

IN THANKS

By Michael Ventura

July 11, 2003

In all the hubbub about *Lawrence v. Texas* -- editorials, op-eds, talking heads, Net reports -- there were two words I didn't come across. So, just for the record: As a straight man I want to say to my gay brothers and sisters, *thank you*.

Like the blacks (and whites) of the civil rights movement, in fighting for your liberty you fought for mine. Thanks is hardly enough, but it's all I've got. It's only been 34 years since Stonewall (for those who don't know what that is, do a Net search; it ain't Stonewall Jackson). In that brief time you have achieved what many struggle for and few manage: a substantial strengthening of our Constitution.

To read Supreme Court Justice Anthony Kennedy's majority (6-3) opinion is to believe again that America can *be* America ... sometimes, on some days, in some crucial ways.

Justice Kennedy wrote: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, *and certain intimate conduct* [my italics]." That last phrase is enormous. You will not find that thought in the Bible (written 2,000 to 5,000 years ago) or the Quran (written 1,500 years ago). You will not find it in the Magna Carta (written 900 years ago) or in the thousands of governmental documents or declarations since. It was implied in Thomas Jefferson's 1776 founding thought that "Life, Liberty, and the pursuit of Happiness" (Jefferson's capital letters) are "unalienable Rights" (not *inalienable* -- un-alienable, not subject to being alienated) ... but only implied. It took another 224 years for American homosexuals to agitate us into accepting that "certain intimate conduct" is a right that the expression of collective will that we call "government" is bound not only to protect but to value.

With Justice Kennedy's formulation, consensual adult sex has -- for the first time, to my knowledge -- been legally recognized as a force not limited to its function of procreation. The Justice's decision says this clearly: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." Packed into those words is the concept that sex, before it is anything else, is a form of *communication*. Commune-ication. Such communion/communication may be procreative or not; *Lawrence v. Texas*, dealing with homosexual sex, says that intimate physical communication -- "absent injury to a person or abuse of an institution the law protects" -- is important enough to be protected by law and *from* law. "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. ... The issue is whether the majority may use the power of the state to enforce [their] views on the whole society through operation of the criminal law."

Justice Kennedy cites *Planned Parenthood of Southeastern Pa. v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Justice Antonin Scalia, in his rabid (and often incoherent) dissent from *Lawrence v. Texas*, scoffed at those words as Casey's "famed sweet-mystery-of-life passage." But the

sweet mysteries are exactly what *Lawrence v. Texas* demands the law recognize as the right of consensual adults, to explore sex free from the "compulsion of the State."

Those who say, as Scalia does, that the Constitution cites no specific "right" to be homosexual, or to explore sex in any way one chooses, or to choose an abortion, pointedly ignore both the Ninth and 10th amendments. They bear re-reading:

Amendment Nine: "The enumeration in the Constitution of certain rights *shall not be construed to deny or disparage* others retained *by the people*." Amendment 10: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people* [my italics]."

These amendments forcefully present two concepts.

Firstly: The Founders were pointedly *not* including *all* our rights in the Constitution. They conceived of the Constitution as a mechanism for telling the *government* what it could and could not do. The government -- not us. They stated clearly and specifically that *the people* possessed further rights that government must not deny or disparage. The Founders had an enormous respect for language (after all, they created a nation through words); they said what they meant; when they left something vague, they had a specific and impelling reason. If they did not define those "certain" rights, it was because they wanted the parameters to remain wide ... they wanted *us* to define those rights, and (read their letters!) they trusted that we would. They felt that, if we were their worthy inheritors, we wouldn't brook any infringement of liberty without a struggle. And they respected us too much to decide in advance what liberties we would struggle for.

Secondly: The Ninth and 10th amendments postulate three equal interests and powers -- the federal government, the states, *and the people*. The 10th Amendment says clearly that any *powers* not specifically "delegated" to the federal government or to the states *are reserved* for the people. Us. Which means that the "strict constructionists" -- those who claim that the only liberties available are those stated in the Constitution -- aren't being true to that document; rather, they're trying to nullify it, ignore it. For the Constitution says specifically that the people have powers that are not specifically stated within its boundaries. The Founders wanted the Constitution's boundaries to be flexible, permeable -- or they would never have included and ratified the Ninth and 10th amendments.

The Founders assumed we had a future they couldn't conceive or imagine. They left room for that future -- our present -- in their painstakingly chosen words, deliberating long and contentiously over each sentence, attempting to leave spaces for you and me to fill in. The Ninth and 10th amendments are the bravest, most audacious, and most generous statements of any law anywhere.

Justice Anthony Kennedy's decision includes this quote (the source of which I could not pin down): "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

And that says it all. *That's* America. The rest is a shopping mall.

Justice Kennedy: "The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime."

The state cannot control their destiny.

Thank you again. That's the ball game.

It's worth noting the most hilarious reaction to *Lawrence v. Texas*. Kenneth Connor, an official of an Orwellian vagueness called the Family Research Council (read: Be Straight or Die): "If the hallmark is privacy and consent, as long as you have those

two, the court is saying you have no basis for legislation to the contrary. Notwithstanding the public health issues involved when you have sexual relations [wha? when *you* have sexual relations? I don't wanna think about it ...], for example, between a mother and her adult son."

This Connor person ... where his mind goes to ... *right away ... with no suggestion from anybody* ... is sexual relations "between a mother and her adult son."

Please, dear God, protect me from ever having to see that man and his mother in the same room.

Will all this lead to legal gay marriage? I understand intellectually why you'd want the right, but emotionally ... having struck out at marriage twice (the second time is recent and still smarts, to say the least), why you'd want the right to fuck up the same way straights do is your business, and you're welcome to it. Since I was 14 years old, too many married women have made passes at me for me to believe this is a right worth a struggle. But, as we used to say on the street when I was a street kid, "Go fy'self." You've strengthened the spine of the Constitution, and I owe you for that. For the rest ... welcome to the wonders of marriage. Good luck.

Copyright © Michael Ventura. All rights reserved.