

United States v. Roberts: A Broader Reading of *Lawrence v. Texas* Puts Gay Relationships in the “Zone of Privacy”

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INTRODUCTION

Steven Roberts and Daniel Mangini had been in a committed relationship for 19 years, and had raised Roberts' niece as a foster daughter together, when on New Year's Eve of 2003, they were arrested for conspiring to possess methamphetamine and related crimes.¹ On pretrial release, despite a court-imposed condition that they not leave the Eastern District of Pennsylvania without permission,² Roberts and Mangini fled to Florida, where they were rearrested.³ In May of 2004, each pled guilty to one felony count of conspiracy to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846.⁴ On September 9, 2004, Mangini was sentenced to 18 months of imprisonment followed by 5 years of supervised release; the next day, Roberts was sentenced to 30 months of imprisonment, also followed by 5 years of supervised release.⁵ Mangini was released from federal prison on April 29, 2005, and Roberts on June 29, 2006.⁶ In each man's case, a condition of supervised release was that he

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¹ See *United States v. Roberts* (Roberts I), Nos. 04-00037-1 and 04-00037-2, 2007 WL 210402, at *1 (E.D. Pa. Jan 24, 2007) (mem.), *vacated*, *United States v. Roberts* (Roberts II), 229 Fed. Appx. 172, 175 (3d Cir. 2007).

² See *United States v. Roberts* (Roberts III), Nos. 04-00037-1 and 04-00037-2, 2007 WL 2221416, at *1 (E.D. Pa. July 31, 2007) (mem.).

³ See *Roberts I*, 2007 WL 210402, at *1.

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

“shall not associate with any person convicted of a felony, unless granted permission to do so by [his] probation officer.”⁷

After Roberts’ release, the two men, who, though having been separated for close to two years, still considered one another to be life partners,⁸ asked their joint probation officer at the U.S. Probation Office in Reading, Pennsylvania for permission to associate with one another.⁹ Permission was denied.¹⁰ By letter-motion to the United States District Court for the Eastern District of Pennsylvania, the men jointly requested that the court clarify or modify the conditions of their supervised release to permit them to associate.¹¹ The court denied the letter-motion.¹² The two then moved for reconsideration, on grounds that the anti-association condition involved a greater deprivation of liberty than was necessary, that it violated their rights to due process since it interfered with a family relationship, and that it was being applied discriminatorily, in violation of their rights to equal protection under the Fifth Amendment, since they were homosexual.¹³ The court denied this motion as well.¹⁴

Roberts and Mangini appealed before the United States Court of Appeals for the Third Circuit, arguing that the district court’s denial was colored by two errors of law.¹⁵ First, they argued, the district court erred in ruling that it lacked jurisdiction under 18 U.S.C. § 3583(e)(2) to consider their request for modification of the anti-association condition on the ground that, as

⁷ *Id.*

⁸ *See* Roberts II, 229 Fed. Appx. 172, 175 (3d Cir. 2007).

⁹ *See id.* at 174.

¹⁰ The denial was due, in part, to Mangini’s alleged statement that he was no longer interested in a romantic relationship with Roberts. *See id.*

¹¹ *See* Roberts I, 2007 WL 210402, at *1.

¹² *See id.*

¹³ *See id.* at *2.

¹⁴ *See id.* at *2 n.6, *3. The court stated that the pain of separation, the men’s close family ties, and Mangini’s struggle with AIDS did not outweigh the risk that the two might commit more crimes if permitted to associate. *See id.* at *2 n.6.

¹⁵ *See* Roberts II, 229 Fed. Appx. 172, 175-76 (3d Cir. 2007).

enforced, it violated their right to equal protection.¹⁶ Second, they argued that the district court erred in considering their request for modification as a facial challenge to the validity of the anti-association condition, rather than as a non-facial challenge to the way the condition was being enforced.¹⁷ The Third Circuit held that the district court did have jurisdiction,¹⁸ and also found that the request for clarification was not a facial challenge to the anti-association condition, but merely a request that the court to correct the Probation Office's failure to grant them permission to see one another.¹⁹ The Third Circuit vacated the district court's order, and remanded for consideration of the men's challenge to the Probation Office's application of the anti-association condition.²⁰ Upon remand, the United States District Court for the Eastern District of Pennsylvania held, alternately, that (1) the anti-association condition of each man's supervised release, as applied, was inconsistent with the limitations on conditions of supervised release in 18 U.S.C. § 3583(d) and 18 U.S.C. § 3583(e)(2);²¹ and (2) the anti-association condition, as applied, violated each man's rights of intimate association and equal protection, which are protected by

¹⁶ *See id.* at 175-76.

