Sex and the Supremes

Act I: Downtown Atlanta, Georgia

It was a typical sultry August day in Atlanta. Michael Hardwick had been working through the night helping his boss install new lighting in the Cove, a popular gay bar in downtown Atlanta where he worked as a bartender. As Hardwick left the Cove he took one last swig of the beer he was drinking, walked out the front entrance and threw the empty bottle into a trashcan placed just outside the door.

Then he saw him. Damn. Damn. Goddamn cops. Now what? An Atlanta police officer had parked his squad car in front of the bar and was approaching him. "You. Get in the car." Hardwick hesitated but he knew from past experience and the stories his gay friends had told him that you don't give Atlanta cops any excuse to harass you. The Atlanta police force had a reputation for being anti-gay and for harassing and even trying to entrap homosexuals by going undercover in the city's parks and public restrooms where gays were known to cruise for sex. "Where's the beer you were drinking?" Hardwick pointed to the trashcan. The officer, Keith Torick, retrieved the bottle and started filling out a ticket for drinking in public. Unfortunately, the ticket was filled out erroneously with two different court dates on different parts of the ticket. The later date was at the top of the ticket. When Hardwick didn't show up for the earlier date a warrant was issued for his arrest. Officer Torick immediately went to Hardwick's home to arrest him but his roommate informed him that Hardwick wasn't there. When Hardwick discovered there was a warrant for his arrest, he quickly went downtown and paid the $50 outstanding fine.

Three weeks later Hardwick was attacked by three men as he returned to his

home. They beat him so severely that they tore all the cartilage out of his nose, repeatedly kicked him in the face and cracked six of his ribs. While he couldn't tie the beating to Officer Torick, Hardwick was convinced he had set it up.

Three weeks after his beating Hardwick's belief was validated. On the morning of August 3, 1982, Officer Torick showed up at Hardwick's home. Torick later claimed that the front door was open and as he entered the apartment he saw a man sleeping on the couch. "Where's Michael Hardwick?" The man pointed to a door in the back of the apartment that was slightly ajar. Torick entered what turned out to be Hardwick's bedroom. There on the bed were Hardwick and a friend who was visiting Atlanta looking for a teaching job engaged in mutual oral sex. After watching for a short time Torick announced his presence by shouting, "You're both under arrest." Hardwick and his friend were shocked. The friend immediately begged Torick not to arrest him saying he was married and if arrested he could lose his teaching job. Hardwick, not one to beg, furiously shouted back at the Officer, demanding that Torick leave immediately and ranting that he had no right to invade his house and his bedroom. Torick said "I have a warrant," but when Hardwick examined it, it was the warrant for his public drinking that was no longer valid. Torick merely smirked saying "It doesn't matter. I am acting in good faith."

It got worse. Hardwick and his friend were handcuffed, driven downtown and booked for violating the state's sodomy law. Georgia's sodomy statute prohibited both oral and anal sex. If convicted, it called for a minimum term of one year in prison but not more than 20 years.

When Torick delivered both men to the station house he informed all the prisoners and guards that they were homosexuals. A guard joked that since they were jailed for cock-sucking, they should have a good time in their new home.

The district attorney decided not to present Hardwick's case to the grand jury, but the local chapter of the ACLU immediately contacted Hardwick when they heard about the arrests. They had been searching for years for a test case suitable for challenging Georgia's sodomy law. They appealed to Hardwick who finally agreed to let them help him file a complaint. With the support of the national ACLU and gay activists groups Hardwick brought suit in federal district court challenging the constitutionality of the sodomy law. The district court dismissed the suit but the 11th Circuit Court of Appeals reversed on the grounds that Georgia's law did in fact violate Hardwick's constitutional right of privacy. Since other circuit courts had ruled that similar laws were constitutional, the Supreme Court of the United States agreed to hear Hardwick's case in order to resolve the inconsistencies among the lower federal courts.

