to sanction by either the state or society is conduct which is "other-affecting;" that which only affects himself is not appropriately subject to external punishment.

Mill's harm principle needs some explication. For example, one might argue that Mill's harm principle does not protect very much because most actions affect others in addition to the actor himself.⁸ Mill was aware of this difficulty, admitting that "the mischief which a person does to himself may

⁴ See *Lawrence*, 539 U.S. at 562, 564-65, 567, 571-74, 578-79.

⁵ The decision has only been discussed or alluded to in dissenting opinions. See *Roper v. Simmons*, 543 U.S. 551, 627 n.9 (2005) (Scalia, J., dissenting) ("[W]e have certainly applied the 'maturing values' rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571-573 (2003) (*parallel citations omitted*")). See also *Tennessee v. Lane*, 541 U.S. 509, 562-63 (2004) (Scalia, J., dissenting) ("[T]he doctrine of so-called 'substantive due process' (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (*parallel citations omitted*))). See also *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) ("[T]he Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing. See . . . *Lawrence v. Texas*, 539 U.S. 558 (2003) (whether the Fourteenth Amendment prohibits the criminalization of homosexual conduct) (*parallel citations omitted*))."

⁶ See, e.g., *Lofton v. Sec'y of Fla. Dep't of Children & Families*, 543 U.S. 1081 (2005), *cert. denied*.

⁷ MILL, *supra* note 3, at 9.

⁸ See Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561, 1620 n.176 (1993) (asking rhetorically, "How do we distinguish between self- and other-regarding acts when almost all acts have both kinds of consequences?").

seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large.”⁹ Nonetheless, merely because others would be affected by an action does not suffice to take it out of the self-regarding sphere. It is only when, “by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term.”¹⁰ Thus, it is somewhat misleading to think of the dichotomy presented by Mill as distinguishing between actions which are solely self-affecting on the one hand and actions which are also other-affecting on the other, because Mill includes many actions which affect others in the self-regarding sphere. The dichotomy is better captured by talking about those actions which involve a failure to fulfill one’s moral or legal obligations to others (making the actions other-regarding) and those which do not.

Suppose that an individual were to spend all of her disposable income on extravagances. Others might suffer some opportunity cost in that the monies might otherwise have been spent on them, and thus their interests will have been adversely affected by these splurges. Nonetheless, the extravagant individual would not be appropriately subject to sanction unless she had thereby become unable to pay her debts or, perhaps, to provide for her family. Mill writes, “If, for example, a man through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated and might be justly punished.”¹¹ Lest this point be misunderstood, Mill makes clear that such a person would be justly punished “for the breach of duty to his family or creditors, not for the extravagance.”¹²

Additionally, Mill suggests that only some other-regarding actions are appropriately subject to legal sanction—others might be subject to criticism but are not appropriately subjected to fine or imprisonment. He writes, “The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law.”¹³ Here, Mill points out that one may violate a moral duty to someone without that duty being reflected in the law, and that it is only when a duty is reflected in law that an individual may justly be subject to legal sanction.

Essentially, Mill offers the following taxonomy of conduct:

a. Those actions that are self-regarding are not appropriately subject to sanctions from either the state or society;

⁹ MILL, *supra* note 3, at 79.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 73.

b. Those actions which are hurtful to others without violating any of their legal rights may be subject to public condemnation, but are not thereby subject to legal sanction; and

c. Those actions which violate the legal rights of others are subject not only to public condemnation, but also to legal sanction.

Mill offers several justifications for his thesis concerning when interference is justified. He believes that an individual's choosing his own life-plan itself adds to its value, arguing, "If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is best in itself, but because it is his own mode."¹⁴ This is true, at least in part, because people require different conditions in order to thrive—what would harm some would help others, and vice versa. He explains that different people "require different conditions for their spiritual development and can no more exist healthily in the same moral than all the variety of plants can in the same physical, atmosphere and climate. The same things which are helps to one person toward the cultivation of his higher nature are hindrances to another."¹⁵ Because people are different, Mill warns that "unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable."¹⁶

While there is no reason to believe that Mill wrote these words with members of the LGBT community in mind, his comments are nonetheless particularly well-suited to understanding why some policies and laws targeting the LGBT community are unjust. The needs and interests of those in the community may be analogous in many ways to the needs and interests of members of other sexual communities, but they are not identical. Rules which would allow members of one group to thrive may not similarly suit others; e.g., rules which specify that one can only have sexual relations with members of a different gender. Indeed, this point is well illustrated if one considers members of the transgender community.

States that refuse to consider individuals' sexual identities and instead define sex in terms of chromosomes¹⁷ may preclude individuals from marrying individuals of a different sex. For example, a post-operative male-to-female transsexual looks like a woman, acts like a woman and is a woman¹⁸ but nonetheless is only permitted in Texas and Kansas to marry another woman.¹⁹ These policies might be contrasted with New Jersey's more enlightened approach, which permits post-operative transsexuals to

¹⁴ *Id.* at 64.

¹⁵ *Id.* at 65.

¹⁶ *Id.*

¹⁷ See, e.g., *Estate of Gardiner*, 42 P.3d 120, 136-37 (Kan. 2002) (holding that state law defines sex in terms of chromosomes); accord *Littleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. App. 1999).

¹⁸ Cf. *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 101 (1977) ("Psychologically the petitioner is female; the body structure is female; endocrine balance is now female; petitioner is now accepted socially as a female; reproductive organs are neither male nor female the testes having been removed and ovaries never having been present.").

¹⁹ See, e.g., *Estate of Gardiner*, 42 P.3d at 136-37; accord *Littleton*, 9 S.W.3d at 230-31.

marry individuals who self-identify as belonging to a different sex even if both parties have XX chromosomes or XY chromosomes.²⁰ Thus, a post-operative male-to-female transsexual might marry a man in New Jersey, notwithstanding that both parties have XY chromosomes.

Yet, all difficulties are not solved by taking New Jersey's admittedly superior approach. First, New Jersey's policy ignores various practical difficulties associated with the current state of medical technology. Requiring that the surgery be performed imposes more of a burden on female-to-male transsexuals than male-to-female transsexuals because of a variety of factors including cost and effectiveness.²¹ Second, the policy ignores the fact that some transsexuals are sexually attracted to members of their self-identified sex while others are sexually attracted to individuals not of their self-identified sex.²² For example, some self-identify as women and are sexually attracted to women. These individuals might be forced to choose between having the beneficial surgery and being able to legally marry their life-partners, a decision which no one should be compelled to make. Unfortunately, neither New Jersey nor Kansas law accounts for these differing permutations.²³

When arguing that different individuals require different conditions in order to thrive, Mill is suggesting not that all rules must be discarded but that society should not simply assume that what is good for some will be good for all. Indeed, Mill believes that one of the most important reasons for society not to interfere is that it will be mistaken about when that interference is appropriate, noting that "the strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place."²⁴ Thus, the state or society might wrongly believe that what helps one person flourish would also help another to flourish. By arranging benefits and burdens to induce the latter person to behave like the former, the latter individual may be chilled from doing that which would most benefit himself. Both the individual and society as a whole might then lose whatever benefits would otherwise have been accrued.