¹⁷ *See id.* at 176.

¹⁸ The Third Circuit held that the district court had jurisdiction to clarify how the probation office may apply the anti-association condition, because the request was premised on "new or unforeseen circumstances," namely, the Probation Office's refusal to grant Roberts and Mangini's request to see one another despite their longstanding intimate relationship. *See id.* at 177 (citing *United States v. Smith*, 445 F.3d 713, 717 (3d Cir. 2006)).

¹⁹ *See id.* at 178-79.

²⁰ *See id.* at 179.

²¹ Pursuant to 18 U.S.C. § 3583(d), discretionary conditions of supervised release must be reasonably related to the factors set forth in 18 U.S.C. § 3553(a)(1) and (a)(2)(B)-(D), must involve no greater deprivation of liberty than reasonably necessary for the purposes described in § 18 U.S.C. § 3553(a)(2)(B)-(D), and must be consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a). 18 U.S.C. § 3583(d)(1)-(3) (2006). 18 U.S.C. § 3553(a)(1) provides that a court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1) (2003). 18 U.S.C. § 3553(a)(2)(B)-(D) provide that a court must consider the need for the sentence imposed: "(B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(B)-(D) (2003). 28 U.S.C. § 994(a) concerns, *inter alia*, provisions for modification or revocation of the term or conditions of supervised release. *See* 28 U.S.C. § 994(a) (2006).

the due process clause of the Fifth Amendment, and that following *Lawrence v. Texas*, 539 U.S. 558 (2003), same-sex couples were not excluded from this protection.²²

I. BACKGROUND

Lawrence v. Texas recognized a right to private, non-remunerative, non-coercive sexual conduct between consenting adults²³ that some have argued was a new fundamental privacy right.²⁴ In a series of Supreme Court decisions in the 20th century, the Court recognized a series of privacy rights related to sex and family relationships as “fundamental,” or “implicit in the concept of ordered liberty,”²⁵ such as rights to contraception, marriage, abortion, procreation, and to control the upbringing and education of one’s children.²⁶ Where a fundamental right exists, government is forbidden, under the due process clauses of the Fifth and Fourteenth Amendments, from infringing that right unless the infringement is narrowly tailored to serve a compelling state interest.²⁷ If a fundamental right is implicated, a court must analyze whether any legislation affecting the right creates an impermissible burden on the exercise of the right.²⁸ Certain fundamental constitutional guarantees work together to create a “zone of privacy,”²⁹ so if the right recognized in *Lawrence* were a fundamental privacy right, and gay relationships (not

²² United States v. Roberts, Nos. 04-00037-1 and 04-00037-2, 2007 WL 2221416 (E.D. Pa. July 31, 2007)

²³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁴ See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 2003 Sup. Ct. Rev. 27, 45 (2003); Donald H.J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DePaul L. Rev. 908, 951 (2005).

²⁵ *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

²⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (right to contraception for married people); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (right to contraception for unmarried people); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to marriage); *Roe*, 410 U.S. at 153 (right to abortion); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (right to abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942) (right to procreation); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (right to control education of one’s children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (right to direct upbringing and education of one’s children).

²⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

²⁸ See *Lofton v. Sec’y of the Dep’t of Children & Family Servs. (Lofton II)*, 358 F.3d 804, 817 (11th Cir. 2005); *cert. denied*, *Lofton v. Sec’y, Fla. Dep’t of Children and Families*, 543 U.S. 1081 (2005).

²⁹ See *Griswold*, 381 U.S. at 483-85.

just sexual relationships) were encompassed within the recognized “zone of privacy”, heightened scrutiny would be applied in analyzing whether laws burdening such relationships were acceptable, and such laws would have to be narrowly tailored to serve a compelling governmental interest.

