

LAWRENCE AS AN EIGHTH AMENDMENT CASE: SODOMY
AND THE EVOLVING STANDARDS OF DECENCY

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ABSTRACT

This Article offers an alternate reading of *Lawrence v. Texas*, the 2003 U.S. Supreme Court case that struck down the Texas sodomy statute that criminalized private, consensual, and adult same-sex intercourse. While most scholars discuss *Lawrence* as a substantive due process case and struggle to find meaning in the ambiguity of the decision's language, I propose that *Lawrence* is better read as an Eighth Amendment case. This Article argues that the majority opinion analyzed the constitutionality of the Texas sodomy law as it would analyze the cruelty and unusualness of a criminal law in an Eighth Amendment evolving standards of decency case. The *Lawrence* Court not only used objective indicators to find a U.S. consensus against sodomy laws but was also cognizant of foreign nations that refused to criminalize sodomy. Additionally, I suggest that the Eighth Amendment and the evolving standards of decency were on the minds of the Justices when deciding *Lawrence*, and at a minimum, the case was decided in the amendment's shadow. The Justices were exposed to an evolving standards of decency analysis in both written briefs and oral arguments, and the majority opinion used language evocative of emergence and evolution. I discuss the importance of this alternative reading of *Lawrence* and begin a conversation on the possibilities of extending an evolving standard of decency analysis to issues other than sodomy and areas beyond criminal law.

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INTRODUCTION

In 2003, the Supreme Court's decision in *Lawrence v. Texas*¹ struck down all state laws that criminalized private adult consensual sexual activity. The views of a majority of Americans had already shifted toward tolerance of homosexuality,² despite the fact that almost two decades earlier the Court had allowed states to criminalize gay sex in *Bowers v. Hardwick*.³ I suggest that the *Lawrence* decision was in touch with an evolved standard of treatment that a majority of Americans had developed toward gays and lesbians. While the result in *Lawrence* is clear, the holding and principles on which it stands are a bit more ambiguous. This lack of clarity has led a number of scholars to offer different interpretations of the Court's holding; however, most seem to converge on the doctrine of due process.⁴ In this Article, I take into account the evolution of American decency

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

2. Gary R. Hicks & Tien-Tsun Lee, *Public Attitudes Toward Gays and Lesbians: Trends and Predictors*, 51(2) J. HOMOSEXUALITY 57, 66-68 (2006).

3. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

4. See, e.g., David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 WIDENER L. REV. 249, 251-52 (2005) (questioning the reach of the Court's opinion in *Lawrence* under the rubric of substantive due process); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1103-04 (2004) (examining the Court's treatment of liberty as a new approach to substantive due process); Laurence Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1896-98 (2008) (examining the interaction between due process and equal protection).

with respect to the punishment of gays and lesbians and offer an additional reading of the *Lawrence* decision. I argue that *Lawrence* was decided using a test remarkably similar to an evolving standards of decency analysis, and despite its obvious connections to due process, the majority opinion has subtle, yet strong, ties to the Eighth Amendment.

Concerns surrounding cruel and unusual punishment provide an explanation for the *Lawrence* decision beyond the somewhat vague Court-articulated liberty rationale and the scholar-offered due process and equal protection readings. If we strip the story of Tyrone Garner and John G. Lawrence⁵ of the complexities of the evolving standards of decency, what remains is a romantic tale of horribly oppressed litigants, heroic lawyers, and Justices who stood firmly for the rights of sexual minorities in the face of hostile majority rule. Examining *Lawrence* as an evolving standards of decency case complicates this narrative because it takes into account that the national consensus toward punishing consensual private homosexual activity had relaxed and shifted significantly in the years following *Bowers*.

This Article argues that *Lawrence* can be read as part of the Court's Eighth Amendment evolving standards of decency jurisprudence. First, I explore and comment on the common readings of *Lawrence* as a substantive due process case. Next, I provide evidence that the Court in *Lawrence* was not only exposed to Eighth Amendment arguments but also deliberated these issues. I then subject sodomy laws to an evolving standards of decency analysis. In conclusion, I address the importance of reading *Lawrence* from an Eighth Amendment perspective. This Article differs from legal scholarship that proposes how famous Court social issues cases should (or could) have been decided.⁶ Instead of proposing how *Lawrence* could have been written better, I focus on the decision as it stands, suggest an alternative interpretation, and then explore the possibilities and productivities that result from this alternate reading.

5. Tyrone Garner and John G. Lawrence were the petitioners in *Lawrence v. Texas*. In the Supreme Court opinion, Garner is referred to as "Tyron," though it is reported that Garner preferred his first name to be spelled as "Tyrone" with an "e." This Article uses the spelling that Garner preferred. For more information about the events that led to the arrest of Garner and Lawrence as well as brief biographical data on the men, see Douglas Martin, *Tyron Garner, 39, Plaintiff in Sodomy Case*, N.Y. TIMES, Sept. 14, 2006, at D8.

6. See, e.g., WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (including many experts' revisions of and thoughts concerning *Brown v. Board of Education*).

I. READING *LAWRENCE*A. *Substantive Due Process: The Usual Reading*

The Supreme Court has ruled that a “substantive” feature of the Due Process Clause allows courts to invalidate laws that are irrational or unduly infringe upon fundamental rights.⁷ Most legal scholars categorize *Lawrence* as a substantive due process case.⁸ This is not surprising because the Court stated that it would determine “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.”⁹

Legal scholars have noted that the majority struck down the Texas law without characterizing its test for doing so.¹⁰ Usually, in substantive due process cases, courts undertake a two-step analysis when deciding a statute’s constitutionality.¹¹ First, the court must determine whether the legislation burdens the exercise of an individual’s constitutionally-protected fundamental right.¹² In short, it answers the question: is the right at issue a *fundamental* right? In *Washington v. Glucksberg*, the Court ruled that this first step of determining whether a fundamental right is at issue has two components:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” . . . and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking” . . . that direct and restrain our exposition of the Due Process Clause.¹³

7. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846-48 (1992) (describing the doctrine of substantive due process).

8. See *supra* note 4 and accompanying text.

9. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

10. See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 2003 SUP. CT. REV. 27, 29 (2004) (remarking on the “opaque[ness]” of the Court’s ruling); Pamela Glazner, Comment, *Constitutional Law Doctrine Meets Reality: Don’t Ask, Don’t Tell In Light of Lawrence v. Texas*, 46 SANTA CLARA L. REV. 635, 643-46 (2006) (arguing that the Court in *Lawrence* undermined the substantive due process tiered analysis by using ambiguous language).

11. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (describing the two-step substantive due process analysis used by the Court).

12. *Id.*

13. *Id.* (citations omitted).

As quoted above, *Glucksberg* holds that courts “must begin with a careful description of the asserted right” because the “doctrine of judicial self-restraint requires [a court] ‘to exercise the utmost care whenever [it is] asked to break new ground in this field.’”¹⁴ Not only must this right be described, but the right must also be deeply rooted in national history, practice, and tradition.¹⁵

Second, once a court has determined whether there is a fundamental right at issue, it must administer the proper standard of review to the challenged legislation.¹⁶ There are two standards that courts can apply: (1) strict scrutiny or (2) rational basis analysis.¹⁷

Courts decide cases where fundamental rights are at issue using a strict or heightened scrutiny analysis.¹⁸ This standard requires that regulations that limit fundamental rights must be justified by a *compelling state interest*.¹⁹ Even when there is a compelling state interest, the Court has ruled that the legislative enactment must be *narrowly tailored* to the state’s interest.²⁰ The strict scrutiny standard is a high burden for the government to meet.²¹ Regulations and laws subjected to strict scrutiny analysis are usually overturned.²²

If a court concludes that no fundamental right is at issue, then it uses a rational basis analysis.²³ Under this test, a court asks whether the law is rationally related to some legitimate government interest.²⁴ The rational basis standard is a low bar.²⁵ Laws are usually upheld under this standard of review.²⁶

14. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

15. *Glucksberg*, 521 U.S. at 720-21.

16. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 794-95 (3rd ed. 2006).

17. *Id.*

18. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

19. *Glucksberg*, 521 U.S. at 720-21.

20. *Id.*; *Aptheker v. Sec’y of State*, 378 U.S. 500, 508 (1964).

21. See CHEMERINSKY, *supra* note 16, at 540-43 (discussing the levels of scrutiny used in examining the constitutionality of government action).

22. See Gerald Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (finding the use of strict scrutiny to be “‘strict’ in theory and fatal in fact”). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (finding that thirty percent of strict scrutiny applications result in the challenged law being upheld).

23. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

24. *Id.* at 320.

25. See CHEMERINSKY, *supra* note 16, at 540-43 (discussing the levels of scrutiny used in examining the constitutionality of government action).

26. *Id.* at 320-21 (describing the presumption of constitutionality and other devices that make the rational basis test a low standard).

B. Moving Beyond Substantive Due Process: Alternative Readings

A number of elements of the Court's analysis suggest that *Lawrence* may not be a true substantive due process case. First, the Court in *Lawrence* did not go through the exercise of describing the liberty interest at issue. Instead, the Court overturned the Texas sodomy law based on its conclusion that, in the United States, individuals possess a liberty interest in private sexual conduct,²⁷ but the Court did not explicitly determine whether the right or the liberty interest was fundamental or announce which type of substantive due process review standard it used.²⁸ This is a departure from many of the Court's previous substantive due process rulings, such as *Glucksberg*.²⁹

Additionally, the *Lawrence* majority wrote of an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."³⁰ Acknowledging an "emerging awareness" is striking considering that substantive due process determines whether a right is "fundamental" by objectively examining history and tradition.³¹ Justice Scalia's dissent in *Lawrence* correctly points out a contradiction between this language and earlier substantive due process precedent. He writes that "an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires."³² There is an apparent inconsistency here: how can a right exist — which is supposed to be fundamentally entrenched in our nation's history and tradition — when we are simultaneously experiencing its emergence?

A number of legal scholars have both directly and indirectly tried to make sense of this contradiction between the standard of review used in earlier substantive due process cases and the emerging awareness standard used in *Lawrence*. Eskridge and Hunter avoid the necessity of looking for a deeply rooted tradition.³³ In their opinion, the majority did not find a fundamental right and instead applied a rational basis test,³⁴ and the Texas sodomy statute could not meet even this low level of scrutiny. In a separate piece, Hunter argues

27. *Id.* at 578.

28. *Id.*

29. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (finding no fundamental right to assisted suicide and therefore applying rational basis review).

30. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

31. *Glucksberg*, 521 U.S. at 720-21.

32. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

33. *See generally* WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 93 (2d ed. 2003).

34. *Id.*

that *Lawrence* is a shift to “a more flexible analytical structure for evaluating substantive due process claims.”³⁵ According to this view, *Lawrence* is a departure from the rigid “tier” approach to a sliding scale analysis.³⁶

This view, however, does not explain the importance of the Court’s reliance on the “emerging awareness” of liberty. A sliding scale approach would only be concerned with whether a right was rooted, somewhat rooted, partially rooted, or not rooted at all. But there is something about the language of “emergence” that speaks to the possibility that the Court may be moved in some meaningful way by the evolution of society or a change in public attitudes. Sunstein makes a similar point when reading *Lawrence* as a case of simple autonomy. He writes, “It does appear that the Court was responding to, and requiring, an evolution in public opinion — something like a broad consensus that the practice at issue should not be punished.”³⁷

Sunstein’s work seems to tap into the Court’s recognition of a shift in society. He argues that the *Lawrence* decision can be read as a procedural due process variation of the common law idea of desuetude — the idea that laws that are rarely enforced lapse because they lack public support.³⁸ There is a problem with a desuetude reading, however: such an interpretation could lead to a precedent where any law that is rarely enforced becomes invalid. Sunstein acknowledges that this is problematic, especially for laws that forbid domestic violence and marital rape in jurisdictions where they are poorly enforced.³⁹ Additionally, even if the Court articulated a desuetude reading that only struck down criminal laws that were rarely enforced because of the lack of public support, how would courts determine whether society supports a law?

The “American-style” desuetude of which Sunstein writes is similar to the Court’s Eighth Amendment evolving standards of decency jurisprudence. Unlike the common law desuetude reading, the evolving standards of decency analysis uses objective indicia to assist courts in assessing societal support for a law.⁴⁰ I argue that reading

35. Hunter, *supra* note 4, at 1118.

36. Both Hunter and Sunstein discuss a possible shift to a “sliding scale” analysis in substantive due process and equal protection doctrines. *See id.* at 1131; Sunstein, *supra* note 10, at 48.

37. Sunstein, *supra* note 10, at 49.

38. *Id.* at 49-50.

39. *Id.* at 51.

40. Harmelin v. Michigan, 501 U.S. 957, 1000 (1991) (stating that review under the Eighth Amendment “should be informed by objective factors to the maximum possible extent”) (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)) (internal quotation marks omitted).

Lawrence as an Eighth Amendment evolving standards of decency case allows for the inclusion of examinations of a national consensus and the “emerging awareness” of liberty interests. It is the influence of this amendment that I explore in the next section.

II. READING *LAWRENCE* AS AN EIGHTH AMENDMENT CASE

In 1986, Justice Lewis Powell foretold of America’s consensus opinion on same-sex sodomy at the beginning of the twenty-first century. In his concurring opinion in *Bowers*, he wrote, “The Georgia statute . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct — certainly a sentence of long duration — would create a serious Eighth Amendment issue.”⁴¹ Social science data suggests that America’s views in the new millennium are congruent with Justice Powell’s. In 1986, when asked, “Do you think homosexual relations between consenting adults should or should not be legal,” 33% of respondents thought that homosexual relations should be legal, compared with 54% who thought they should not be legalized.⁴² In contrast, by May 2003, the positive response reached 60% (an increase of 27%), while 35% were opposed.⁴³ Before the Court issued the *Lawrence* decision in June 2003, many Americans’ views had shifted and it is safe to say that, like Justice Powell, most Americans would have opposed a prison sentence for consensual, adult, sexual activity.

We can begin to see connections between Powell’s concurrence and the evolution of America’s attitudes toward sodomy if we consider Supreme Court jurisprudence from the years immediately preceding and following the *Lawrence* decision. During this time, the Supreme Court was busy developing its Eighth Amendment evolving standard of decency jurisprudence in two high profile death penalty cases. The

41. *Bowers v. Hardwick*, 498 U.S. 186, 197 (1986).

42. See Hicks & Lee, *supra* note 2, at 66-67. It is unclear when during 1986 this survey was administered and whether the *Bowers* ruling and the media coverage associated with the case led to a decline in tolerance towards homosexuals. The 33% of 1986 respondents who believed that homosexual relations should be legal was a decline from three previous years with reported data (1977, 1982, and 1985). In those years, the percentages of respondents who believed that homosexual activity should be legal were 43%, 45%, and 44%, respectively. *Id.* If one believes that the 1986 decline was an anomaly, then one could argue that Justice Powell’s concurrence actually reflected national consensus. Though a majority of Americans did not support the legalization of consensual homosexual activity, none of these surveys found that a majority of respondents believed it should be illegal. Prior to 1986, the highest percentage of respondents, in any year, who thought that same-sex activity should not be legal, was 47%. *Id.*

43. *Id.* at 67.