²⁰ See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

²¹ Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 *BYU J. PUB. L.* 371, 385 (2004) ("Given the current state of medical technology, the standard is highly discriminatory against female-to-male transsexuals. Many F-T-M transsexuals choose not to undergo phalloplasty both because of the complications often associated with the surgery and because of the extraordinary costs. Moreover, even if such surgery is undertaken, it does not result in the individual's having male genitals that can function sexually.")

²² See *Estate of Gardiner*, 22 P.3d at 1093 (*aff'd in part, rev'd in part*, 42 P.3d 120 (Kan. 2002)) ("A transsexual is one who experiences himself or herself as being of the opposite sex, despite having some biological characteristics of one sex, or one whose sex has been changed externally by surgery and hormones. A transsexual might be a homosexual."); *State v. Passarelli*, Nos. 98-0912-CR, 98-0913-CR, slip. op. at 1 n.1 (Wis. App. Oct. 20, 1998) ("At a conference before trial, outside the jury's presence, Passarelli explained that he was a transsexual and a lesbian.")

²³ See *Estate of Gardiner*, 22 P.3d at 1109 ("Kansas law forbids same-sex marriages.") (citing KAN. STAT. ANN. §§ 23-101 (2000)); *Lewis v. Harris*, 875 A.2d 259, 262 (N.J. Super. App. Div. 2005) (discussing "the statutory limitation of the institution of marriage to members of the opposite sex").

²⁴ MILL, *supra* note 3, at 81.

When arguing that both the state and society are precluded from imposing burdens on individuals merely because the state and society disapprove of the self-regarding choices made by those individuals, Mill is not suggesting that members of society are barred from expressing their disagreement with the choices made—he is simply suggesting that there are limitations on what can be done to manifest that disapproval. Thus, Mill suggests, where an individual is acting in a way of which others disapprove, they can of course try to persuade him that he would be better off acting differently, but they are not free to “visit[] him with any evil, in case he do otherwise.”²⁵

Mill is quite clear about what justifies the use of power over an individual, arguing that “the only purpose for which power can rightfully be exercised over any members of a civilized community, against his will, is to prevent harm to others.”²⁶ This means that an individual’s “own good, either physical or moral, is not a sufficient warrant”²⁷ for intervention. Mill explains that an individual “cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.”²⁸ Essentially, Mill suggests that individuals must be permitted to make and act on a variety of decisions without being subject to second-guessing by the state or society through the imposition of sanctions.

At least two further points should be made. First, it might be argued that statutes criminalizing sodomy are outside of the self-regarding realm because they obviously require that someone else participate. Yet, Mill’s principle is not limited to actions which only involve one person. He suggests that the principle he is offering comprehends “all that portion of a person’s life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation.”²⁹ Thus, two adults who have voluntary sexual relations are engaging in an activity that would fall within the self-regarding sphere.

Second, Mill argues that the state and society are not justified in interfering merely because they “think our conduct foolish, perverse, or wrong.”³⁰ Nor will they be justified because they not only think the behavior wrong but also claim to be harmed by it, e.g., because they are disgusted. Mill discusses those “who consider as an injury to themselves any conduct which they have a distaste for,”³¹ offering as an example the “religious bigot, [who] when charged with disregarding the religious feelings of others, has been known to retort that they disregard his feelings by persisting in their abominable worship or creed.”³² Rejecting that the religious bigot can dictate what others do or believe merely because those

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

³¹ *Id.* at 81-82.

³² *Id.* at 82.

beliefs or actions contradict his own views, Mill writes that “there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it.”³³ Lest the reader think Mill’s comment restricted to beliefs, Mill stresses that “a person’s taste is as much his own peculiar concern as his opinion or his purse.”³⁴

In offering these comments, Mill is not suggesting that, for example, young children must be allowed to fend for themselves unless they would be harming others. “It is perhaps hardly necessary to state that this doctrine is meant to apply only to human beings in the maturity of their faculties.”³⁵ Nonetheless, he makes clear that there are distinct limits to the kinds of interventions that are appropriate for adults.

B. DOES *LAWRENCE* REALLY INCORPORATE THE HARM PRINCIPLE?

Suppose that Mill’s harm principle was incorporated into the United States Constitution. Certainly, it would dictate the *Lawrence* result. Indeed, Mill himself suggests that fornication statutes should neither be enacted nor enforced.³⁶ Nonetheless, those commentators who suggest that *Lawrence* follows Mill’s harm principle³⁷ have failed to fully capture the import of that decision.

Those reading *Lawrence* are correct that isolated passages are quite reminiscent of *On Liberty*; indeed, some of the paragraphs in the opinion

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 9.

³⁶ See *id.* at 98 (“Fornication, for example, must be tolerated.”).

³⁷ J. L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 575 (2004) (“Justice Anthony Kennedy’s majority opinion articulates a notion of freedom that is reminiscent of John Stuart Mill.”); William Huhn, *Science, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM & MARY RTS. J. 125, 130 (2004) (suggesting that the *Lawrence* Court effectively made Mill’s “harm principle a necessary component of substantive due process”); Paul M. Secunda, *Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 134-35 (2005) (“a closer reading of Justice Kennedy’s majority opinion establishes that the *Lawrence* Court embraced a Millian legal orientation, supporting a robust notion of the right to personal autonomy”); Lino A. Graglia, *Lawrence v. Texas: Our Philosopher Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004) (“In *Lawrence*, however, the Court in effect held, in agreement with and at the urging of the libertarian Cato Institute, that the Constitution does enact John Stuart Mill’s *On Liberty*.”); Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court’s Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 407, 409 (2004) (“the recent Supreme Court decision on sodomy, *Lawrence v. Texas*, shows that it all but enacts John Stuart Mill’s *On Liberty*.”). Professor Randy Barnett reads *Lawrence* as offering a kind of libertarian constitutional theory. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 36 (2002-2003) (“Although he never acknowledges it, Justice Kennedy is employing here what I have called a ‘presumption of liberty’ that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow ‘fundamental.’ In this way, once an action is deemed to be a proper exercise of liberty (as opposed to license), the burden shifts to the government.”). See also Lino A. Graglia, *Lawrence v. Texas: Our Philosopher Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1149 (2004) (“Professor Barnett has good reason to rejoice at what he correctly identifies as ‘Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*.’ Justice Kennedy has indeed seemingly written libertarianism into the Constitution.”).

would have fit very nicely in Mill's volume. For example, the *Lawrence* Court writes, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."³⁸ Thus, like *On Liberty*, the *Lawrence* decision suggests that there exists a certain sphere which should be free from government interference. Yet, the way that the Court *justifies* its holding differs greatly from the way that the Court would have justified it had it simply been incorporating *On Liberty*'s rationale into the Fourteenth Amendment. Had the Court intended to offer a libertarian justification of its position, it would have limited its discussion to demarcating the self-regarding sphere and, perhaps, justifying why society and the state are not permitted to encroach upon this sphere.