Michael Bowers, Georgia's attorney general, petitioned the Court, arguing that the constitutional right of privacy should not be extended to the right of homosexual sodomy. Prior cases protecting the right of privacy were deeply rooted in the traditional values of family and one's home. There is no such historical tradition for the purported right of homosexual sodomy. Bowers described homosexual sodomy as an act of sexual deviance that Georgia has declared to be morally wrong. The state's brief concluded by arguing that a state should have the constitutional discretion to create a moral framework defending deeply held moral values of its citizens. He was invoking a theory known as Legal Moralism.

The brief of the respondent, Michael Hardwick, was authored by one of the most famous litigators of civil rights of the time, Laurence Tribe of the Harvard Law School. Tribe argued that prior cases have established a fundamental right of privacy that includes sexual intimacy between unmarried adults in the privacy of their home. Any law such as Georgia's sodomy law that violates such a fundamental right is justified only if supported by a compelling secular state interest. But Georgia has provided no evidence that such a compelling interest exists.

Georgia's Assistant Attorney General presented the case for Bowers before the Supreme Court. He began by invoking a form of the slippery slope argument. Striking down Georgia's sodomy law would in effect negate the State's right to defend laws based on Legal Moralism. That would mean the State would have no rational limiting principle to justify laws prohibiting polygamy, same sex marriage, incest, prostitution, and adultery.

Professor Tribe argued the case for Michael Hardwick. He had spoken fewer than two minutes before being interrupted by Justice Powell. Powell appealing to the slippery slope argument asked him what limiting principle could be applied to distinguish the present case from such practices as bigamy, incest or prostitution if they occur between consenting adults in the privacy of one's home? Tribe responded that unlike homosexual sodomy these practices can be legitimately regulated in order to protect individuals and society from harm. Justice Rehnquist pointed out that many states had already decriminalized sodomy and asked: Why not leave this issue to democracy? Let the people decide through their state legislatures? Tribe's response echoed the argument

presented in his brief: When it comes to a basic, fundamental right, the Court had never ceded its protection to democracy.

Tribe and his associates left the Court Room with triumphant smiles on their faces. Surely they had convinced the swing vote of Justice Powell and maybe even O'Connor to affirm the 11th Circuit's decision declaring Georgia's sodomy law unconstitutional. Along with the almost certain votes of the liberal justices, Blackmun, Brennan, Marshall and Stevens, this would guarantee a victory for their client, Michael Hardwick. Justices Burger, Rehnquist and White would definitely rule against Hardwick, but that still meant a majority decision for their client of at least 5-4 or possibly even 6-3. Tribe's team was so convinced of their success that they retired to a nearby café for a celebratory luncheon. What they didn't know was that Justice Powell who had supported the extension of the right of privacy to abortion services in Roe v. Wade could not find a constitutional limiting principle in this case. Consequently, Powell voted with the 5-4 majority to declare that Georgia's sodomy law was in fact constitutional.

Justice White agreed to write the opinion for the Court. The heart of White's opinion rested on his interpretation of the question he believed to be central to this case. He ignored Tribe's attempt to cast the issue in terms of whether the constitutional right of privacy can be extended to consensual sex between same-sex adults in the home. Instead, White interpreted the issue in Bowers to involve the question: Is there a basic or fundamental constitutional right of homosexual sodomy? And he stated two criteria for identifying basic rights: 1) Rights that are so implicit in the concept of ordered liberty that justice could not exist if they were sacrificed and 2) rights that are deeply rooted in our nation's history and tradition. White argued that the alleged right to homosexual

sodomy meets neither criterion because historically sodomy was always a crime in the United States. Sodomy was a crime in all 13 states when the Bill of Rights was ratified in 1791. Therefore, the 11th Circuit Court was mistaken when it claimed Hardwick enjoyed a fundamental right to engage in homosexual sodomy.

In response to Tribe's claim that Georgia did not have a rational basis justifying its law, White explicitly appealed to Legal Moralism. Georgia has the constitutional discretion to criminalize majority sentiments about acts its citizens judged to be grossly immoral.

White's relatively mild use of Legal Moralism pales in comparison to Justice Burger's shocking concurring opinion. In his words and I quote:

"Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards…Eighteenth-century English legal scholar Sir William Blackstone described the "infamous crime against nature" as an offense of "deeper malignity" than rape…"a crime not fit to be named." …To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching" [End quote.]