Several courts have construed the right recognized in *Lawrence* to be less than a fundamental right. The Eleventh Circuit explained that the effect of *Lawrence* was to establish a greater respect for private sexual conduct, but not to recognize a “fundamental” right.³⁰ The United States District Court for the District of Connecticut similarly stated that, in order to exercise the judicial restraint appropriate in substantive due process cases, it must forgo “creating” a new substantive due process right deriving from *Lawrence*.³¹ The United States District Court for the Eastern District of Pennsylvania, in *Roberts I*, stated that *Lawrence* upheld only the right of consenting adults to engage in private sexual conduct at home.³² Several state supreme courts have also interpreted *Lawrence* narrowly.³³ Many courts have pointed to the Supreme Court’s failure to use the *Glucksberg* methodology in *Lawrence* to analyze whether a fundamental liberty interest was implicated.³⁴ The *Glucksberg* approach requires that fundamental rights be, objectively, so “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty,” that “neither liberty nor justice would exist if they were sacrificed.”³⁵ *Glucksberg* also requires a “careful description” of the asserted interest.^{36 37}

³⁰ Lofton II, 358 F.3d at 815-16.

³¹ See *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 189 (D. Conn. 2005).

³² See *Roberts I*, Nos. 04-00037-1 and 04-00037-2, 2007 WL 210402, at *3 n.8 (E.D. Pa. Jan 24, 2007).

³³ See, e.g., *State v. Holm*, 137 P.3d 726, 742-43 (Utah 2006); *State v. Thomas*, 891 So. 2d 1233, 1238 (La. 2005); *Sylvester v. Fogley*, 465 F.3d 851, 857 (Ark. 2006); *Commonwealth v. Mayfield*, 832 A.2d 418, 424 (Pa. 2003).

³⁴ See, e.g., *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005); Lofton II, 358 F.3d 804, 817 (11th Cir. 2004); *Hernandez v. Robles*, 855 N.E.2d 1, 17 (N.Y. 2006); *State v. Limon*, 122 P.3d 22, 29-30 (Kan. 2005); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); *People v. Downin*, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005); *State v. Jenkins*, 2004 Ohio App. LEXIS 6663, at *11 (Ohio Ct. App. 2004).

³⁵ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

³⁶ *Id.*

In *Lofton v. Secretary of the Department of Children & Family Services*, a dissenting judge on the Eleventh Circuit argued that the *Lawrence* Court did apply the *Glucksberg* approach and found a fundamental liberty interest.³⁸ Judge Barkett argued that the requirement that a fundamental right be “deeply rooted in this Nation’s history” is proved by a history of state non-interference in the private sexual lives of homosexual adults, despite laws criminalizing homosexual conduct,³⁹ and that no history of affirmative governmental protection of an asserted liberty interest is required for a right to be characterized as “fundamental.”⁴⁰ Judge Barkett found a “careful description” in the *Lawrence* Court’s statement that the case before it did not involve minors, coercion, lack of consent, public conduct, prostitution, or formal recognition of gay relationships, but only sexual practices between consenting adult homosexuals.⁴¹ Chief Judge Kaye of the New York Court of Appeals, dissenting, similarly declared that the right to engage in private consensual sexual conduct was fundamental, and argued that the fact that certain groups had historically been denied the right did not render it otherwise.⁴² The Ninth Circuit has also characterized *Lawrence* as recognizing a fundamental right to engage in consensual sexual activity in the home without government intrusion.⁴³

Other courts and jurists have similarly found that *Lawrence* protected a fundamental right. A dissenter on the Supreme Court of Hawai’i found that *Lawrence* discerned a broad fundamental right to private sexual relations.⁴⁴ The United States District Court for the Central District of California placed *Lawrence* among the Supreme Court’s string of historic cases

³⁷ Arguably the greatest difference between the methodology of *Lawrence* and the methodology used in *Glucksberg* and *Bowers*, which *Lawrence* overturned, is the breadth with which the proposed liberty interest was described.

³⁸ *Lofton II*, 358 F.3d at 1307 (Barkett, J., dissenting from denial of rehearing en banc).

³⁹ See *Lofton II*, 358 F.3d at 1308 (Barkett, J., dissenting).

⁴⁰ *Id.* at 1309 (Barkett, J., dissenting).

⁴¹ *Id.* at 1308 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)) (Barkett, J., dissenting).

⁴² See *Hernandez v. Robles*, 855 N.E.2d 1, 19-20 (N.Y. 2006) (Kaye, C.J., dissenting).

⁴³ *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007).

⁴⁴ See *State v. Romano*, 155 P.3d 1102, 1122 (Haw. 2007) (Levinson, J., dissenting).

recognizing fundamental privacy rights.⁴⁵ The United States Navy-Marine Corps Court of Criminal Appeals characterized *Lawrence* as holding that to criminalize homosexual sodomy violated “the right to liberty” under the Due Process Clauses of the Fifth and Fourteenth Amendments.⁴⁶ Such decisions indicate that a significant number of courts and jurists believe that *Lawrence* implied substantive due process protection for certain rights beyond the scope of the narrowly delineated right to private, non-remunerative sexual conduct between consenting adults.

