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## Surviving *Lawrence v. Texas*

Marc Spindelman

*The Ohio State University's Moritz College of Law*

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# SURVIVING *LAWRENCE v. TEXAS*

Marc Spindelman\*

One can't go on writing forever about how hard it is to breathe.

— Václav Havel

For Anonymous

## INTRODUCTION

The lesbian and gay communities have reacted to the Supreme Court's decision in *Lawrence v. Texas*<sup>1</sup> — striking down state sodomy laws on Due Process grounds<sup>2</sup> — with unbridled enthusiasm. *Lawrence* has variously been praised as an unmitigated victory for lesbian and gay rights,<sup>3</sup> a turning point in our community's history,<sup>4</sup> and the

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\* © 2004 by Marc Spindelman. All rights reserved. Assistant Professor of Law at The Ohio State University's Moritz College of Law. — Ed. For conversation or comments that were especially helpful as this essay took shape, many thanks to: Doug Berman, Jim Brudney, Martha Chamallas, Sarah Cole, Ruth Colker, Charlotte Croson, Sharon Davies, Joshua Dressler, Chris Fairman, L. Camille Hébert, Lisae Jordan, Yale Kamisar, Chris Kendall, Catharine MacKinnon, Caleb Mason, Mary Ellen O'Connell, Andy Siegel, Peter Swire, Adam Thorburn, Robin West, and the participants at the *Ohio State Law Journal* Symposium on *Lawrence v. Texas*, held on November 7, 2003. Research librarians Kathy Hall, Sara Sampson, and Amy Burchfield, as always, provided assistance beyond the ordinary call of duty, as did Ohio State University law students Chris Geidner and Peter Debelak. Some of the ideas here have been previously published in *Sodomy Politics* in *Lawrence v. Texas*, JURIST, June 12, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew115.php>.

1. 539 U.S. 558 (2003).

2. The Court's *Lawrence* opinion variously refers to "privacy," see, for example, *Lawrence*, 539 U.S. at 564, "liberty," see, for example, *id.* at 562, and "autonomy," see, for example, *id.* at 574, hence raises questions about the precise conceptual and doctrinal foundation of the substantive due process right to sexual intimacy it announces. See, e.g., *id.* at 578 (announcing the right). Recognizing there are differences between the terms, the analysis I offer here is consistent with all of them.

3. See, e.g., John Rechy, *Finally, Dignity and Respect — But at Such a Cost*, L.A. TIMES, June 29, 2003, at M5 ("Many will rightly celebrate the decision as an unqualified victory — and those who brought it about are heroic.").

4. See, e.g., Chris Bull, *Justice Served*, THE ADVOCATE, Aug. 19, 2003, at 35, 36 (describing *Lawrence* as "revolutionary"); Editorial, *A Gay Pride Day to Remember*, N.Y. DAILY NEWS, July 29, 2003, at 42 ("The ruling was stunning for another reason: For the first time in history, the rights of gays to live their lives with dignity, free from state persecution and prosecution, was vigorously defended by the nation's highest court — a conservative one, at that."). As E.J. Graff put it:

*Lawrence* is our *Brown v. Board of Education*, declaring us full citizens, entitled to all the rights and freedoms held by our siblings, colleagues, and friends. *Lawrence* is our first national victory, and for many, it's a tearjerker. From recoil to respect — from criminality to citizenship — in just 17 years is so thrilling that it makes this the best gay pride month in history.

moment when we have gone from second-class political outcasts to constitutional persons with first-class rights.<sup>5</sup>