On June 30, 1986 the Supreme Court of the United States in Bowers v. Hardwick announced their decision to uphold the State's constitutional discretionary right to criminalize homosexual sodomy thereby defending the 24 states that had laws against such conduct at that time. Tribe, Hardwick and the gay community had lost. The curtain closes on Act I.

Act II: Harris County – just outside Houston, Texas

Robert Royce Eubanks was a drunk. Worse, he was a mean drunk. Worse yet, he had little steady income, instead working odd jobs on again and off again. Eubanks shared an apartment with his boyfriend, John Lawrence, but he often couldn't help with expenses. That and his drinking and belligerence made life so difficult that Lawrence finally kicked Eubanks out of his apartment. In the vernacular of our organization, Eubanks just wasn't clubbable.

John Geddes Lawrence was at least employed working as a medical technologist analyzing blood samples. But he, also, had a serious drinking problem. Notwithstanding their troubled relationship, Lawrence and Eubanks remained friends and would at times meet for a drink at gay bars in the Houston area.

In 1990 Eubanks met a gay African-American man named Tyron Garner. Unfortunately, Garner's life was equally problematic. He, also, couldn't hold a steady job and couldn't even afford an apartment. Instead, he moved among the homes of his family and friends staying as long as he could. So he was relieved when Eubanks invited him to share a bedroom in the home of Eubanks' parents. But their relationship was tempestuous and at times even violent.

The two men had separated for a time but agreed to try to restart their relationship by renting an apartment together. Of course, they had little money for furniture, but, fortunately, Lawrence had decided to purchase new furniture and offered them his old furniture. After helping Eubanks and Garner move into their new apartment, the three decided to celebrate by going to a Mexican restaurant where, of course, they began

drinking. After dinner the trio continued their drinking at Lawrence's apartment. All the conditions were present for a perfect storm.

Perhaps deliberately, we don't know, Lawrence began flirting with Garner. Inevitably, Eubanks, getting more and more inebriated, became furious, grabbed the half-empty bottle of vodka on the kitchen table and retreated to the living room turning on the TV there. The drunker he got, the more his jealousy flared up. He stormed into the kitchen verbally attacking both Lawrence and Garner. By that time Lawrence, also drunk, had had enough. Plus, he was angry that Eubanks had drunk the last of his hard liquor. Lawrence demanded that Eubanks leave immediately. Eubanks refused and, seeing some change on top of the kitchen table, he took it shouting that he was going to buy a soda from the vending machines located in the entrance to the Colorado Club Apartment complex. However, instead of purchasing a soda, seeing a pay phone and still seething with anger, Eubanks concocted an absurd plan as payback for his lover's behavior. In his drunken stupor, Eubanks phoned the police, telling the dispatcher that there is a crazy black man waving a gun around in apartment number 833 of the Colorado Club Apartments.

Enter, stage left, our fourth and final protagonist in Act II, Harris County Deputy Sheriff Joseph Quinn. The officers of this county located just outside Houston, Texas, are known for their reputation of being macho, trigger-happy and inclined to use excessive force. Joe Quinn relished his reputation as being the toughest of the tough who would quickly write tickets or make arrests even for minor offenses like public intoxication. He was especially prone to act tough or even become physically abusive if the subject complained, talked back to him or didn't immediately follow his orders.

Quinn bragged about having the largest internal complaint file in a department famous for citizen complaints.

It was this macho, quick-to-act officer who was the first to respond to the dispatcher's report of a crazed black man with a gun on the night of Sept. 17, 1998. When he arrived at the apartment's front door, Quinn noticed it was slightly ajar. He began knocking on the door causing it to open further. Quinn pushed it open and entered the apartment followed by Officer William Lilly and two other officers. All four had their guns drawn. Seeing no one, Quinn shouted, "Sheriff's department. Sheriff's department." No one answered. Following procedure, all four officers started searching each room separately. Quinn and Lilly entered the bedroom on the right. Both half expected to encounter an armed man so they entered with guns drawn.