How would the Court have done this? First, it would have emphasized that an individual's choices have worth simply by virtue of having been made and, further, would have limited its discussion to the virtues of permitting individuals to make their own choices, however wrong they might be. A Millian defense would indeed have only yielded a kind of constitutional toleration.³⁹ Yet, *Lawrence* is much more robust than that, which is precisely why *Lawrence* should not be read as merely offering (beseeching?) toleration.

C. LAWRENCE AS GOING BEYOND THE HARM PRINCIPLE

To see why *Lawrence* is not appropriately thought simply to be an incorporation of *On Liberty*, consider the arguments offered by the Court for why a same-sex sodomy statute violates Constitutional guarantees. The *Lawrence* Court begins its due process analysis by discussing *Griswold v. Connecticut*,⁴⁰ identifying that decision as "the most pertinent beginning point" of the Court's substantive due process analysis.⁴¹

At issue in *Griswold v. Connecticut* was a law precluding sexual activity—uncontracepted sexual relations.⁴² Because the statute did not include an exception for married couples, the *Griswold* Court described it as infringing on "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,"⁴³ and thus struck it down.⁴⁴

³⁸ *Lawrence*, 539 U.S. at 562.

³⁹ Cf. William N. Eskidge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) ("Lawrence gives us nothing less than, but also nothing more than, a jurisprudence of tolerance.").

⁴⁰ 381 U.S. 479 (1965).

⁴¹ *Lawrence*, 539 U.S. at 564.

⁴² See *Griswold*, 381 U.S. at 480 ("The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: 'Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.' Section 54-196 provides: 'Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.'").

⁴³ *Id.* at 485.

⁴⁴ *Id.* at 486.

There are numerous reasons that the *Lawrence* Court might have thought *Griswold* the most relevant case to begin the analysis. For example, both *Griswold* and *Lawrence* involved statutes proscribing sexual activity,⁴⁵ and both opinions focused on relationships rather than sexual relations. While it might be suggested that the *Lawrence* Court focused on *Griswold* as a way of readying society for a holding that the Federal Constitution protects the right to marry a same-sex partner,⁴⁶ the Court was careful to make clear that it was not deciding that particular issue.⁴⁷ That said, however, it would be erroneous to believe that *Lawrence* has no implications for whether same-sex relationships have constitutional protection. Indeed, the *Lawrence* Court suggests that one of the errors made in *Bowers v. Hardwick*⁴⁸ was the Court's failure to "appreciate the extent of the liberty at stake"⁴⁹ by ignoring the context in which same-sex sodomitical relations might be occurring. Specifically, the *Lawrence* Court stressed that "to say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."⁵⁰ The *Lawrence* Court realized what the *Bowers* Court apparently did not, that individuals engaging in sodomitical relations might be in a committed relationship,⁵¹ where the sexual conduct is "but one element in a personal bond that is more enduring."⁵² By suggesting that this enduring personal bond provides one of the reasons that the same-sex relations are protected, the Court is attributing positive constitutional weight to same-sex relationships and is not, for example, merely formulating a Millian argument that those relationships have worth by virtue of their having been chosen.

The *Lawrence* Court is not suggesting that only marital relations and relationships are constitutionally protected—it reads *Eisenstadt v. Baird*⁵³ as recognizing that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship," implying that sexual relations are constitutionally protected even if not occurring within the context of a marital relationship and, perhaps, even if not occurring within the context of a relationship at all.⁵⁴ In offering this analysis, the Court may

⁴⁵ See notes 42-43 and accompanying text *supra* (discussing *Griswold*'s focusing on marriage) and notes 47-51 and accompanying text *infra* (discussing *Lawrence*'s focusing on same-sex relationships).

⁴⁶ Cf. *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.").

⁴⁷ *Id.* at 567.

⁴⁸ 478 U.S. 186 (1986).

⁴⁹ *Lawrence*, 539 U.S. at 567.

⁵⁰ *Id.*

⁵¹ The *Lawrence* Court realized that sodomitical relations might take place in the context of a more enduring relationship. However, the opinion was not predicated on whether Lawrence and Garner had a continuing relationship, a point not appreciated by some commentators. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004) ("Recall that Justice Kennedy takes it as given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship.").

⁵² *Lawrence*, 539 U.S. at 567.

⁵³ 405 U.S. 438 (1972).

⁵⁴ See *Lawrence*, 539 U.S. at 565.

have been seeking to leave itself an opening whereby it could claim that *Lawrence* does not establish the right to marry a same-sex partner,⁵⁵ and it may also have been seeking to provide a basis upon which to claim that *Lawrence* follows rather than modifies the existing jurisprudence.⁵⁶

Whether or not one accepts the *Lawrence* Court's implicit claim that adult, voluntary, same-sex sodomitical relations have been protected since *Eisenstadt*—the *Bowers* Court's misreading of the existing jurisprudence notwithstanding—it is clear that *Lawrence* is not merely offering a Millian defense of same-sex sodomitical relations. By suggesting that the relations are protected because they may be part of a more enduring relationship, the Court is ascribing some degree of positive constitutional value to same-sex relationships. Further, the Court does not qualify that claim by suggesting that the relationships have value solely by virtue of their having been chosen, just as it did not qualify its claims about the value of marriage by saying that such unions are valuable solely by virtue of their having been chosen.