Obviously, something remarkable happened in *Lawrence*. In an opinion written by Justice Anthony Kennedy, the Court declared that John Geddes Lawrence and Tyrone Garner, who had been convicted under Texas's sodomy law making consensual same-sex sexual activity illegal, are no longer sexual criminals. According to *Lawrence*, homosexuals like Lawrence and Garner are "entitled to respect for their private lives."<sup>6</sup> Therefore, *Lawrence* teaches, the State cannot "demean their existence or control their destiny"<sup>7</sup> by making private homosexual sexual conduct a crime. The Constitution affords lesbians and gay men "the full right to engage in their conduct without intervention of the government,"<sup>8</sup> and to engage in that conduct without sacrificing their "dignity as free persons."<sup>9</sup> After *Lawrence*, sodomy bans, and not the lesbians and gay men that they had previously made outlaws, are "derelicts on the waters of the law."<sup>10</sup>

The recognition by the Supreme Court of the United States that lesbians and gay men are human beings who have "dignity as free persons" that is deserving of "full"<sup>11</sup> constitutional respect is itself a monumental breakthrough. *Lawrence* is the first Supreme Court

E.J. Graff, *The High Court Finally Gets It Right*, BOSTON GLOBE, June 29, 2003, at D11. While many others have similarly likened *Lawrence* to *Brown* (Katherine Franke collects a few noteworthy sources in Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399 n.2 (2004)), there has been remarkably little serious public consideration of what the analogy might suggest about the kind of "breakthrough" *Lawrence* actually represents. Michael Klarman, whose work on *Brown* has been central to recent scholarly reconsiderations of its significance, see Marc Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 457 n.315 (2001) [hereinafter Spindelman, *Reorienting Hardwick*] (collecting sources, including work by Klarman), productively traces the theme in his *Brown and Lawrence* (unpublished manuscript, on file with author). A pre-*Lawrence* variation can be found in Spindelman, *Reorienting Hardwick*, *supra*, especially at 446-488.

5. See, e.g., Ed Madden, *Ruling Makes Gays, At Last, Equal Citizens*, THE STATE.COM, June 28, 2003, at <http://www.thestate.com/mld/thestate/news/columnists/6190528.htm>. Madden notes:

[*Lawrence*] comes only a week before the Fourth of July, when Americans celebrate their freedoms. It was sometimes difficult to celebrate as a full and equal citizen when the state considered you a felon. . . . [When the Court issued its decision in *Lawrence*], that time bomb — the sodomy law — stopped ticking. And for many of us, our lives as full and equal citizens . . . truly began.

*Id.*

6. 539 U.S. at 578.

7. *Id.*

8. *Id.*

9. *Id.* at 567.

10. Alabama Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 357 (1951) (Frankfurter, J., concurring in the result).

11. *Lawrence*, 539 U.S. at 578.

decision in American history that openly acknowledges this. Not a generation ago, the Court scoffed at the suggestion. Speaking for the Court in *Bowers v. Hardwick*,<sup>12</sup> Justice Byron White dismissed the notion, accepted by *Lawrence*, that same-sex sexual intimacies deserve substantive constitutional protection. For Justice White, the very idea was preposterous; “at best, facetious,”<sup>13</sup> he famously said. Even Charles Fried, Ronald Reagan’s former Solicitor General, thought that Justice White’s *Hardwick* opinion was “stunningly harsh and dismissive.”<sup>14</sup> The concurring opinion of then-Chief Justice Warren Burger, which endorsed William Blackstone’s description of sodomy as “an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named[,]’” was even more so.<sup>15</sup>

Not surprisingly, a large segment of the gay community reacted with intense aversion to *Hardwick*, concluding (with reason) that it went beyond a simple affirmation of the constitutionality of sodomy laws to the constitutional legitimation of anti-gay animus<sup>16</sup> — an

12. 478 U.S. 186 (1986). I have previously written about the interpretive possibilities of *Bowers v. Hardwick*, proposing that it can be read as having decided not to decide the merits of the substantive due process claim presented in it. Spindelman, Reorienting *Hardwick*, *supra* note 4. In discussing *Hardwick* in these pages, I indulge the “standard” reading of it (that it rejected Michael Hardwick’s substantive due process claim). In doing so, I do not abandon my previously stated views. In important ways, *Lawrence* proves them, though how, exactly, awaits explanation on another day.