II. COURT’S DECISION

In *Roberts*, the United States District Court for the Eastern District of Pennsylvania interpreted *Lawrence* similarly to those courts and jurists that have found *Lawrence* to protect a fundamental right to sexual privacy. The court found that its denial of Roberts and Mangini’s original request for modification or clarification of the anti-association condition of their supervised release constituted a clear error of law, vacated its previous order, and granted Roberts and Mangini’s joint motion for reconsideration or clarification.⁴⁷ The court ordered the anti-association condition modified to permit the two to associate in person, by telephone, by mail and by email, though they would be required to seek permission from the Probation Office in order to cohabit.⁴⁸ The court did not disturb any other conditions of their supervised release.⁴⁹

⁴⁵ See *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003).

⁴⁶ *United States v. Humphreys*, 2005 WL 3591140, at *2 (N-M. Ct. Crim. App. 2005) (unpublished opinion).

⁴⁷ See *Roberts III*, 2007 WL 2221416, at *6, *12.

⁴⁸ See *Roberts III*, 2007 WL 2221416, at *12.

⁴⁹ See *id.*

The court used two lines of reasoning in coming to its conclusion, resulting in two alternate holdings.⁵⁰ In arriving at its first holding, the court found that it had jurisdiction to clarify or modify a condition of supervised release pursuant to 18 U.S.C. § 3583(e)(2),⁵¹ which governs when a court may “modify, reduce, or enlarge” such conditions.⁵² The court concluded that no supervisory need for the anti-association condition existed,⁵³ and that, as applied, it violated the statutory requirements that a discretionary condition of supervised release be reasonably related to the factors set forth in 18 U.S.C. § 3553(a)(1) and (a)(2)(B)-(D), and that it involve no greater a deprivation of liberty than reasonably necessary for the purposes described in 18 U.S.C. § 3553(a)(2)(B)-(D).⁵⁴ The court reasoned that this was because (1) under the court’s judgment, there was little significant risk that Roberts and Mangini would engage in criminal or harmful conduct if permitted to associate; (2) Mangini’s physical and emotional well-being would improve if he were allowed to rebuild his relationship with his life partner, Roberts; and (3) Roberts’ rehabilitation would be furthered by modification of the condition because associating with Mangini would discourage him from returning to criminal conduct.⁵⁵ For these reasons, the anti-association condition contravened the statutory requirement that a condition not be more restrictive than reasonably necessary, and be reasonably related to the need “to provide the defendant . . . with needed medical care, or other correctional treatment in the most effective manner.”⁵⁶

In arriving at its second holding, the court reasoned that the Due Process Clause of the Fifth Amendment protected the right to intimate association, protecting highly personal

⁵⁰ *See id.* at *7.

⁵¹ *See id.*

⁵² 18 U.S.C. § 3583(e)(2) (2006).

⁵³ *See Roberts III*, 2007 WL 2221416, at *8.

⁵⁴ *See id.* at *9. These statutes are discussed *supra* at note 21.

⁵⁵ *See Roberts III*, 2007 WL 2221416, at *5, *9.

⁵⁶ 18 U.S.C. § 3553(a)(2)(D) (2003).

relationships of deep attachment and commitment.⁵⁷ The court stated that *Lawrence* made it clear that same-sex couples are not excluded from this protection,⁵⁸ and that a condition of supervised release that interfered with a constitutionally protected relationship would only be upheld if it is narrowly tailored and directly related to deterring crime and protecting the public.⁵⁹ The court found that application of the anti-association condition, where there was no supervisory need for it, was not directly related to deterring crime or protecting the public, and was not narrowly tailored to achieve those ends, and so it violated Roberts and Mangini’s right to intimate association.⁶⁰ The court found that, because the Probation Office had a policy of lifting anti-association conditions for similarly situated individuals in other kinds of “family relationships”—siblings, parents and children, and spouses—the Probation Office had violated the men’s rights to equal protection under the Fifth Amendment,⁶¹ and this differential burden on the men’s fundamental right to intimate association was subject to heightened scrutiny.⁶² The court further found that because there was no evidence that association between committed same-sex partners posed any greater supervisory concern than association between similarly-situated family members, treating Roberts and Mangini unequally failed any level of constitutional scrutiny.⁶³

III. ANALYSIS

Roberts is a positive example of a court reading *Lawrence* in a way it should reasonably be read: as recognizing that gay relationships are protected by fundamental privacy rights. The

⁵⁷ Roberts III, 2007 WL 2221416, at *10 (citing Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)).