Lilly entered first and would later claim that he saw Lawrence and Garner on the bed having sex. Seeing the two men with guns pointing at him, Lawrence became furious and immediately began shouting: "What the fuck are you doing? You don't have any right to be here." In his drunken state he even threatened Quinn yelling that he would have him fired and demanded to be able to call a lawyer. That's the point at which the officers handcuffed both men and started to rough up Lawrence.

The officers then proceeded to search the entire apartment still looking for a gun. They found no gun but did come across scores of gay pornographic magazines and videos. The walls of Lawrence's bedroom were covered with photos of nude men including a drawing of the actor James Dean with an enormous erect penis. It was clear to all four officers that the men were homosexuals.

Finding no evidence of a gun, they interrogated Eubanks who had stayed just outside the apartment. He confessed that he had made up the entire story and volunteered that he acted out of jealousy because it looked like Garner was cheating on him. This further angered Lawrence who resumed his shouting at the deputies, calling them Gestapo storm troopers and jackbooted thugs and cursing at them, especially at Quinn. Now Quinn was furious. He and his officers were endangered and could have shot someone all over what seems to be a lovers' quarrel among three men. At this point Quinn told all three men that they were under arrest. He informed Eubanks that he would be charged with filing a false police report. No one told Lawrence or Garner of the charges against them. Already handcuffed, the deputies led Garner into a waiting squad car but Lawrence refused to cooperate. Lawrence, wearing only his underwear, was grabbed by two officers and forcibly dragged outside and down cement steps causing minor wounds but considerable bleeding. The men were taken to a holding cell that contained sixty other inmates.

Quinn charged both Lawrence and Garner with violating Texas' Homosexual Conduct statute against "deviant sexual intercourse" banning same-sex sodomy.

The following morning at their initial arraignment, the men finally were informed of the charges against them. The DA read Quinn's report claiming he saw Lawrence and Garner having anal sex. Both men pled not guilty. Neither even knew that there were laws against homosexual sodomy. At this point the story becomes problematic. Quinn's report claimed that he observed Lawrence and Garner on the bed engaging in anal sex, but Lilly had initially reported that he saw them having <u>oral</u> sex. Only after reading

Quinn's police report would Lilly change his story to be consistent with Quinn's. The other two officers said they didn't see anyone having sex.

The two men were returned to their cells and not released until after midnight. Lawrence would later declare it to be the most humiliating experience of his life.

When local gay activists learned of the arrest, they immediately tried to contact Lawrence and Garner. They had been waiting for years for an appropriate test case in order to challenge the Texas homosexual sodomy law. The arrest of two consenting adults for committing sodomy in the privacy of an apartment was ideal. However, both men had pled not guilty. And when they talked to Lawrence promising to hire a lawyer for him for free if he would contest the charges, he repeated his claim of innocence. In fact, he claimed that when the deputies burst in Garner and he were in separate rooms. Lawrence was tempted to agree to challenge the sodomy law, but he worried about losing his job if his manager found out about the arrest. Still, if his case went to trial that would risk his actions being made public.

At this point the local gay activists called in legal experts from Lambda Legal, the national gay rights legal advocacy group. They argued against taking the case to trial since there was a strong possibility that Lawrence and Garner would be found not guilty. This would result in losing the right of appeal necessary to challenge the constitutionality of Texas' sodomy statute. Instead, they had lengthy discussions with Lawrence and Garner urging them to plead "no contest." This was tantamount to their not denying the charges against them but would mean there would be no trial avoiding the publicity that would ensue. Most importantly, it would enable the men's attorneys to argue in legal briefs that the Texas sodomy law was unconstitutional.

After lengthy private discussions between Lawrence and Garner, both finally agreed to the Lambda's lawyers' strategy. Both pled "no contest" to the charges against them.

After unsurprising losses in lower courts, the Lambda legal team appealed to the Court of Criminal Appeals, the highest court in Texas that dealt with such appeals. After waiting an entire year the state's highest court denied the request to review the decision thus confirming Lawrence and Garner's convictions. The Court cited Bowers v. Hardwick as the basis for its decision.