Supreme Court decided *Atkins v. Virginia*⁴⁴ in 2002, striking down laws that permit the execution of convicts with mental retardation. In 2005, the Court decided *Roper v. Simmons*,⁴⁵ which held that it is unconstitutional to administer the death penalty to individuals convicted for crimes they committed while under the age of eighteen. Legal scholarship often covers these death penalty cases and the *Lawrence* decision in separate passages alongside each other as partners in chronology alone rather than as part of the same story.⁴⁶ This is understandable in some ways because *Atkins* and *Roper* are Eighth Amendment cases, while *Lawrence* was decided on substantive due process grounds.⁴⁷ How can *Lawrence* and the evolving standards of decency doctrine be understood as part of the same story? These death penalty cases, Justice Powell's Eighth Amendment analysis, and America's shifting opinions toward homosexual activity help to situate sodomy within a specific legal context.

A. *The Eighth Amendment and the Evolving Standards of Decency*

The Eighth Amendment of the United States Constitution prohibits federal and state governments from inflicting "cruel and unusual punishments."⁴⁸ Yet the amendment itself does not specify what acts constitute cruel and unusual treatment.

The Court has ruled that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁹ The Court has provided some guidance on how to assess whether standards are evolving. Objective factors should inform the inquiry to the maximum possible extent.⁵⁰ The Court has observed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's [state] legislatures."⁵¹

While objective indicia are important for the analysis of evolving standards of decency, they do not ultimately determine the outcome

44. *Atkins v. Virginia*, 536 U.S. 304 (2002).

45. *Roper v. Simmons*, 543 U.S. 551 (2005).

46. See, e.g., Adil Ahmad Haque, *Lawrence v. Texas and the Limits of Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 4-10 (2007) (providing a chronology of death penalty cases and the history of the proportionality review in the context of the Eighth Amendment).

47. *Roper*, 543 U.S. 551 (2005); *Lawrence*, 539 U.S. 558 (2003); *Atkins*, 536 U.S. 304 (2002).

48. U.S. CONST. amend. VIII.

49. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

50. See *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991).

51. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

of the controversy. In *Coker v. Georgia*, the Court stated that the Constitution contemplates that the judgment of the Justices “will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁵² When deciding whether the evolving standards of decency prohibited the execution of those with mental retardation, the Court in *Atkins v. Virginia* undertook its analysis by examining the judgments of state legislatures and then considering reasons for agreeing or disagreeing with the states’ judgments.⁵³

B. The Eighth Amendment and Lawrence

The majority opinion in *Lawrence* reads like an Eighth Amendment evolving standards of decency case because of its awareness of U.S. and global consensus when deciding the constitutionality of the government’s regulation of private adult sexual conduct. The Court used the word “emerging” twice to discuss the liberty interest that protects consensual adult sexual activity.⁵⁴ As evidence of an “emerging recognition” of liberty, the Court noted that, while all fifty states outlawed sodomy before 1961, only twenty-four states and the District of Columbia had sodomy laws when *Bowers* was decided.⁵⁵

Lawrence not only argued that the “emerging recognition” of liberty existed when *Bowers* was decided, but that recognition strengthened in its aftermath.⁵⁶ The Court implied that a national consensus, captured in the states’ responses following the Court’s 1986 announcement, showed the error of the *Bowers* holding.⁵⁷ The majority in *Lawrence* wrote that “[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”⁵⁸

The majority in *Lawrence* used a national consensus to support its argument by illustrating that few states have laws that single out same-sex sexual activity for criminal prosecution.⁵⁹ The Court noted that prior to the 1970s, no state singled out homosexual activity and since then “only nine states have done so.”⁶⁰ The Court also

52. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

53. *Atkins v. Virginia*, 536 U.S. 304, 312-13 (2002).

54. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

55. *Bowers v. Hardwick*, 498 U.S. 186, 192-93 (1986).

56. *Lawrence*, 539 U.S. at 572-73.

57. *Id.* at 573.

58. *Id.*

59. *Id.* at 570.

60. *Id.*

wrote of the trend of states to move toward abolishing these same-sex prohibitions.⁶¹

The use of the word “emergence” is reminiscent of language used in the *Atkins* decision to recognize a national consensus in determining the standard of decency with regard to executing those with mental retardation. In *Atkins*, the Court stated that the significant number of states abolishing the death penalty for criminals with mental retardation, along with the consistency of the direction of change toward prohibiting this type of punishment, was important in ruling the punishment unconstitutional.⁶² When put side-by-side, it is clear that the Court in both *Atkins* and *Lawrence* performed an Eighth Amendment evolving standards of decency analysis. Both decisions examined the number of states abolishing a particular criminal act when deciding the constitutionality of a criminal law. The major difference between the two cases is that the *Lawrence* opinion never articulated its legal analysis as an Eighth Amendment inquiry.

C. Exposure to the Evolving Standards of Decency

One should not be surprised that *Lawrence* reads as though it was written in light of the evolving standards of decency doctrine. There is substantial evidence that the Court was exposed to the doctrine during the *Lawrence* case and contemplated it in their decision-making process. We see examples of exposure and deliberation in (1) the Court’s recent case history, (2) the arguments submitted to the Court in briefing *Lawrence*, (3) the Justices’ questions during oral arguments, and (4) the shift in Justice Kennedy’s approach to the Eighth Amendment.

Much of the “evidence” that I present to support my argument is circumstantial. There is no direct link or smoking gun, such as letters from a Justice or an interview with a law clerk, that will demonstrate decisively that the Eighth Amendment was pivotal in deciding *Lawrence*. This is not particularly problematic, however, because the work of judicial decision making is interpretive and not an exact science of precision. Pointing to the circumstances that surround a judge’s decision works to acknowledge the context of the times and is valuable in understanding the interpretation.

Moreover, my argument that *Lawrence* can be read as an Eighth Amendment case does not demand that the Justices were conscious of the importance of the evolving standards of decency. The Justices

61. *Id.*

62. *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002).

may have been unaware that the doctrine influenced their thinking and therefore would be unable to refer to its influence. Simply put, my argument is that *Lawrence* was decided in the shadow of the Eighth Amendment and that changes in the Justices' views toward crime, punishment, and decency were of great significance to the majority opinion.

1. *Previous Term, Atkins v. Virginia*

In the term before *Lawrence* was decided, the Court decided *Atkins v. Virginia*, which used the evolving standards of decency doctrine to rule that the execution of mentally retarded individuals was an Eighth Amendment violation.⁶³ One could argue that the *Atkins* case and the evolving standards of decency doctrine were fresh in the minds of the nine Justices when they decided the *Lawrence* case a year later.

Although it did not use the same constitutional test as *Lawrence*, *Atkins* performed a similar analysis. In *Atkins*, the Court looked to the number of states that had eliminated the death penalty for inmates with mental retardation in order to understand society's direction of change on the issue.⁶⁴ In addition, the Court made note of the uncommonness of the death penalty, even in those states that allowed the execution of mentally retarded individuals.⁶⁵

2. *Briefs Before the Court*

Second, the briefs before the Justices in *Lawrence* argued whether *Atkins* and the Eighth Amendment evolving standards of decency doctrine were important in reaching a decision on the substantive due process claim.⁶⁶ Briefs in favor of ruling the Texas sodomy decision unconstitutional argued for an analysis that considered the evolving standards of decency doctrine;⁶⁷ briefs in favor of upholding the sodomy legislation argued against the use of the decency doctrine.⁶⁸

For example, the petitioners wanted the Court to look to the majority of states that had abolished their sodomy laws.⁶⁹ In their brief, they wrote:

63. *Id.* at 321.