⁵⁸ *Id.* (citing Lawrence v. Texas, 539 U.S. at 567 (2003)).

⁵⁹ *Id.* at *11.

⁶⁰ *Id.* (citing Lawrence v. Texas, 539 U.S. 558 (2003); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Moore v. East Cleveland, 431 U.S. 494 (1977); and Eisenstadt v. Baird, 405 U.S. 438 (1972)).

⁶¹ See *id.*

⁶² *Id.* (citing Police Dep’t of City of Chicago v. Mosley, 408 U.S. 92, 92 (1972)).

⁶³ *Id.*

court in *Roberts* used language associated with substantive due process analysis when it stated that Roberts and Mangini had a constitutionally protected liberty interest in their intimate relationship with each other,⁶⁴ calling it a fundamental right to intimate association subject to heightened scrutiny.⁶⁵ When the court stated that a condition of supervised release which interfered with a constitutionally protected relationship would only be upheld if it were narrowly tailored and directly related to deterring crime and protecting the public,⁶⁶ it employed the language of *Glucksberg*, describing how a court must analyze legislation burdening a fundamental privacy right.⁶⁷

A weakness in the *Roberts* is the court's lack of clarity in differentiating between its use of equal protection and substantive due process reasoning. When read carefully, the decision is not internally inconsistent, but the court could have been more explicit at times about what sort of analysis it was employing. Particularly in its second alternate holding, the court seemed to merge equal protection and substantive due process reasoning, noting both that substantive due process required that a condition of supervised release restricting fundamental rights be narrowly tailored and directly related to certain well-defined penological goals, and that equal protection required that Roberts and Mangini be treated the same as "similarly-situated individuals in other kinds of family relationships."⁶⁸ However, the validity of the conclusions the court did reach are unaffected. As Professor Laurence H. Tribe has noted, in substantive due process cases, "due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."⁶⁹ The Supreme Court's reasoning in *Loving*

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ *See id.* (citing *United States v. Loy*, 237 F.3d 251, 256 (3d Cir.2001)).

⁶⁷ *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

⁶⁸ *See Roberts III*, 2007 WL 2221416, at *11.

⁶⁹ Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1917 (2004).

v. Virginia, in which the Court found that restricting the freedom to marry based on racial classifications violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment,⁷⁰ appears to be an example of the “legal double helix.” The court in *Roberts*, like the *Loving* court, concluded that both equal protection and due process rights were implicated.

Roberts is part of an important trend running counter to the trend of some courts to read *Lawrence* narrowly as holding only that private, non-remunerative, non-coercive sexual acts between consenting adults may not be criminally punished. To come to their conclusions, such courts treat large swaths of *Lawrence* as dicta, focusing only on portions that support a narrow reading. Many courts have argued that the *Lawrence* court’s comment that the Texas anti-sodomy statute at issue “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”⁷¹ was evidence that the Court applied only rational basis scrutiny in *Lawrence*, and thus that *Lawrence* did not recognize any fundamental privacy right.⁷² This mode of interpretation perpetuates and enables the tendency of many courts, contrary to the spirit of *Lawrence*, to deprive gay relationships of full recognition under the law. *Lawrence*, along with *Roberts* and its fellows, supports the conclusion that, in order for due process to be afforded to gay individuals, courts must afford gay relationships the protection of a constitutional “zone of privacy”. In order to achieve the goals of *Lawrence*, lower courts must follow the example of the *Roberts* court in applying *Lawrence* to cases involving discriminatory treatment of gay relationships.

⁷⁰ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967)

⁷¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added). A law must serve only a “legitimate state interest” to survive rational basis scrutiny, as opposed to the “compelling state interest” required to survive strict scrutiny. See also *Glucksberg*, 521 U.S. at 721.

⁷² See, e.g., *Sylvester v. Fogley*, 465 F.3d 851, 857 (Ark. 2006); *Loomis v. United States*, 68 Fed. Cl. 503, 518 (Fed. Cl. 2005). Justice Scalia, in his dissent in *Lawrence*, was the first to advance this argument. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).