The Lambda team was delighted. The Court's denial was all they needed to ask the Supreme Court of the United States to review their case.

The lawyers knew that the odds of the Supreme Court accepting their case were slim but they immediately began preparing their petition to the Court requesting the Court's review. In their cert petition they argued the Court should address three issues: 1) whether the convictions of Lawrence and Garner violated the 14th Amendment's Equal Protection Clause since an identical act committed by a heterosexual couple is not a crime in Texas; 2) whether the Texas sodomy law violated their right to privacy; and 3) whether Bowers v. Hardwick should be overruled. They knew the latter request was highly unlikely since it had only been 16 years since the Bowers decision; moreover, Justice O'Connor who was still sitting on the Supreme Court had herself concurred with the Court's decision in Bowers. To their surprise and delight, on Dec. 2, 2002, the Court granted Lawrence and Garner's request for review including the request to reconsider Bowers.

The intellectual, political and legal firepower supporting Lawrence and Garner's case was remarkable. Some of Houston's top legal talent teamed up with the national gay organization, Lambda Legal that had been involved in the case from its inception. They were joined by several lawyers from Washington D.C.'s top legal firms including some who had presented multiple cases before the Supreme Court. In addition, the Lambda team organized 15 amicus briefs supporting Lawrence and Garner written by the Cato Institute, the ACLU, several eminent historians, the American Psychological Association, the American Public Health Association, multiple mainline religious denominations, the American Bar Association, and leading professors of constitutional law.

The Lambda team's brief centered on their claim that the Texas sodomy law violated Lawrence and Garner's basic, fundamental right of privacy. By criminalizing sex between gay and lesbian couples, Texas in effect had invaded their private and sexual autonomy. They argued that just as for heterosexual couples, sex between gays and lesbians involved a realm of personal autonomy that served as a central factor supporting long-term relationships and the stability of families. The brief cited the fact that the US Census Bureau identified more than 600,000 households of same-sex partners many raising children.

The Lawrence brief then argued that there exists no compelling State interest to justify the State's prohibition of such a fundamental right as the right to privacy. Attacking Legal Moralism, it argued that even the existence of majority moral preferences has never by itself been sufficient to justify abridgment of basic rights.

Third, the brief attacked the rationale used in Bowers v. Hardwick arguing that the reasoning used in that case was outside the judicial and legislative precedents on privacy both before and subsequent to that decision.

Since the Texas law criminalized only homosexual sodomy, the brief also claimed it violated the Equal Protection Clause.

Finally, the Lambda team attacked the slippery slope argument pointing out that states had sufficiently strong justifications for laws against incest, prostitution, adultery and bestiality adding that the State's citing the latter was absurd and offensive.

The brief filed by the state of Texas led off with the obvious: Given the tradition of precedent, Texas was required to follow the ruling in Bowers v. Hardwick. The brief referred to the argument in Bowers that homosexual sodomy could not involve a fundamental right since no such right was protected by the tradition and history of the United States. Again, referencing Bowers, the state argued: "…that conduct could not conceivably achieve the status of a fundamental right in the brief period of 16 years since Bowers was decided."

Texas also rejected the use of precedent cases expanding the right of privacy since all of those cases were limited to issues such as marriage, conception or parenting. Therefore, they do not apply to homosexual sodomy.

Not surprisingly, the Texas brief explicitly invokes Legal Moralism arguing that there exists sufficient rationale for its statute, "the legitimate government interest in promoting morality."

The Lambda team chose Paul Smith to argue the case before the Supreme Court. Smith, a graduate of Yale Law School and editor of its Law Review, had clerked for

Justice Powell. He had extensive experience with the Court having argued eight cases before it. Notwithstanding his experience, Smith was very well aware of the difficult task that awaited him especially insofar as it included asking the Court to overrule a case it had decided a mere 16 years ago. As a consequence Smith devoted literally weeks of his time preparing his argument.

While the choice and preparation of the team defending Lawrence and Garner was extensive and thorough, the choice and preparation by those arguing for the State of Texas was haphazard and insufficient. The State finally chose Chuck Rosenthal who had helped in the preparations of Texas' Lawrence briefs. While Rosenthal was an excellent trial lawyer, he had little experience at all in any appellate court let alone before the Supreme Court. His lack of experience would soon be revealed during the oral argument.