64. *Id.* at 314-16.

65. *Id.* at 316.

66. Brief for the Respondent at 14-16, *Lawrence*, 539 U.S. 558 (No. 02-102); Petition for Writ of Certiorari at 22-24, *Lawrence*, 539 U.S. 558 (No. 02-102).

67. Petition for Writ of Certiorari, *supra* note 66, at 22-24.

68. Brief for the Respondent, *supra* note 66, at 15-16.

69. Brief for the Petitioner at 22-24, *Lawrence*, 539 U.S. 558 (No. 02-102).

The “consistency of the direction of change” among the States . . . is indicative of a strong national consensus reflecting profound judgments about the limits of government’s intrusive powers in a civilized society. The principles and sentiments that have led the States to eliminate these laws are yet another objective indicator of the fundamental interests at stake. . . . Legislative repeals reflect the same deep-seated values.⁷⁰

In this instance, the petitioners used an Eighth Amendment evolving standards of decency argument to shed light on the question of substantive due process.⁷¹ The petitioners attempted to use the evolving standards of decency relating to states’ punishment of sodomy as evidence of the substantive due process heightened scrutiny requirement for fundamental rights that are deeply rooted in society.⁷²

The State of Texas, the respondent in the *Lawrence* case, argued against the petitioners’ attempt to introduce references to a national consensus of states that have eliminated their sodomy laws.⁷³ First, the respondent argued that “only one direction of change [was] possible” because every state, prior to 1961, criminalized sodomy.⁷⁴ Secondly, the respondent confronted the use of the Eighth Amendment and the evolving standards of decency doctrine head on:

In any event, currently evolving standards are an unstable basis for recognition of fundamental rights protected by the Fourteenth Amendment. The Eighth Amendment has long been construed to require consideration of “evolving standards of decency that mark the progress of a maturing society” In contrast, none of this Court’s precedents so much as suggests that recent legislative activity should be accepted as proof of “deeply rooted” fundamental rights, and the Court’s decisions exploring the possible existence of unrecognized liberty interests under the Fourteenth Amendment have never taken into account rapidly “evolving standards.” The approach advocated by the petitioners would require this Court to serve as a micro-managing super-legislature, continually assessing current legislative trends to determine the current extent of protection under the Fourteenth Amendment — an approach which is entirely inconsistent with the Court’s reliance in *Glucksberg* upon history and legal tradition.⁷⁵

70. *Id.* at 24 (citation omitted).

71. *See id.* at 17-21 (discussing the increasing visibility of gay couples, families headed by gay persons, and the concomitant decriminalization of private sexual choices by adults).

72. *See id.* at 22-25 (noting the consistent decline since the 1960s in the number of states that criminalize sodomy).

73. Brief for the Respondent, *supra* note 66, at 14-15.

74. *Id.* at 14.

75. *Id.* at 15-16 (citations omitted).

In contrast, the petitioners argued that history was not a dispositive objective indicator and

the personal liberty that is protected by the Due Process Clause is not perpetually frozen in the mold set by the laws of 1868 or any other bygone age. Nor is the Court's job merely to mirror all changes around it. The Court must apply its "reasoned judgment" to determine the deeper question of what is required to protect Americans' ordered liberty today.⁷⁶

The petitioner and respondent's debate over the appropriateness of an evolving standard of decency analysis was not the only instance when the Court was exposed to the Eighth Amendment argument. In addition to the parties in the case, several international nongovernmental organizations, including Amnesty International and Human Rights Watch, filed an amicus brief.⁷⁷ The brief argued that "in *Atkins v. Virginia*, this Court looked to the opinions of "the world community" to conclude that execution of persons with mental retardation would offend civilized standards of decency."⁷⁸ This amicus brief mentioned *Atkins* and its use of the evolving standards of decency in order to encourage the *Lawrence* Court to also look at the world community's response to sodomy regulation — in order to witness a global human rights trend calling for equal treatment of persons without regard to their sexual orientation.⁷⁹

3. *Lawrence Oral Arguments*

The oral arguments in *Lawrence* provide evidence that the Eighth Amendment and the evolving standards of decency were on Justices' minds during the deliberative process. In a question to the counselor for the petitioner, Chief Justice Rehnquist voiced apprehension at citing a "trend" in a substantive due process analysis of rights that, in his opinion, are supposed to have historical recognition:

On your substantive due process submission, Mr. Smith, certainly, the kind of conduct we're talking about here has been banned for a long time. Now you point to a trend in the other direction, which would be fine if you're talking about the Eighth Amendment, but

76. Reply Brief for the Petitioners at 4, *Lawrence*, 539 U.S. 558 (No. 02-102).

77. Brief of Mary Robinson et al. at 4-5 as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.ai.pdf.

78. *Id.* at 4-5 (footnotes omitted).

79. *Id.* at 18.

I think our case is like *Glucksberg*, say, if you're talking about a right that is going to be sustained, it has to have been recognized for a long time. And that simply isn't so.⁸⁰

Another Justice also expressed hesitation to include an evolving standard in substantive due process law:

Really what's at issue in this case is whether we're going to adhere to . . . what we said in — in *Glucksberg*, mainly that before we find a substantive due process right, a fundamental liberty, we have to assure ourselves that the liberty was objectively deeply rooted in this nation's history and tradition.

That's what we said in *Glucksberg* and we've said it in other cases. Or are we going to depart from that and go to the approach that we've adopted with regard to the Eighth Amendment, which is it evolves and changes in — in social values will justify a new perception of what is called unusual punishment.

Now, why should we — why should we slip into the second mode? I'm — I mean, suppose all the States had laws against flagpole sitting at one time, you know, there was a time when it was a popular thing and probably annoyed a lot of communities, and then almost all of them repealed those laws.

Does that make flagpole sitting a fundamental right?⁸¹

The Justices' previous statements illustrate the uneasiness of some Court members with using an Eighth Amendment analysis in order to inform a substantive due process ruling. The goal of this section, however, is not to show that the Justices accepted the evolving standards of decency approach that the petitioners advanced. These transcripts demonstrate that the Justices were aware of the evolving standards of decency argument, and they deliberated its application to the case. Justices use oral arguments to clarify positions, and sometimes they focus on what they perceive to be weak or strong arguments in order to influence colleagues. If two justices asked questions regarding the evolving standards of decency during the time constraints of a one hour oral argument, then this issue was clearly on the Court's radar.

4. Justice Kennedy's Shift

As the author of the *Lawrence* decision, Justice Anthony Kennedy's shift on the evolving standards of decency, as evidenced in other cases,

80. Transcript of Oral Argument at 4, *Lawrence*, 539 U.S. 558 (No. 02-102) (italics added).

81. *Id.* at 8-9 (italics added).

is a relevant feature to consider in an Eighth Amendment reading of *Lawrence*. Justice Kennedy is an important individual to examine because of his swing vote in *Lawrence*. Changes in the swing voter's decision making can point to possible motivations behind a court's actions. This section explores Kennedy's evolving understanding of the Eighth Amendment.