13. *Hardwick*, 478 U.S. at 194.

14. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 82 (1991); accord Lance Liebman, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 13, 19 & n.22 (1993) (hinting that *Hardwick* was Justice White’s “worst decision”). Fried’s criticism of *Hardwick* is cited with approval in *Lawrence*. 539 U.S. at 576 (“In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C[harles] Fried . . .”).

15. *Hardwick*, 478 U.S. at 197 (Burger, J., concurring) (citations omitted).

16. See, e.g., Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 649 (1987) (“*Hardwick* rests upon nothing more substantial than the collective distaste of the five justices in the majority for the conduct under scrutiny.”); *id.* at 655 (“At one point, the majority resorted to a flippancy verging on contempt; it described Michael Hardwick’s invocation of constitutional protection as ‘at best, facetious.’”); *id.* (“Justice White and his four colleagues, it seems, simply do not like homosexuality, and do not want to elevate or honor it by conferring on it the imprimatur of the Constitution of the United States.”). A larger helping of sources that treat *Hardwick* as revealing “the pervasiveness of irrational, homophobic, or heterosexist bias within our legal regime,” can be found in Spindelman, Reorienting *Hardwick*, *supra* note 4, at 368-69 n.17 (collecting sources). To the extent these views are correct, one could say that *Hardwick* itself violated the principle of *Romer v. Evans*, 517 U.S. 620 (1996), which was, on *Lawrence*’s understanding of it at least, that anti-gay animus was not constitutionally acceptable under the Equal Protection Clause as a basis for governmental action. *Lawrence*, 539 U.S. at 574 (“We concluded that the provision [previously described as ‘class-based legislation directed at homosexuals’] was ‘born of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate governmental purpose.” (emphasis added)). Why should the Court’s own decisions not be measured by these principled terms?

impression confirmed by judicial decisions that followed in its wake.<sup>17</sup> William Rubenstein captured the sentiments of countless lesbian women and gay men when he said: “I don’t think about sex when I read *Hardwick* and I don’t think about what sex acts are at issue [in the case]. *I think how they hate me.*”<sup>18</sup>

Seen in contrast, *Lawrence* has been welcomed as everything *Hardwick* was not. If *Hardwick* was the case that toe-kicked lesbians and gay men in the face,<sup>19</sup> *Lawrence* is the case that brings them inside to tend and mend their wounds. Along the way to delivering lesbians and gay men dignity and substantive due process rights, the *Lawrence* Court even manages to apologize gently for the things it said and did in *Hardwick*. *Lawrence* embraces lesbians and gay men, going so far as to admit that *Hardwick* was wrong on the day it was decided, as it is wrong today.<sup>20</sup> Hence, “*Bowers v. Hardwick* should be and now is overruled.”<sup>21</sup> To anyone whose life has been overshadowed, complicated, demeaned, occupied, even ruined by sodomy laws, rare is the flower that has smelled as sweet. Those who wept upon hearing the Supreme Court announce its decision in *Lawrence* (quite a few, according to press reports<sup>22</sup>) must have understood that the Constitution’s freedoms delivered are a singularly magnificent thing.

It is thus easy to appreciate the reasons the Supreme Court’s decision in *Lawrence* has generated a palpable euphoria within the lesbian and gay communities and among a number of their heterosexual allies. But much more difficult to understand — and unnoticed until now — is what the Court’s *Lawrence* opinion looks like to people concerned with inequality between the sexes. From the

17. See, e.g., *Able v. U.S.*, 155 F.3d 628 (2d Cir. 1998); *Shahar v. Bowers*, 114 F.3d 1097, 1105 (11th Cir. 1997); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 268 (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Limon v. State*, 41 P.3d 303 (Kan. App. 2002); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

18. Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 435 (1997) [hereinafter Halley, *Romer v. Hardwick*] (emphasis added in original) (quoting letter from William B. Rubenstein, Consulting Associate Professor, Stanford Law School (Nov. 11, 1996)).