This historic argument occurred on March 26, 2003. Hundreds of supporters of Lawrence and Garner lined up to witness the event some having slept in tents or sleeping bags overnight. The excitement was contagious – almost circus-like - including the singing of folk songs and civil rights anthems. A small group of anti-gay protestors held up signs with slogans like: "God condemned Sodom." "God hates fags." A woman mocked the Supreme Court's opening greeting shouting: "Oyez! Oyez! All you having business with the Court draw near and bend over."

At 11:09 A.M. before a packed courtroom consisting largely of gays and lesbians, Chief Justice Rehnquist announced, "We'll hear arguments next in No. 02-102, John Geddes Lawrence and Tyron Garner v. Texas." Paul Smith began his presentation basically summarizing the arguments given in the Lambda brief and the amicus briefs supporting Lawrence and Garner. In less than two minutes he was challenged by the

Chief Justice. Rehnquist argued that the conduct at issue in this case has been banned for centuries; therefore, there can be no fundamental right to same-sex sodomy even in private. Smith's reply included one of several attacks on the reasoning used in Bowers. Bowers had the history wrong. Laws banning sodomy did not single out same sex sodomy until recently. They banned such acts for everyone. Scalia burst in claiming that was irrelevant since throughout our nation's history gay sex was prohibited. Smith responded: If the long history of sodomy laws is sufficient to justify the Texas law that applies only to homosexual sodomy, then it would justify banning such acts for married couples. But, Texas has conceded that states could not criminalize marital sodomy. Scalia responded loudly: "Texas may have conceded it. I haven't." In effect Scalia was indicating his rejection of the entire series of cases in which the Court had gradually expanded the interpretation of the right of privacy.

And so it went. Smith's arguments were often questioned especially by Justices Scalia and Rehnquist.

Rosenthal's presentation of the argument for Texas started on the wrong foot. He began by reading his introductory statement, a practice frowned on by the justices. Oddly, Rosenthal claimed that the facts of the case do not show which rights the petitioners are asking to uphold. Scalia, already upset with the tenor of Rosenthal's arguments, interrupted saying surely they were supporting the alleged right of homosexual sodomy. Rosenthal's reply had the audience gasping. "There's nothing in the record to show these people are homosexuals," he said. Rosenthal then tried to explain his convoluted reasoning: One homosexual act does not mean that one is a homosexual. The state of Texas believes that a heterosexual person can also violate its

statute if he has sex with a person of the same sex. Rosenthal apparently used this bizarre reading of the Texas sodomy law in the belief that it could avoid violation of the Equal Protection Clause.

At this point Justice Breyer tried to get Rosenthal back on track by turning to the central issue concerning Bowers. "Why shouldn't the Court overrule Bowers?" he asked. Upset with Rosenthal's wandering logic, Breyer added: "I would like to hear your – your straight answer to this issue." The courtroom erupted in laughter though Breyer didn't seem to get his own unintended joke. Part of Rosenthal's answer included a defense of the Texas law by claiming that it served the state's interest in "the preservation of marriage, families and the procreation of children." Justice Ginsburg immediately asked, "Does Texas permit same-sex adoptions of children?" Surprisingly, Rosenthal was unaware that gays could adopt in Texas. Ginsburg pointed out that if Texas allowed such adoption it couldn't argue that its sodomy law was justified to preserve families. In a vain attempt to salvage at least part of Rosenthal's argument, Justice Scalia jokingly asked, "You're fairly certain that they can't procreate children, aren't you?"

It got no better and at times the justices seemingly ignored Rosenthal engaging in arguments among themselves.

When the oral arguments ended, the Lambda team and their supporters felt optimistic about Smith's presentation but realized that they couldn't be at all certain of the outcome of the case. Clearly, Scalia, Rehnquist and Thomas would side with Texas. Breyer, Ginsburg, Stevens and Souter would probably support Lawrence and Garner. O'Connor was problematic because she had voted with the majority in Bowers and Kennedy did not indicate his position in the course of the oral questioning.