Similarly, the *Lawrence* Court does not simply suggest that adult, voluntary relations involve a realm which should be protected from state interference because the state would interfere at the wrong times. Nor does the Court say that the state's valuable resources could be better spent elsewhere, a view that was articulated in Justice Thomas's dissent.⁵⁷ In short, *Lawrence*'s rationale does not include the kind of reasons that Mill offers to justify his harm principle and, instead, is much more affirming of the objective, positive good involved in non-marital, adult, voluntary relations and relationships.⁵⁸

An additional reason offered by the Court for striking the Texas same-sex sodomy prohibition is that sodomy statutes stigmatize the LGBT community. The Court noted, "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."⁵⁹ *On Liberty* does not focus on the prevention of stigma,

⁵⁵ But see generally Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003, 1036 (2004) (suggesting that after *Lawrence* the Court will have to overrule the current due process jurisprudence if it is going to hold that the Constitution does not protect the right to marry a same-sex partner.).

⁵⁶ Of course, in at least one sense it cannot be compatible with the pre-existing jurisprudence in that it overruled *Bowers v. Hardwick*. Nonetheless, the Court might argue that *Bowers* was simply mistaken even at the time it was decided, see *Lawrence*, 539 U.S. at 578 ("Bowers was not correct when it was decided, and it is not correct today"), and that *Lawrence* simply follows the existing due process jurisprudence bracketing *Bowers*.

⁵⁷ See *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) ("Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.").

⁵⁸ Arguably, the Court is not suggesting that adulterous relations are protected. See *id.* at 567 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.") Here, when discussing abuse of a legally protected institution, the Court may be thinking that adultery undermines the institution of marriage. See Strasser, *supra* note 55, at 1009 (describing *Lawrence* as offering "language suggesting how the case before it might be distinguished from one involving adultery.").

⁵⁹ *Lawrence*, 539 U.S. at 575.

and thus this is yet another way in which *Lawrence* is not simply an incorporation of the harm principle.

While the *Lawrence* justification includes elements which would not have been included had the Court merely been incorporating the harm principle into 14th Amendment substantive due process jurisprudence, the *Lawrence* Court leaves open to regulation some behaviors which *On Liberty* suggests should not be regulated. For example, when suggesting that fornication should not be criminalized, Mill has in mind a broader liberty than does the *Lawrence* Court. The *Lawrence* Court expressly distinguished commercial sexual activity,⁶⁰ suggesting that prostitution would not be similarly protected. Mill would have precluded prosecution of prostitutes, although he would have permitted the prosecution of pimps.⁶¹

Further, Mill is not merely talking about limitations on the state. He, in addition, is suggesting that society should not impose burdens on individuals for engaging in self-regarding conduct of which it disapproves. Thus, *On Liberty* suggests that the *state* should be precluded from imposing evils on self-regarding conduct,⁶² which includes not only the decriminalization of adult, voluntary, same-sex relations, but also lifting adoption bans on individuals who would be wonderful parents but for the fact that they have sexual relations with someone of the same sex,⁶³ and precluding a modification of custody in a case in which a parent would retain custody but for the fact that she was in a relationship with another woman.⁶⁴ In addition, it also suggests that *society* should be precluded from imposing burdens on individuals merely because it disapproves of the individual's personal choices.

It is inappropriate to characterize *Lawrence* as a straightforward incorporation of the harm principle both because in some respects it does more than the harm principle, and because in other respects it does less than the harm principle. It is more affirming of LGBT relations and relationships than it would have been simply adopting Mill's principle. However, *Lawrence* does not go as far as the harm principle might go with respect to which liberties are protected from the state (e.g., prostitution) and it simply does not address whether society should be limited in the kinds of burdens that it places on individuals who perform self-regarding actions of which it disapproves.⁶⁵

⁶⁰ See *id.* at 578 ("The present case . . . does not involve . . . prostitution.").

⁶¹ See MILL, *supra* note 3, at 99 (discussing "the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer, but not the fornicator").

⁶² See *id.* at 9.

⁶³ See *infra* pp. 16-20 and notes 66-92 (discussing Florida's ban on adoption by gays or lesbians).

⁶⁴ See *infra* pp. 20-23 and notes 93-112 (discussing a case involving a modification of custody which would seem inexplicable but for the custodial mother's relationship with another woman).

⁶⁵ Precisely because the 14th Amendment's reach has been limited to state action, it would indeed have been a significant change were *Lawrence* to have incorporated *On Liberty*'s suggestion that even private actors should not be allowed to impose evils on others because of their disapproval of those individuals' actions.

III. ON THE RECEPTION OF *LAWRENCE* AND THE HARM PRINCIPLE IN THE COURTS

While commentators have wrongly claimed that *Lawrence* merely incorporates the harm principle, that error pales in comparison with the errors offered by some courts interpreting *Lawrence*. These courts have misconstrued not only the decision in particular, but also various constitutional principles more generally, and ignored local law to uphold laws burdening the LGBT community. Thus, in at least some of the recent cases decided by lower courts,⁶⁶ LGBT individuals have been disadvantaged not because of a misreading of *Lawrence* as simply an incorporation of Mill's harm principle into 14th Amendment jurisprudence, but because the courts have been making more serious and obvious mistakes in their interpretation of local and constitutional law.

A. *LOFTON*

One case that received national attention involved a Florida man precluded from adopting a child for whom he had been a foster parent for almost all of the child's life.⁶⁷ In upholding that law, the Eleventh Circuit not only had to offer an utterly implausible reading of *Lawrence*, but also had to ignore local policy as well. Regrettably, the United States Supreme Court denied certiorari when that case was appealed,⁶⁸ allowing the Eleventh Circuit's flawed analysis to remain uncorrected.

In *Lofton v. Secretary of Florida Department of Children and Family Services*,⁶⁹ a Florida law precluding adoption by same-sex couples was challenged.⁷⁰ Florida law permits members of the LGBT community to be foster parents, and the plaintiff, Steven Lofton, had foster parented the child whom he wished to adopt since shortly after the child's birth on April 29, 1991.⁷¹ Lofton's childcare efforts had been deemed "exemplary,"⁷² and his adoption petition was denied solely because of his relationship with another man.⁷³

Florida did not claim that the child would be better off elsewhere and offered to make Lofton the child's legal guardian.⁷⁴ That offer was rejected

⁶⁶ See Mark Strasser, *The Lawrence Reader: Standhardt and Lewis on Women in Love*, 24 ST. LOUIS U. PUB. L. REV. 59-88 (2005) discussing Arizona and New Jersey decisions analyzing *Lawrence*'s implications for the same-sex marriage bans in their respective states, and exploring the implication of *Lawrence* for same-sex marriage bans.

⁶⁷ See *Screen Gems*, MIAMI HERALD, June 19, 2005 at M8 (discussing Showtime documentary about this individual).

⁶⁸ 358 F.3d 804 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005).