One may argue correctly that *Lawrence* was not a split decision because six justices voted to strike the Texas sodomy law.⁸² Yet, we must remember that Justice O'Connor did not join the majority opinion and wrote a separate concurring opinion.⁸³ Justice O'Connor did not change her position from her earlier vote in the *Bowers* majority.⁸⁴ In *Lawrence*, she voted that the Texas law should be ruled unconstitutional on equal protection grounds.⁸⁵ This rationale, however, would seemingly apply only to sodomy laws that were directed against homosexual conduct and would leave open the possibility that sodomy laws that do not distinguish between homosexual and heterosexual conduct might be constitutional.⁸⁶

Therefore, one could argue that the majority opinion in *Lawrence* was a split decision because it only had five votes.⁸⁷ Of these five justices, all except Justice Kennedy were considered liberal jurists.⁸⁸ Justice Kennedy, a conservative-leaning moderate, served as a swing vote in the *Lawrence* case.⁸⁹ Kennedy's vote in *Lawrence*, while not

82. *Lawrence*, 539 U.S. at 561.

83. *Id.* at 579-85 (O'Connor, J., concurring).

84. *See id.* at 579.

85. *Id.*

86. *See also id.* at 584-85 (declining to decide whether a sodomy law that applied equally to both heterosexual and homosexual conduct would "violate the substantive component of the Due Process Clause").

87. The *Lawrence* majority consisted of Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer.

88. *See, e.g.,* Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away From a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 25-27 (2007) (noting that, at the time of Kennedy's appointment to the Supreme Court in the late 1980s, commentators considered him a reliably conservative justice); Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, WASH. POST, Jan. 31, 2006, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001356.html?nav=hcmodule> (describing the expected composition of the court after Justice Alito's confirmation).

89. While Justice O'Connor was often seen as the swing vote during the Rehnquist Court (when *Lawrence* was decided) there is considerable evidence of the potential swing vote power of Justice Kennedy. There are a number of commentaries on the swing vote nature of Justice Kennedy. *E.g.,* Parshall, *supra* note 88; Lane, *supra* note 88, at A4; Edward Lazarus, *The Pivotal Role of Justice Anthony Kennedy: Why The Supreme Court's Romantic May Only Become More Influential Over Time*, FINDLAW, Aug. 7, 2003, available at <http://writ.news.findlaw.com/lazarus/20030807.html>; Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42.

a surprise, was also not entirely predictable based on the variance in his previous votes in cases concerning the rights of homosexuals and the privacy rights of individuals with regard to personal autonomy and reproductive decision making. For example, while Kennedy found that a state constitutional amendment prohibiting any branch of state government from taking action to protect homosexuals from discrimination violated the Equal Protection Clause in *Romer v. Evans*,⁹⁰ he also voted against the expansion of rights to homosexuals when he ruled to uphold the ban on gay scoutmasters in *Boy Scouts of America v. Dale*.⁹¹

I argue that Kennedy's views on the Eighth Amendment underwent significant change, and this change had a profound effect on his vote in *Lawrence*. I offer two grounds for this argument. First, as previously mentioned, there are similarities in language between the majority opinion in *Lawrence* and the death penalty cases.⁹² Second, there is evidence of a significant shift in Kennedy's views on the evolving standards of decency when one inspects his changing position on the juvenile death penalty.

The juvenile death penalty serves as an excellent indicator of Kennedy's changing approach to the evolving standards of decency because it serves as a natural experiment of sorts. There are two cases — *Stanford v. Kentucky*,⁹³ and *Roper v. Simmons*⁹⁴ — that consider the constitutionality of juvenile executions. Kennedy cast a decisive vote and joined the opinion in *Stanford* and wrote the majority opinion in *Roper*.⁹⁵ In *Stanford*, the Court ruled that capital punishment for sixteen- and seventeen-year-olds does not constitute cruel and unusual punishment.⁹⁶ In *Roper*, the Court ruled that the death penalty for individuals who committed crimes under the age of eighteen was cruel and unusual.⁹⁷

In *Stanford*, Kennedy joined Justice Scalia's majority opinion that the juvenile death penalty did not violate the evolving standards of decency test because, "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and

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

91. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 642-43 (2000).

92. *See supra* Part II.B.

93. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

94. *Roper v. Simmons*, 543 U.S. 551 (2005).

95. Both *Roper* and *Stanford* were five to four decisions. *See Roper*, 543 U.S. at 554; *Stanford*, 492 U.S. at 364.

96. *Stanford*, 492 U.S. at 380.

97. *Roper*, 543 U.S. at 578-79.

12 decline to impose it on 17-year-old offenders.”⁹⁸ Kennedy later wrote the majority opinion in *Roper* that overturned *Stanford*.⁹⁹ In departing from *Stanford*, Kennedy counted states that abolished capital punishment when determining whether a national consensus prohibited juvenile executions.¹⁰⁰ The number of states that abolished the juvenile death penalty increased slightly — by only three — in the sixteen years between *Stanford* and *Roper*.¹⁰¹ The overturned decision may be more a result of a shift in the views of one Justice than significant changes in the national consensus. While *Roper* was decided after *Lawrence*, I argue that *Lawrence* is a result of a shift in Kennedy’s thinking toward the evolving standards of decency and the use of foreign authority. The signals of his shift first appeared in *Atkins*, continued through *Lawrence*, and crystallized most prominently in *Roper*.

Kennedy’s views on the evolving standards of decency shifted not only with respect to the national consensus but also with regard to the appropriateness of other objective indicators. Kennedy has ruled that the frequency with which a punishment is imposed,¹⁰² the use of that practice and attitudes toward it in foreign countries, and the laws and legal authority of foreign nations¹⁰³ are relevant when determining public attitude toward a specific sanction. Since the *Atkins* decision, Kennedy has authored every majority opinion involving the Eighth Amendment’s evolving standards of decency test, and he has both emphasized and solidified a number of indicia that help courts objectively evaluate society’s standards.¹⁰⁴

98. *Stanford*, 492 U.S. at 370.

99. *Roper*, 543 U.S. at 554, 579.

100. *Id.* at 564.

101. At the time *Stanford* was decided, twenty-five states either prohibited the death penalty entirely or did not impose it upon seventeen-year-olds. *Stanford*, 492 U.S. at 362. An additional three states prohibited the death penalty for sixteen-year-olds, but not seventeen-year-olds. *Id.* When the Court decided *Roper*, thirty states prohibited the death penalty for juveniles, including twelve that do not allow the death penalty at all and eighteen that do not impose the death penalty on juveniles. *Roper*, 543 U.S. at 564.

102. The Court in *Atkins* argues that in states that allow the execution of people with mental retardation, the practice is uncommon and therefore unusual. The Court cites this infrequency as evidence of a national consensus. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). In *Atkins* and *Roper*, the Court noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five states had executed mentally retarded offenders between 1989 and 2002. *See id.* Only three states executed juvenile offenders between 1995 and 2005. *Roper*, 543 U.S. at 564-65.

103. *Roper*, 543 U.S. at 575-78.

104. *See, e.g.*, *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2649-65 (2008) (advocating the proportionality of the crime to the punishment and respect for human dignity as part of the evolving standards test); *Roper*, 543 U.S. at 560-61 (listing factors used in the evolving standards of decency test including “history, tradition, and precedent”).