On Thursday, June 26, 2003 Justice Kennedy who wrote the opinion in Lawrence for the Court announced the Court's decision. In a 6-3 ruling the Supreme Court held that the Texas law was unconstitutional. More surprisingly, 5 justices directly overruled Bowers v. Hardwick. There was an audible gasp from those attending in the gallery as they realized the historic importance of the day.

In his opinion Kennedy first delivered what in effect was the obituary for Bowers. He began by attacking the Bowers' Court's interpretation of the question raised by the case: That Court claimed the issue was whether the federal Constitution confers a fundamental right of homosexual sodomy. In Kennedy's words, "That statement…discloses Bowers' failure to appreciate the extent of the liberty right at stake…" adding that it demeans the issue as much as someone who argued that marriage is simply about the right to have sex. Instead, liberty, he continued, "…presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." … "Liberty protects the person from unwarranted governmental intrusion into a dwelling or other private place."

By this time overcome with emotion, many of the gays and lesbians and the supporters of Lawrence and Garner were in tears. For the first time in our nation's history, states could no longer criminalize actions that they believed to be central to a loving and caring relationship. In fact, Kennedy stressed the crucial importance of relationships in his opinion stating that intimate sexual conduct can be "…one element in a personal bond that is more enduring." He continued: "[w]hen 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 the private spheres."

Kennedy next argued that Bowers was an outlier. It ignored central precedent cases such as Griswold v. Conn., Eisenstadt v. Baird, Roe v. Wade and Carey v. Population Services, all of which developed the fundamental privacy right at stake in Bowers. Kennedy added that the Court's decision in Lawrence is further supported by cases subsequent to Bowers. He concluded starkly, "Bowers was not correct when it was decided and it is not correct today. It ought not to be a binding precedent. It should be, and now is, overruled." Note that it is extremely rare for the Court to overrule a prior case especially in such a brief time. It is remarkable for the Court to confess that its previous ruling was wrong at the time it was decided.

In his attack on Bowers Kennedy argued that that case was based on the false claim that laws against homosexual sodomy were deeply rooted in our nation's history and tradition. 19th century sodomy laws were exclusively against nonconsensual or public activities. Only in the last third of the twentieth centuries were laws adopted targeting gays. In fact, the first sodomy law to specifically single out homosexuals alone was a Kansas statute not adopted until 1969.

Kennedy acknowledged that many had moral objections to homosexual conduct but he argued that Legal Moralism is inadequate if it is the sole basis for a law regulating or prohibiting fundamental rights. Perhaps surprisingly, Kennedy cites Justice Stevens dissent in Bowers: "…the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice;" And so ends Act II.

The decision in Lawrence has had deeply significant and long-lasting impact. First, it immediately rendered unenforceable the sodomy laws of 13 states.

Second, as the American Bar Association's amicus brief demonstrated in addition to violating privacy rights of homosexuals, the very existence of Texas' homosexual sodomy law had discriminatory effects. For example, the exclusion of antigay violence from hate crime legislation, the disqualification from public employment including serving as police or school teachers, denial of custody or visitation rights to gay parents, refusal to allow gays to adopt or foster children and the exclusion of sexual orientation from state and local antidiscrimination law. Until Lawrence gay men and lesbians were in effect presumptive criminals.

Third, Lawrence removed one gigantic obstacle to the possibility of governments' recognition of gay marriage. In his dissent Justice Scalia warned that the principle and logic used in Lawrence would inevitably lead to the recognition of same-sex marriage. He got that right. Months after the decision the Massachusetts Supreme Court legalized same-sex marriage citing Kennedy's opinion in Lawrence. Within a decade 8 states followed suit. And, of course, you're all aware of the Court's recent decision legalizing same-sex marriage for all Americans involving one of our own Cincinnatians, Jim Obergefell in Obergefell v. Hodges.

Finally, it is important to note that Lawrence not only serves to protect the rights of gays and lesbians. It is an important part of a tapestry of cases developing the right of privacy and limiting unwarranted governmental intrusion into our lives. Thank you.