19. For a note on my use of terminology, see Spindelman, *Reorienting Hardwick*, *supra* note 4, at 368 n.15.

20. *Lawrence*, 539 U.S. at 578. *But see* Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 397, 402 (2004) (“For some, this may have read as an apology. . . . [B]ut it was not the apology that sexual minorities deserve.”).

21. *Lawrence*, 539 U.S. at 578.

22. See, e.g., Nina Totenberg, *All Things Considered*, NATIONAL PUBLIC RADIO, June 26, 2003 (“Sitting in the courtroom was Harvard law Professor Laurence Tribe . . . Today, there were tears in his eyes.”); *Sodomy Ruling: Did the Supreme Court Legislate Morality?*, THE WEEK, July 18, 2003, at 6 [hereinafter *Sodomy Ruling*] (“The ruling set off silent weeping among the gay lawyers in the Supreme Court chambers . . . .”); cf. Graff, *supra* note 4 (saying of *Lawrence*, “it’s a tearjerker”).

standpoint of these concerns, *Lawrence* raises some unmistakable danger signs. Before explaining what they are, I begin with an account of how they arise.

### I. LAWRENCE'S "LIKE-STRAIGHT" LOGIC

During the course of the Supreme Court litigation in *Lawrence v. Texas*, lesbian and gay rights advocates broadly united to urge the Court to accept a simple postulate when ruling in the case.<sup>23</sup> In the course of raising both Due Process and Equal Protection challenges to Texas's sodomy law, lesbian and gay rights advocates maintained: Gays are just like heterosexuals. The normative power of this "like-straight" idea came from the presumptive goodness of heterosexuality, a sexual status that is socially sacrosanct and legally protected.<sup>24</sup> Proponents of this like-straight argument thus said: Lesbians and gay men, being just like heterosexuals, are entitled to all the rights heterosexuals receive, and for the same reasons.

To show how good gay could be, the lesbian and gay rights briefs in *Lawrence* went out of their way to praise heterosexuality over and over again. One romantic depiction of heterosexual, hence homosexual, "domestic bliss," for instance, appeared in the brief filed by eighteen of our country's leading constitutional law scholars.<sup>25</sup> This Law Professors' Brief told the Court that: "By interfering with the interest gay people share with all other adults [read: heterosexuals] in making choices about their private consensual sexual activity, [Texas's

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23. Bernard Harcourt provocatively describes the entire roster of those supporting Lawrence and Garner as a "surprising coalition[.]" full of "telling alliances" and "strange bedfellows." Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian-Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 510 (2004). "To be sure," he writes, "the cornucopia of *amicus* briefs reflects strategy and lobbying on the part of John Lawrence's lawyers." *Id.* at 511. "But," he adds, "more important, it reflects the kind of political coalition-formation that produced the result in *Lawrence*." *Id.* Needless to say, I do not mean to suggest that all those who were part of this coalition should be considered (or are) either advocates or advocacy organizations for lesbian and gay rights, at least beyond the borderland of this case.

24. See, e.g., Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 662 (1980) ("If marriage and the traditional family are the archetypal associations protected by the emergent freedom of intimate association, it is easy to see how the principle of equality presses for extension of that freedom to other relationships.") [hereinafter Karst, *Freedom of Intimate Association*]; see also *id.* at 682 ("By now it will be obvious that the freedom of intimate association extends to homosexual associations as it does to heterosexual ones."); *id.* at 685 ("The chief importance of the freedom of intimate association as an organizing principle in the area of homosexual relationships is that it lets us see how closely homosexual associations resemble marriage and other heterosexual associations.").