III. EIGHTH AMENDMENT ANALYSIS OF STATE SODOMY LAWS

If one can read the *Lawrence* decision as an Eighth Amendment case, then it follows that an Eighth Amendment analysis of laws criminalizing sodomy would also have led to a ruling of their unconstitutionality.¹⁰⁵ At the time *Lawrence* was decided, a national consensus existed that rejected the criminalization of sodomy. Prior to 1961, every state in the country banned the practice of sodomy.¹⁰⁶ However, after examining the most objective indicator of our society's maturing standards — state legislative action — we see that between 1962 and 2003, twenty-eight states and the District of Columbia legislatively repealed their criminal sodomy laws.¹⁰⁷ An additional six states had amended or repealed their laws to exclude heterosexual sodomy from criminal punishment.¹⁰⁸ Therefore, via the legislative process, fifty-six percent of states had found it unacceptable to punish any private adult consensual acts, and sixty-eight percent of states refused to criminalize heterosexual acts.¹⁰⁹ These percentages are similar to,

105. Other articles have discussed the use of the Eighth Amendment as a basis for challenging sodomy statutes. See Kendall Thomas, *Beyond The Privacy Principle*, 92 COLUM. L. REV. 1431, 1435, 1461-92 (1992) (arguing that “homosexual sodomy statutes work to legitimize homophobic violence . . . at the hands of private and public actors”); Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723 (2004); Claude Millman, Note, *Sodomy Statutes and the Eighth Amendment*, 21 COLUM. J.L. & SOC. PROBS. 267 (1988) (arguing that state courts have misunderstood the limitations the Eighth Amendment imposes on states, curtailing their power to criminalize certain conduct); J. Drew Page, Comment, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test*, 56 U. CHI. L. REV. 367 (1989) (focusing on the proportionality test for determining whether punishment for violation of homosexual sodomy statutes constitutes cruel and unusual punishment). Falco's comment suggests the use of the evolving standards of decency doctrine as a basis for striking sodomy laws. Falco, *supra*, at 723-24. Her analysis, however, is flawed. When counting the number of states that no longer have sodomy laws, she does not distinguish those states that have legislatively repealed their sodomy laws from those states that have struck them down judicially. *Id.* at 725, 750.

106. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

107. In researching the states that repealed their sodomy laws, Sodomy Laws, Sodomy Laws in the United States, <http://www.glapn.org/sodomylaws/usa/usa.htm> (last visited Feb. 25, 2009), was a valuable resource and starting point. This page, as well as the figures cited in this section, describe the state of sodomy laws at the time *Lawrence* was decided. For a list of states and the years their legislatures repealed their sodomy laws (including those laws that were legislatively repealed after *Lawrence* was decided), see Table 1, *infra* p. 657.

108. For a list of states and the years their legislatures repealed their state sodomy laws for heterosexuals, see Table 2, *infra* p. 659.

109. These percentages do not include the District of Columbia. Also, it is important to note that these percentages are for repeals through the legislative process. Thirteen state courts have stricken their states' sodomy laws as well. See Table 3, *infra* p. 660. Two of these states, New York and Pennsylvania, later repealed their laws legislatively. See Sexual Assault Reform Act, ch. 1, § 6, 2000 N.Y. Laws 1, 3; Act of Mar. 31, 1995, No.

if not higher than, the national consensus percentages cited in *Atkins* and *Roper*.¹¹⁰

The *Atkins* and *Roper* decisions state that the number of states that have decriminalized a practice is not as significant as the consistency of the direction of the change in society's evolving standards of decency.¹¹¹ In the case of sodomy, societal change has been in one direction — toward the elimination of these criminal statutes.¹¹² Furthermore, these laws could be viewed as cruel and unusual because the few states that still criminalized sodomy when *Lawrence* was decided — without legislative or judicial restraint — rarely arrested or prosecuted couples engaging in these acts.¹¹³

A major factor that may lead to a ruling of unconstitutionality under an Eighth Amendment analysis is the fact that New York, Arizona, and Rhode Island were the only states whose sodomy law repeals were less than five years old when *Lawrence* was decided.¹¹⁴ There were a number of states — a total of seven — whose sodomy laws have been repealed for at least thirty years (Colorado, Connecticut, Delaware, Hawaii, Illinois, Ohio, and Oregon) when *Lawrence* was decided.¹¹⁵ Twenty-one of the twenty-eight states (seventy-five percent) that repealed their sodomy laws prior to the *Lawrence* decision did so at least twenty-five years prior.¹¹⁶ These states' extensive experience with the repeal of these laws proved that these changes had long term viability.

Additionally, as mentioned in *Lawrence*, many in the world community (particularly those nations that share our Anglo-American

1995-10 (SS1), § 7, 1995 Pa. Laws 985, 987. For a list of states and the years their courts struck their sodomy laws, see Table 3, *infra* p. 660.

110. In considering evidence of a national consensus with regard to the execution of juvenile offenders, the Court in *Roper* noted that 47%, or eighteen of the thirty-eight states that allowed the death penalty at the time, had changed their laws to prohibit such executions. *Roper v. Simmons*, 543 U.S. 551, 564 (2005). The percentage is higher (60%) if one includes the twelve states that prohibited the death penalty altogether. *Id.* Whichever percentage is used, the percentages for states that had legislatively repealed their sodomy statutes at the time *Lawrence* was decided — 56% for same-sex sodomy and 68% for heterosexual sodomy — are comparable to (and arguably higher than) the numbers in *Roper*. *But see* *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). In *Kennedy*, the Court struck the death penalty for individuals convicted of raping a child. The Court ruled that a national consensus existed that prohibited this punishment for the crime. This decision was based, in part, on the court's find that 88%, or forty-four states, have not made child rape a capital offense. *Id.* at 2652. The percentages in *Lawrence* are lower than those in *Kennedy*.

111. *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002); *Roper*, 543 U.S. at 565-66.

112. *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003).

113. *Id.*

114. *See* Table 1, *infra* p. 657.

115. *Id.*

116. *Id.*

heritage and some countries of Western Europe) had invalidated sodomy laws because of their irrational animus and prejudice toward homosexuals.¹¹⁷ The nation-state signatories of the European Charter on Human Rights,¹¹⁸ Canada,¹¹⁹ and South Africa¹²⁰ are examples of countries that share a common heritage with the United States, yet did not criminalize sodomy. These countries' practices would provide added weight to a finding that sodomy laws are cruel and unusual.

Some might argue that while an Eighth Amendment analysis in *Lawrence* might have ruled the severity of the Texas sodomy statute unconstitutional, it would still allow less severe, nonincarceration forms of punishment (i.e., smaller fines and citations). Individuals arguing from this perspective emphasize the proportionality doctrine of the Eighth Amendment, which condemns "punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged."¹²¹ Upon a close analysis, however, it seems that a *Lawrence* Eighth Amendment analysis would not allow less severe forms of punishment for sodomy.

In order to clarify my position, I distinguish two categories of Eighth Amendment proportionality: procedural and substantive proportionality. The former assumes the presence of a crime and that acceptable punishments exist. This approach works to determine whether the crime fits the punishment by comparing how a legislature punishes other crimes or how other legislatures punish similar crimes. On the other hand, substantive proportionality does not necessarily assume criminal activity. A substantive proportionality analysis aims to discover the very nature (i.e., substance) of what constitutes criminal activity and whether the "crime" at issue deserves any form of punishment. There are two cases that illustrate the different manifestations of proportionality analysis: *Weems v. United States*¹²² and *Robinson v. California*.¹²³

117. *Lawrence*, 539 U.S. at 576-77.

118. The European Court on Human Rights, interpreting the charter, ruled in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 18 (1981), that sodomy laws violated rights to privacy.

119. The Canadian House of Commons decriminalized private same-sex acts between consenting adults on May 15, 1969. R. Douglas Elliott, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. R. 591, 597 n.23 (2004). Canada has not only decriminalized sodomy, but also now allows same-sex marriage. See Clifford Krauss, *Gay Marriage is Extended Nationwide in Canada*, N.Y. TIMES, June 29, 2005, at A4.

120. The South African Constitutional Court struck South Africa's sodomy laws in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.).

121. *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

122. *Weems v. United States*, 217 U.S. 349 (1910).

123. *Robinson v. California*, 370 U.S. 660 (1962).