⁶⁹ *Id.*

⁷⁰ While the law's language targets orientation, it has been construed by the courts to target only those who have had voluntary same-sex relations during the previous year. See *id.* at 807 (citing *Fla. Dep't of Health and Rehab. Servs. v. Cox*, 627 So.2d 1210, 1215 (Fla. Dist. Ct. App. 1993)).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Florida law prohibits those who are known to "engage in current, voluntary homosexual activity" from adopting, see *id.*, and the only implicit reference in the opinion to Lofton's presumed current activity was to "Roger Croteau, his cohabiting partner . . . a member of his household." See *id.* at 808.

⁷⁴ See *id.*

by Lofton unless it would have been “an interim state toward adoption.”⁷⁵ Lofton unsuccessfully challenged the statute precluding the adoption.

The Florida court understood that *Lawrence* precluded states from criminalizing same-sex sodomy,⁷⁶ and that the Florida law at issue precluded individuals from adopting if they had had voluntary same-sex relations during the past year.⁷⁷ Even bracketing that, the *Lofton* court likely mischaracterized the level of scrutiny used by the *Lawrence* Court,⁷⁸ the *Lofton* court ignored one of the *Lawrence* rationales for striking the statute at issue, namely that sodomy laws extend “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁷⁹ Yet, precluding an otherwise qualified individual from adopting the child whom he has nurtured for almost thirteen years seems precisely to subject gay individuals to just such discrimination in the public sphere. To read *Lawrence* as invalidating an invitation to discriminate, but approving of or even condoning the discrimination itself is to offer an interpretation of the case which is inconsistent and untenable.

At issue in *Lofton* was a decision by the Florida legislature to prohibit a child from establishing legal ties with the only parent⁸⁰ that he has ever known, which is justified by an appeal to the “primacy of the welfare of the child.”⁸¹ However, this child was not helped by being denied the opportunity to have the state recognize his relationship with his father, and countless other Floridian children will similarly be harmed by such a statute. The state of Florida is spiting its own children so that it can impose burdens on members of the LGBT community and the *Lofton* court is upholding this enactment of spite, *Lawrence* notwithstanding. If *Lawrence* or *On Liberty* stands for anything, it should be that this kind of imposition is impermissible.

Lofton should have been quite tempting for the Court to hear for a few reasons. The state failed to argue that this child’s best interests were being promoted by denying the adoption, making it unclear how this policy was rationally related to the promotion of a legitimate goal. Further, Florida is burdening the right to engage in same-sex relations. While not punishing such relations criminally, the state is nonetheless imposing a heavy burden on a would-be adoptive parent with a same-sex orientation, since he has to choose between having a relationship with another adult and having a

⁷⁵ *Id.*

⁷⁶ *See id.* at 817.

⁷⁷ *See id.* (suggesting that the statute has been construed to target same-sex relations).

⁷⁸ The *Lofton* court suggested that the *Lawrence* Court used the rational basis test but given the argumentation and the cases cited in support of the opinion like *Griswold* and *Eisenstadt*, the most plausible interpretation of the opinion is that the Court was using strict scrutiny for a fundamental right. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 48 (2003) (“The more natural interpretation is simpler: The Court’s assimilation of the *Lawrence* problem to that in *Griswold* and its successors suggests that a fundamental right was involved.”).

⁷⁹ *Lawrence*, 539 U.S. at 575.

⁸⁰ Lofton had a partner who also acted as a parent. However, Lofton was seeking to adopt and his partner, Roger Croteau, was not.

⁸¹ *Lofton*, 358 F.3d at 810.

legally recognized relationship with a child. Add to this that children do better in homes where there are two parents rather than one even when those parents are of the same sex,⁸² and the invidiousness of Florida's adoption law becomes even more apparent.

The *Lofton* court reads *Lawrence* to hold that "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct."⁸³ Certainly, *Lawrence* does hold that, making clear that the "State cannot demean [the petitioners'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."⁸⁴ However, were *Lawrence* merely about precluding the state from criminalizing the conduct, much of the opinion would be superfluous, for example, its comments about preventing stigmatization and public discrimination.

As a separate matter, Florida's absolute ban is the kind of impermissible legislation which Justice O'Connor argues in her *Lawrence* concurrence violates equal protection guarantees.⁸⁵ Justice O'Connor notes that the Texas statute makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex," explaining that "[s]odomy between opposite-sex partners . . . is not a crime in Texas."⁸⁶ So, too, Florida distinguishes between those who can adopt and those who cannot based on whether the sexual partner is of the same sex.

The *Lofton* court dismisses the equal protection argument, stating that "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."⁸⁷ Yet, this is exactly what heightened rational basis review does not permit, because there is reason to believe that "a law [which] exhibits . . . a desire to harm a politically unpopular group" is motivated by animus rather than a legitimate state interest.⁸⁸ Further, the *Lawrence* majority suggested that the argument that Texas's sodomy law violated equal protection guarantees was "tenable,"⁸⁹ but believed it necessary to decide the case in light of due process guarantees because otherwise "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and

⁸² See Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. ILL. L. REV. 1, 52 ("Although children are doubtless better off living in households with two parents, the empirical evidence does not suggest that one parent must be a man and the other a woman for children to flourish.").

⁸³ *Lofton*, 358 F.3d at 815.

⁸⁴ *Lawrence*, 539 U.S. at 578.

⁸⁵ See *id.* at 580 (O'Connor, J. concurring in the judgment) (quoting TEX. PENAL CODE ANN. §21.06(a)(2003)).

⁸⁶ *Id.* at 581 (O'Connor, J., concurring in the judgment).

⁸⁷ *Lofton*, 358 F.3d at 818 (citing *Heller v. Doe*, 509 312, 320-21 (1993)).

⁸⁸ See *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (describing "more searching form of rational basis review").

⁸⁹ See *Lawrence*, 539 U.S. at 574.

different-sex participants.”⁹⁰ In short, a fair reading of either *Lawrence* or the harm principle would prevent a state from precluding an exemplary parent from establishing legal ties with the child whom he has been raising for over a decade when the child would be benefited by that legal recognition.⁹¹

B. *L.A.M.*

Lofton implied that *Lawrence* has no relevance for adoption statutes. A related issue is whether *Lawrence* has any relevance in the context of custody awards or modifications. Regrettably, an Alabama court offered an analysis of *Lawrence*, local law, and the facts before it which was no more persuasive than the analysis offered in *Lofton*.

In *L.A.M. v. B.M.*,⁹² an Alabama appellate court approved a modification of custody from the child’s lesbian mother to the child’s remarried father. Among the striking elements in the decision is the lack of discussion of how the child’s life would be improved were she to live with her father,⁹³ since it was neither clear that the child was doing poorly living with her mother nor that the child would be better off were custody modified.