The *Weems* case is a classic example of procedural Eighth Amendment proportionality. In *Weems*, the Court struck down a sentence of fifteen years of incarceration at hard labor with ankle chains, constant surveillance, and loss of civil rights for the crime of falsifying public documents.¹²⁴ The Court “condemn[ed]” the sentence as excessive after comparing it to the sentences given for other criminal acts.¹²⁵

The Court moved in a slightly different direction in *Robinson*, when it set aside a conviction under a law that made it a crime for an individual to be addicted to narcotics.¹²⁶ The Court ruled that the statute was unconstitutional because it punished the status of addiction.¹²⁷ The Court’s proportionality review was less concerned with the excessiveness of the sentence than it was focused on whether addiction was a “thing” or activity that should be punished.¹²⁸ The *Robinson* Court adjudicated the definition of criminality and grappled with the fundamental question of what things or acts should be punished.¹²⁹

I argue that the analysis in *Lawrence* falls closer to a substantive proportionality analysis and uses indications of society’s evolved standards of decency to help the Court determine whether sodomy is a criminal activity. The twenty-eight states that had repealed their sodomy laws when *Lawrence* was decided made a statement about the definition of crime and punishment. By repealing the laws and not replacing them with some lesser punishment, the legislatures were signaling that sodomy no longer constitutes a crime. In *Lawrence*, the Court does not grapple with the fact that there are different sanctions that legislatures can use to punish the act of sodomy. Instead, when making its determination, the Court focused on the fact that sodomy laws, regardless of the punishment, were repealed.¹³⁰ At issue in sodomy cases is not the specific punishment but the actual labeling of the adult consensual sex act as criminal. The fact that the act is

124. *Weems*, 217 U.S. at 357-58, 364.

125. *Id.* at 380-81.

126. *Robinson*, 370 U.S. at 667.

127. *Id.* There are multiple ways to read the Court’s decision in *Robinson*. In addition to the narrow ruling that legislatures cannot punish an individual’s status (in absence of some act), *Robinson* can also be read to stand for the broader proposition that it is cruel and unusual to punish an individual for conduct that she is unwilling or unable to control. Though slightly outside the scope of this Article, one can also read *Lawrence* such that it fits well within this broader interpretation of *Robinson*. While some argue that *Lawrence* is a case where actions, not status, are punished, others argue that the act of engaging in sexual activity is intimately linked to one’s sexuality and that the distinction between status and action is meaningless. See Millman, *supra* note 105, at 269.

128. *Robinson*, 370 U.S. at 667.

129. *Id.* at 666-67.

130. *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003).

considered a crime can be interpreted as cruel and unusual by contemporary standards. Following this reasoning, an Eighth Amendment evolving standards of decency analysis would not allow any form of punishment for sodomy — not even a small fine. The evolving standards of decency analysis has been used to determine what constitutes cruelty when society punishes crimes. However, the Eighth Amendment not only addresses how we punish crimes but also what constitutes a crime worthy of punishment.

CONCLUSION

One could argue that *Lawrence* stands on weak ground because the majority did not utilize a traditional substantive due process analysis (by failing to articulate a well-described right and then applying the appropriate test). Additionally, just as in the overturned *Bowers* case, only five Justices voted for the majority opinion in *Lawrence*.¹³¹ Depending on which Justice is replaced, just one conservative court appointment could find the *Lawrence* opinion overturned or at least severely modified. The goal of this Article, however, is not to perfect *Lawrence* or rewrite the decision, but to view it through a different lens. Despite its arguably weak rationale, *Lawrence* probably will not be overturned because the American public's conception of crime has evolved in such a way that it does not include private adult same-sex consensual activities. Instead, I hope that reading *Lawrence* as an Eighth Amendment case may serve as the beginning of a conversation on how an evolving standards of decency approach may advance civil rights for gays and lesbians as well as other marginalized social groups whose identities, behaviors, and activities have historically been stigmatized and/or criminalized.

The idea that advocates should move beyond the use of privacy for protecting homosexuals from government criminalization of their sexual lives is not new.¹³² One alternative could be legal arguments that analyze society's evolved standards of decency. This could be a particularly useful approach because unlike privacy rights arguments that focus largely on the relationship between the individual and the government, the evolving standards argument incorporates contemporary society into the human rights dialogue. Instead of solely arguing that government cannot interfere in individuals' lives or discriminate against gay and lesbian people, an added argument can appeal to

131. *Id.* at 561.

132. *See* Thomas, *supra* note 105, at 1435 (arguing for recognition of a "right to 'corporal integrity'").

decency and argue that society no longer finds it acceptable to punish people in a particular fashion.

Can this approach be extended? In the context of criminal laws, the evolving standards of decency doctrine has been used to prohibit loss of nationality,¹³³ but it has been used most often in cases involving corporal punishment.¹³⁴ By reading *Lawrence* as an evolving standards case, we can advocate the use of this approach in other areas of criminal law, such as fornication.

Another inquiry worthy of exploration is whether this approach could be extended beyond criminal laws to strike down civil laws that discriminate against gays and lesbians. Would it be possible to use an evolving standards of decency analysis on claims against sexual orientation employment discrimination? Same-sex marriage? The military's ban on gays? Though not without its problems, it might be beneficial to explore a legal strategy that moves beyond privacy arguments when arguing for the expansion of civil rights to employment or marriage and instead calls upon the decency of society and humanity.

While this approach has exciting imagined possibilities, it could be extremely problematic for the protection of minority rights if courts begin placing majority rule as a fundamental element for discerning individual rights. The structure of our legal system is to protect the rights of the minority from the "tyranny of the majority" of which Mill writes.¹³⁵ Perhaps a conversation can occur that can analyze the hybrid nature of the evolving standards of decency analysis, where the Eighth Amendment acknowledges the complex and multiple manifestations of the majority and finds instances of the majority's decency that protect the minority from the majority's other harmful stances. This is an area that needs more thought, discussion, and research.

133. *See Trop v. Dulles*, 356 U.S. 86, 86 (1958) (holding a portion of the Nationality Act of 1940 unconstitutional because it is cruel and unusual to revoke the citizenship of a military deserter).

134. *See, e.g., Weems v. United States*, 217 U.S. 349, 357-58, 364 (1910) (finding a sentence of "hard and painful labor" for fifteen years while wearing an ankle chain to be cruel and unusual punishment).

135. JOHN STUART MILL, ON LIBERTY (1859) (arguing for the freedom of the individual against the claims of the state).

TABLE 1¹³⁶
 SODOMY LAWS LEGISLATIVELY REPEALED FOR ALL
 (REGARDLESS OF SEXUAL ORIENTATION)

1.	Alaska	1980
2.	Arkansas	2005 ¹³⁷
3.	Arizona	2001 ¹³⁸
4.	California	1975 ¹³⁹
5.	Colorado	1971 ¹⁴⁰
6.	Connecticut	1969 ¹⁴¹
7.	Delaware	1973
8.	District of Columbia	1993 ¹⁴²
9.	Hawaii	1972 ¹⁴³
10.	Illinois	1961 ¹⁴⁴
11.	Indiana	1976 ¹⁴⁵
12.	Iowa	1976 ¹⁴⁶
13.	Maine	1975 ¹⁴⁷
14.	Missouri	2006 ¹⁴⁸
15.	Nebraska	1978
16.	Nevada	1993
16.	New Hampshire	1975 ¹⁴⁹
17.	New Jersey	1978 ¹⁵⁰
18.	New Mexico	1975
19.	New York	2000 ¹⁵¹
20.	North Dakota	1975

136. The year each state's law was repealed was obtained from the individual state's page at Sodomy Laws, *supra* note 107, except where otherwise noted.