Much of the discussion of the child’s interests centered on whether the child was harmed when she and her mother moved in with her mother’s partner. Yet, the child was doing as well in school and participating in as many extracurricular activities as she had been before the move.⁹⁴ Further, there was no awkwardness between the child and the mother’s partner.⁹⁵ Indeed, the child seemed to have suffered no ill effects from the move.

That is not to say that the child was perfectly fine. She had suffered some depression over the custody fight,⁹⁶ which had subsequently abated.⁹⁷ However, if a child depressed over her parents’ custody dispute suffices as a justification to modify custody, then courts will be very busy changing the living arrangements of children of divorced parents. Here, there was no showing that the child was adversely affected by living with the mother and her partner. The most that could be said was that the child was unwilling to say that she preferred living with one parent over the other and that she was willing to abide by the court’s decision.⁹⁸ Further, there was no indication in the record that the court had even considered whether the child would be better off, or even doing as well, if living with her father and his wife and

⁹⁰ *Id.* at 575.

⁹¹ For a more extended discussion of *Lofton* and *Lawrence*, see generally Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton and the Best Interests of Children*, 40 TULSA L. REV. 421 (2005).

⁹² *L.A.M. v. B.M.*, 906 So.2d 942 (2004).

⁹³ See *id.* at 942.

⁹⁴ See *id.*

⁹⁵ *Id.* at 944.

⁹⁶ *Id.* at 944-45.

⁹⁷ *Id.* at 945.

⁹⁸ *Id.* (“The psychologist noted that the child did not indicate a desire to live with either the father or the mother but appeared to be willing to accept the trial court’s decision with regard to custody.”)

stepchild. From the record, it was not clear how old that stepchild was,⁹⁹ much less whether the children got along. Nor were there any discussions of the possible effects on the daughter were custody modified so that she would no longer be living with her half-brother.¹⁰⁰ In short, there was no analysis of how the child would fare were custody modified, much less a showing that the child's life would be materially improved. The relevant standard set out by the Alabama Supreme Court—"that a noncustodial parent seeking a change of custody must show not only that he or she is fit to have custody, but that the change would materially promote the child's best interests,"¹⁰¹—was clearly not met, which the mother pointed out to no avail.¹⁰²

In *L.A.M.*, the father sought a modification of custody because (1) his ex-wife was having a relationship with another woman, (2) his ex-wife had allegedly made visitation difficult on occasion, and (3) his ex-wife allegedly neglected the child.¹⁰³ Yet, it was somewhat difficult to assess these charges. For example, much was made of the mother's having moved from Alexander City to Montgomery to live with her partner, although that move had had no established negative effect on the child.¹⁰⁴ Although some of the visitation difficulties may be traced to this move, there was no discussion of any obstruction of visitation incidents which would rise to the level justifying a modification of custody.

The alleged neglect seemed based on the father's testimony that when he had sometimes "called the mother's home looking for the child at night, *the person who answered the phone did not know where the child was or whom the child was with at that time.*"¹⁰⁵ Yet, there is no mention of whether the mother was home when he had called, whether the mother knew where the child was, or even who had answered the phone. It may well be that the phone was answered by the mother's partner, who might not have been particularly interested in helping or chatting with someone who had allegedly used offensive language to describe her and her partner.¹⁰⁶

The court also noted that testimony revealed that "the child frequently walked to a neighbor's house down the street from the mother's home." Yet, the child was eleven years old,¹⁰⁷ and it is far from clear that this would constitute neglect. In short, if this evidence of neglect would suffice to

⁹⁹ *See id.*

¹⁰⁰ *Cf. id.* ("The mother testified that she, and the child, as well as the mother's son from a previous relationship, lived in P.M.'s home.")

¹⁰¹ *Ex parte J.M.F.*, 730 So.2d 1190, 1194 (1998).

¹⁰² *L.A.M.*, 906 So.2d at 944-45.

¹⁰³ *See id.* at 945.

¹⁰⁴ *See id.* at 942.

¹⁰⁵ *Id.* at 944 (emphasis added).

¹⁰⁶ *See id.* ("According to P.M., the father knew that she and the mother were in a homosexual relationship. P.M. testified that the father called the mother and her derogatory names. P.M. testified that the father's bad attitude towards her and the mother had been ongoing for at least two years.")

¹⁰⁷ The parents divorced on April 3, 1996 when the child was almost 4, and he brought the custody modification action on July 10, 2003. *See id.* at 943.

warrant a change in custody, Alabama courts should be prepared to hear innumerable cases and Alabama custodial parents should be quite worried.

In light of the paucity of other evidence, one may infer from the opinion that the modification of custody was primarily due to the first factor cited by the father—namely, that his ex-wife was maintaining a relationship with another woman. The *L.A.M.* court cited with approval an Alabama Supreme Court decision that had partially based its decision to uphold a custody modification from the mother to the father on the mother's having "chosen to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most of its citizens.'"¹⁰⁸ However, this decision was issued prior to *Lawrence*¹⁰⁹ and, as the mother noted, *Lawrence* effectively overruled that part of the decision because "*Lawrence* 'expressly confirms that moral disapproval of homosexual persons is not a legitimate basis for laws that disadvantage lesbians and gay men.'"¹¹⁰ The *L.A.M.* court rejected the mother's argument, reasoning that *Lawrence* involved a criminal matter and the state supreme court's decision had involved a custody modification.¹¹¹

Yet, the passage quoted with approval by the appellate court is exactly what *Lawrence* suggests cannot be taken into account. What was against Alabama law at the time the state supreme court decided *J.M.F.* is no longer against the law, because *Lawrence* declares such laws unconstitutional. Thus, the mother in *L.A.M.* was not engaging in conduct which violated the enforceable laws of the state. Further, *Lawrence* suggests that penalties cannot be imposed on members of the LGBT community because others claim to be morally offended by LGBT relations and relationships. Thus, in *L.A.M.*, a mother lost custody of her child because she was in a same-sex relationship, despite the child's flourishing when living with her mother and despite the father's failure to establish that his having custody would materially promote the child's interests as local law requires. The *L.A.M.* court was willing to allow the presumed moral view of the populace to "correct" a situation which did not need correction, interests of the child notwithstanding.

Both *Lofton* and *L.A.M.* involve civil matters—establishing a legally recognized parent-child relationship or maintaining custody of a child. In both cases, the child's interests are sacrificed in violation of local law and policy so that members of the LGBT community can be burdened because of their relationships. Neither *Lawrence* nor the harm principle would permit this occurrence.

C. LIMON

A different issue involves the implications of *Lawrence* or the harm principle in the criminal context. Certainly, both suggest that certain kinds

¹⁰⁸ *Id.* at 945 (citing *Ex parte J.M.F.*, 730 So.2d 1190, 1196 (Ala. 1998)).

¹⁰⁹ *J.M.F.* was decided in 1998. *See id.*

¹¹⁰ *L.A.M.*, 906 So.2d at 946.

¹¹¹ *Id.*

of activities cannot rightfully be criminally proscribed. However, both *Lawrence* and *On Liberty* focus on adults rather than children,¹¹² and additional issues are implicated where one of the parties is a minor. Nonetheless, it strains credibility to argue that *Lawrence* and the harm principle simply have no relevance, for example, when radically different sentences are imposed for similar crimes involving a minor, where the justification for that differential treatment appeals to the moral views of the legislature or populace.

At issue in *State v. Limon*¹¹³ was “whether the [Kansas] legislature can punish those adults who engage in heterosexual sodomy with a child less severely than those adults who engage in homosexual sodomy with a child.”¹¹⁴ To justify this differential treatment, the court appealed to “traditional sexual mores.”¹¹⁵ Yet, *Lawrence* rejected that morality would suffice to justify Texas’s sodomy statute,¹¹⁶ and it is not at all clear why morality suffices here to justify the “much greater criminal penalties.”¹¹⁷ So, too, the harm principle precludes the state from infringing on an individual’s liberty merely because some are morally offended by the conduct, and it is difficult to see how a sentence of 206 rather than fifteen months for what is essentially the same crime can be justified by appealing to such moral considerations.¹¹⁸

The *Limon* court dismissed the relevance of *Lawrence* by noting that it concerned the rights of adults and not children.¹¹⁹ As Judge Pierron suggested in his *Limon* dissent, however, that analysis would have been correct had *Limon* claimed that he had a constitutional right to engage in sexual relations with a minor.¹²⁰ But that was not being argued—instead, the plaintiff was merely suggesting that the punishment was too severe, given how the same crime was punished when individuals of differing sexes were involved.¹²¹

¹¹² See *Lawrence*, 539 U.S. at 578; MILL, *supra* note 3, at 9.

¹¹³ 83 P.3d 229 (Kan. Ct. App. 2004), *rev’d* 122 P.3d 22 (Kan. 2005).

¹¹⁴ 83 P.3d at 235.

¹¹⁵ *Id.* at 236.

¹¹⁶ See *Lawrence*, 539 U.S. at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

¹¹⁷ See *Limon*, 83 P.3d at 247 (Pierron, J., dissenting).

¹¹⁸ See *id.* It might be argued that same-sex and different-sex sodomy are different crimes, but that is exactly what the *Lawrence* Court is rejecting. See *Lawrence*, 539 U.S. at 574 (O’Connor, J., concurring in the judgment). Indeed, Justice O’Connor’s equal protection argument, which the *Lawrence* Court describes as “tenable,” is predicated on the rejection of the contention that same-sex and different-sex sodomy are relevantly dissimilar. *Id.* at 581. “The statute at issue here makes sodomy a crime only if a person ‘engages in deviate sexual intercourse with another individual of the same sex.’ Tex. Penal Code Ann. S 21.06 (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants.” *Id.*

¹¹⁹ See *Limon*, 83 P.3d at 234. The *Lofton* court also pointed to *Lawrence*’s saying, “The present case does not involve minors,” *Lofton*, 358 F.3d at 817 (quoting *Lawrence*, 539 U.S. 558, 578 (2002)), and implied that *Lawrence* therefore had no relevance to the case before it. But it is of course true that the Court’s suggesting that minors do not have a constitutionally protected right to engage in sexual relations does not speak to whether a state can undermine a child’s interests so that it can effectuate biases held by some portion of the population.

¹²⁰ See *Limon*, 83 P.3d at 244 (Pierron, J., dissenting).

¹²¹ *Id.*

The *Limon* court implied that the differentiation was justifiable because “sexual acts between same-sex couples do not lead to procreation on their own.”¹²² Yet, procreation is a very odd justification for distinguishing between punishments for sodomy based on the sexes of the parties, since sodomitical acts are non-procreative whether or not the parties are of the same sex.¹²³

The speciousness of the analysis did not end with the *Limon* court’s appeal to procreation to justify vastly differing penalties for sodomitical acts. Its analysis of the implicated equal protection issues was no less unsettling. *Limon* argued that the state’s imposition of much harsher penalties for same-sex sodomy involving a minor than for different-sex sodomy involving a minor offended equal protection guarantees,¹²⁴ citing *McLaughlin v. Florida*¹²⁵ for support. *McLaughlin*, which involved statutes that punished interracial fornication more heavily than intra-racial fornication,¹²⁶ is illuminating because it did not address whether the prohibited conduct was protected by the Constitution,¹²⁷ but merely whether a greater penalty could be imposed because of the races of the parties. So too, *Limon* did not involve whether the conduct was constitutionally protected but merely whether a greater penalty could be imposed because of the sexes of the parties.¹²⁸

The *Limon* Court attempted to distinguish *McLaughlin* by noting that race was the classification at issue in that case, and that race “is one of those characteristics over which an individual has no control.”¹²⁹ The *Limon* Court continued, “Unlike the individuals in . . . *McLaughlin*, who had no control over their race, the offense with which *Limon* was charged was not based on his sexual orientation or his gender, but was based on his conduct of engaging in sodomy with a child, conduct over which *Limon* had some control.”¹³⁰

Yet, Dewey *McLaughlin* was not charged with being a member of a particular race—rather, he was charged with cohabiting with a white woman,¹³¹ something over which he had control.¹³² The point here is not

¹²² *Limon*, 83 P.3d at 237.

¹²³ *Id.* at 247 (Pierron, J., dissenting).

¹²⁴ *See id.* at 238-39.

¹²⁵ 379 U.S. 184 (1964).

¹²⁶ *Id.* at 185-86 n.1 (1964) (listing Florida laws which punish interracial fornication more severely than intra-racial fornication).

¹²⁷ *Id.* at 193 (“The State in its brief in this Court, however, says that the legislative purpose of s 798.05, like the other sections of chapter 798, was to prevent breaches of the basic concepts of sexual decency; and we see no reason to quarrel with the State’s characterization of this statute, dealing as it does with illicit extramarital and premarital promiscuity.”).