137. Arkansas Criminal Code Revision Commission's Bill, Act 1994, § 496, 2005 Ark. Acts 6932, 7446.

138. Tax Equity Act of 2001, ch. 382, § 1, 2001 Ariz. Sess. Laws 2146, 2146.

139. Act of May 12, 1975, ch. 71, § 7, 1975 Cal. Stat. 131, 133.

140. Act of June 2, 1971, ch. 121, § 40-3-411, 1971 Col. Sess. Laws 425.

141. Penal Code, Pub. Act No. 828, §§ 71-81, 1969 Conn. Acts 1554, 1581-83.

142. Anti-Sexual Abuse Act of 1994, D.C. Act. 10-385, § 501(b), 42 D.C. Reg. 53 (Jan. 6, 1995).

143. Hawaii Penal Code, Act 9, §§ 733-35, 1972 Haw. Sess. Laws 32, 90-91.

144. Criminal Code of 1961, § 11-2, 1961 Ill. Laws 1983, 2006.

145. Act of Feb. 25, 1976, Pub. L. No. 148, sec 1, § 35-42-4-2, 1976 Ind. Acts 718, 733-34.

146. Iowa Criminal Code, ch. 1245, 1976 Iowa Acts 549.

147. Maine Criminal Code, ch. 499, § 253, 1975 Me. Laws 1273, 1298-99.

148. Act effective June 5, 2006, H.B. 1698, § 550.090, 2006 Mo. Laws 330, 344.

149. Act of June 7, 1975, ch. 302, 1975 N.H. Laws 273.

150. New Jersey Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482.

151. Sexual Assault Reform Act, ch. 1, § 6, 2000 N.Y. Laws 1, 3. The law had previously been ruled unconstitutional by the state's highest court. *People v. Onofre*, 415 N.E.2d 936, 937 (N.Y. 1980).

21.	Ohio	1972 ¹⁵²
22.	Oregon	1971 ¹⁵³
23.	Pennsylvania	1995 ¹⁵⁴
24.	Rhode Island	1998 ¹⁵⁵
25.	South Dakota	1977
26.	Vermont	1977
27.	Washington	1976
28.	West Virginia	1976 ¹⁵⁶
29.	Wisconsin	1983 ¹⁵⁷
30.	Wyoming	1977 ¹⁵⁸

152. Act of Dec. 22, 1972, No. 338, § 1, 1971 Ohio Laws 1866, 1906-11.

153. Oregon Criminal Code of 1971, ch. 743, 1971 Or. Laws 1873.

154. Act of Mar. 31, 1995, No. 1995-10 (SS1), § 7, 1995 Pa. Laws 985, 987. The statute had previously been ruled unconstitutional by the Pennsylvania Supreme Court. *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980).

155. Act of June 5, 1998, ch. 24, 1998 R.I. Pub. Laws 70.

156. Act of Mar. 11, 1976, ch. 43, 1976 W. Va. Acts 241.

157. Act of May 5, 1983, ch. 17, 1983 Wis. Sess. Laws 37.

158. Sexual Assault Laws Revision, ch 70, 1977 Wyo. Sess. Laws 228.

TABLE 2¹⁵⁹
SODOMY LAWS LEGISLATIVELY REPEALED FOR HETEROSEXUALS
ONLY

1.	Arkansas	1975 ¹⁶⁰
2.	Kansas	1969
3.	Kentucky	1974 ¹⁶¹
4.	Montana	1973
5.	Texas	1973
6.	Tennessee	1989

159. The information for this table was obtained from each state's individual page at Sodomylaws, *supra* note 107, except where noted.

160. The law was repealed entirely in 1975 but reinstated in 1977 in a format that targeted only same-sex acts. Sodomylaws, Arkansas, <http://www.glapn.org/sodomylaws/usa/arkansas/arkansas.htm> (last visited Feb. 25, 2009).

161. Sodomylaws, History of Sodomylaws, <http://www.glapn.org/sodomylaws/history/history.htm> (last visited Feb. 25, 2009).

TABLE 3¹⁶²
 SODOMY LAWS JUDICIALLY RULED INVALID

1.	Arkansas	2002 ¹⁶³
2.	Georgia	1998 ¹⁶⁴
3.	Kentucky	1992 ¹⁶⁵
4.	Louisiana	2005 ¹⁶⁶
5.	Maryland	1998 ¹⁶⁷
6.	Massachusetts	2002 ¹⁶⁸
7.	Michigan	1990 ¹⁶⁹
8.	Minnesota	2001 ¹⁷⁰
9.	Montana	1997 ¹⁷¹
10.	New York	1980 ¹⁷²
11.	North Carolina	2005 ¹⁷³

162. This table includes only sodomy laws invalidated by a state court.

163. *Jegley v. Picado*, 80 S.W.3d 332, 353-54 (Ark. 2002). The statute in question “condemn[ed] conduct between same-sex actors while permitting the exact same conduct among opposite-sex actors.” *Id.* at 353.

164. *Powell v. State*, 510 S.E.2d 18, 23-24 (Ga. 1998) (finding the statute unconstitutional as applied to “a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act”).

165. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

166. *La. Elect. of Gays & Lesbians, Inc. v. Connick*, 902 So.2d 1090, 1094 (La. Ct. App. 2005) (finding that portions of the state’s statute criminalizing sodomy were unconstitutional after *Lawrence v. Texas*, 539 U.S. 558 (2003)).

167. *Williams v. Maryland*, No. 98036031/CC-1059, 1998 Extra LEXIS 260, at *1 (Md. Cir. Ct. Balt. City Oct. 15, 1998) (enjoining the state from enforcing the state’s sodomy laws against all “consensual, non-commercial, private sexual activity,” including between persons of the same sex); *see also Schochet v. State*, 580 A.2d 176, 184 (Md. 1990) (construing the state’s laws prohibiting oral sex as inapplicable to heterosexual conduct so as to avoid “serious constitutional issues”).

168. *Gay & Lesbian Advocates & Def. v. Atty. Gen.*, 763 N.E.2d 38, 40 (Mass. 2002) (“clarify[ing]” that the state’s “crime[s] against nature” law does not apply to “acts conducted in private between consenting adults”).

169. A Wayne County trial court invalidated the law, and the state declined to appeal. *Sodomy Laws, Michigan*, <http://www.glapn.org/sodomylaws/usa/michigan/michigan.htm> (last visited Feb. 25, 2009) (citing *Mich. Org. for Human Rights v. Kelley*, No. 88-815820CZ (Mich. Cir. Ct. Wayne County July 9, 1990)). The state supreme court subsequently found the statute unconstitutional against a vagueness challenge. *People v. Lino*, 527 N.W.2d 434 (Mich. 1994).

170. *In re Proposed Petition to Recall Hatch*, 628 N.W.2d 125, 126 (Minn. 2001) (recognizing that Minnesota’s sodomy law had been ruled unconstitutional).

171. *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997).

172. *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980). The statute was subsequently repealed by the New York State Assembly. *Sexual Assault Reform Act*, ch. 1, § 6, 2000 N.Y. Laws 1, 3.

173. *State v. Whiteley*, 616 S.E.2d 576, 581 (N.C. Ct. App. 2005) (finding the state’s “crime against nature” statute unconstitutional as applied to consenting adults after *Lawrence v. Texas*, 539 U.S. 558 (2003)).

12. Pennsylvania 1980¹⁷⁴
13. Tennessee 1996¹⁷⁵

174. *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980). The statute was subsequently repealed by the Pennsylvania General Assembly. Act of Mar. 31, 1995, No. 1995-10 (SS1), § 7, 1995 Pa. Laws 985, 987.

175. *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996).