¹²⁸ *Limon*, 83 P.3d at 244 (Pierron, J., dissenting) (“*Limon* does not contend there should be no punishment for his acts. This was reemphasized at oral argument by his counsel. It is the great difference in punishment, based on the sex of the participants, that is challenged.”).

¹²⁹ *Id.* at 239.

¹³⁰ *Id.*

¹³¹ See Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us about the Meaning of Race, Sex, and Marriage*, 32 Hofstra L. Rev. 1663, 1675 (2004) (“in *McLaughlin v. Florida*, the Court heard Dewey *McLaughlin*’s appeal from a conviction for cohabiting with Connie Hoffman, a White woman.”).

that cohabiting with someone of a different race should be a crime but merely that the Limon court was mischaracterizing what was at issue in *McLaughlin* in order to distinguish it from the issue in *Limon*.

Certainly, a sex-based classification might pass constitutional muster even if an analogous race-based classification would not—sex-based classifications are merely subject to heightened scrutiny, while race-based classifications are subject to strict scrutiny.¹³³ Nonetheless, the *Limon* court offered such a confused and inconsistent analysis of the relevant issues that it is difficult to argue how the decision could withstand review after *Lawrence*.

Perhaps even more surprising is that the *Limon* court understood that the statute embodied a gender-based classification,¹³⁴ protestations to the contrary notwithstanding,¹³⁵ and nonetheless rejected the idea that heightened scrutiny was appropriate.¹³⁶ The court reasoned that the classification at issue was not quasi-suspect because the “statute places both men and women under the same restrictions and similarly excludes them from the statute's applicability when they engage in same-sex sex acts.”¹³⁷ Yet, this is a misunderstanding of equal protection jurisprudence, as was made clear in *McLaughlin*, the very case discussed by the *Limon* court in the paragraph preceding its equal protection analysis.

In *McLaughlin*, Florida denied that equal protection guarantees were violated because a white woman and a black man would be subject to the same penalty as would a white man and a black woman and, further, all would be subject to the same penalty.¹³⁸ Yet, as the *Limon* Court noted, the *McLaughlin* Court used strict scrutiny,¹³⁹ notwithstanding the fact that members of both races were more heavily punished for engaging in interracial fornication,¹⁴⁰ a punitive scheme that admittedly burdened both races equally. However, under the analysis outlined in *Limon*—whereby heightened scrutiny is not triggered as long as the sexes are treated equally and members of each sex are precluded from having sexual relations with someone of the same sex—then it would seem that strict scrutiny should not have been triggered in *McLaughlin* as long as the members of each race

¹³² The court seemed clearly confused about what to say concerning control. The court worried that if it said that Limon did not have control, then “we would have to believe that an adult with an irresistible urge to engage in sodomy with a child should not be punished for such behavior.” See *Limon*, 83 P.3d at 239. Of course, neither Limon nor *McLaughlin* claimed to have been subject to irresistible impulses. Needless to say, the *McLaughlin* Court nowhere suggests that the Florida statutes were invalid because *McLaughlin* could not help cohabiting with Hoffman.

¹³³ See Mark Strasser, *Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny*, 13 *Widener L.J.* 859, 871-72 (2004) (noting that “sex-based classifications trigger heightened scrutiny . . . [and] race-based classifications trigger strict scrutiny”).

¹³⁴ *Limon*, 83 P.3d at 240.

¹³⁵ See note 131 and accompanying text *supra* (discussing the *Limon* court's claim that conduct rather than sex or orientation was the basis of the statute).

¹³⁶ *Limon*, 83 P.3d at 239.

¹³⁷ See *id.*

¹³⁸ *McLaughlin*, 379 U.S. at 188 (“all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty”).

¹³⁹ *Limon*, 83 P.3d at 239.

¹⁴⁰ See *McLaughlin*, 379 U.S. at 185. The *McLaughlin* Court did not address that Florida's statutes picked out two races without discussing commingling by other races.

were precluded from having non-marital relations with someone of another race.

The *McLaughlin* Court rejected Florida's claim that the classifications were not racially discriminatory by pointing out that the Florida statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple."¹⁴¹ The same logic applies in *Limon*. Just as the interracial couple would be treated differently than other couples, even if all interracial couples were treated the same, the same-sex couple (whether composed of males or females) would be treated differently than different-sex couples even if all same-sex couples were treated the same.

The *Limon* Court not only misconstrued *Lawrence*, but also the existing equal protection jurisprudence, in order to uphold a "blatantly discriminatory sentencing provision [which] does not live up to American standards of equal justice," whose purpose was "not to accomplish any of the stated aims other than to punish homosexuals more severely than heterosexuals for doing the same admittedly criminal acts."¹⁴² This kind of legislation cannot stand in light of *Lawrence* or the harm principle.

IV. CONCLUSION

On Liberty and the harm principle suggest that neither the state nor society should interfere with an individual's private relations absent harm to third parties and, further, that adult, consensual relationships are valuable because they are chosen by the individuals themselves. *Lawrence v. Texas* does more. It ascribes independent value and dignity to LGBT relations and relationships—above and beyond merely having been chosen—and further suggests that the United States Constitution recognizes this value. *Lawrence* also makes clear that equal protection principles apply to members of the LGBT community and that stigmatization of that community will not be permitted. It is precisely because of these elements above and beyond the rule of noninterference offered by the harm principle that *Lawrence* is inaccurately described as simply embodying that principle.

Part of Mill's project was to prevent the state and society from imposing penalties on individuals merely because some members of society think the "conduct foolish, perverse, or wrong."¹⁴³ The *Lawrence* Court claimed to want to prevent LGBT individuals from being subjected "to discrimination both in the public and in the private spheres."¹⁴⁴ Yet, there are a number of respects in which LGBT members are being discriminated against in the context of intimate or family relations, and the *Lawrence* Court has thus far not manifested a commitment to preventing such discrimination.

¹⁴¹ *Id.* at 188.

¹⁴² *Id.* at 185.

¹⁴³ Mill, *supra* note 3, at 12.

¹⁴⁴ *Lawrence*, 539 U.S. at 575.

In decisions rendered since *Lawrence*, the difficulty for members of the LGBT community has not been that courts have wrongly interpreted *Lawrence* to be merely reducible to the harm principle, but that courts have ignored *Lawrence*, the harm principle, and basic equal protection principles so that they can impose burdens on the LGBT community. Courts in Florida, Kansas, and Alabama have made clear that constitutional values, basic fairness, and local public policy can be sacrificed so that illegitimate objectives can be pursued. The United States Supreme Court must reaffirm the principles of *Lawrence* by making clear again (and again, if necessary) that states simply are not constitutionally permitted to enact prejudice into law.