25. See Brief of *Amici Curiae* Constitutional Law Professors Bruce A. Ackerman et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief of Constitutional Law Professors].

sodomy law] also interferes with the relationships gay couples develop.”<sup>26</sup> For a long time, the Brief went on to remind the Justices, the Supreme Court had recognized how important heterosexual sexual intimacy is.<sup>27</sup> And “[t]his is true,” the Brief intoned, “for gay people no less than for heterosexuals.”<sup>28</sup>

Just in case anyone — or anyone who happened to sit on the High Bench<sup>29</sup> — was unaware of the breezy similarities between homosexuals and heterosexuals, the Law Professors’ Brief detailed some of the ways that “gay people,” just like heterosexuals, “form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound.”<sup>30</sup> Gay people, for example, “shop, cook, and eat together.”<sup>31</sup> (Who knew?) They “celebrate the holidays together, and share one another’s families.”<sup>32</sup> They even “make financial and medical decisions for one another”<sup>33</sup> and “rely on each other for companionship and support.”<sup>34</sup> In sum, “[m]any gay couples share ‘the duties and the satisfactions of a common home.’”<sup>35</sup> In these and other ways, the Law Professors’ Brief insisted, as did other lesbian and gay rights briefs in the case,<sup>36</sup> that

26. *Id.* at 12.

27. *Id.*

28. *Id.*

29. See *High Court Post-Mortem*, LEGAL TIMES, Aug. 18, 2003, at 24, 27 (“We were obviously appealing to Justice [Sandra Day] O’Connor and Justice Kennedy” (alteration in original) (quoting Paul Smith)). But see Christopher Lisotta, *It’s About More Than Sodomy*, L.A. WEEKLY, July 4, 2003, at 16, 17 (“You couldn’t have a Justice Powell anymore who had complete ignorance of the issue” (quoting Edward Lazarus)).

30. Brief of Constitutional Law Professors, *supra* note 25, at 12.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 13 (citation omitted).

36. See, e.g., Amicus Brief of Human Rights Campaign et al., at 17-18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter HRC Brief] (“Gay men and lesbians also tend to live in committed relationships. . . . Many gay men and lesbians raise children in their homes. . . . Gay men and lesbians serve their country in both civilian and military capacities.”); Brief *Amici Curiae* of the American Civil Liberties Union and the ACLU of Texas in Support of Petitioner at 8, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter ACLU Brief] (“Lesbians and gay men, no less than other individuals, center their lives around close-knit emotional bonds. As adults, they form intimate relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families.” (footnote omitted)). According to the National Lesbian and Gay Law Association’s brief in *Lawrence*:

[A]n individual’s homosexuality or bisexuality does not correlate with that individual’s ability or capacity to perform a range of societal activities. . . . The simple fact is that gay men, lesbians, and bisexuals demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted, while others are not; some are strong, while others are not; some are mentally or physically disabled, but most are not.

homosexuals are *just like* heterosexuals and, consequently, should be afforded all the same rights and privileges that heterosexuals receive.

As a litigation tactic, this like-straight line of argument achieved its desired effect.<sup>37</sup> The Court accepts it — and so basically that it animates the Court's opinion at every major analytic turn along the way to its conclusion that the Constitution protects a right to sexual intimacy,<sup>38</sup> including its discussion of history, of contemporary legal norms, and of precedent.

With its examination of the history of sodomy laws, the Court clears away a significant doctrinal obstacle for declaring that homosexuality is just like heterosexuality: the claim, traceable at least to *Bowers v. Hardwick*, that the two should be treated as fundamentally different because historically they were. Emphatically rejecting *Hardwick's* assertion that legal proscriptions against homosexual sodomy have “ancient roots,” *Lawrence* declares that, “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”<sup>39</sup> *Lawrence* speculates that the reason for this may be, as many historians following Michel Foucault have argued,<sup>40</sup> that “the homosexual as a distinct category of

Brief of the National Lesbian and Gay Law Association et al., at 14-15, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) (emphasis omitted).

37. The lesbian and gay rights organizations involved in *Lawrence* wasted little time in taking credit for the Court's decision in the case, according to reports in the lesbian and gay press. See, e.g., Lou Chibbaro Jr., *Taking Credit for Lawrence vs. Texas Decision*, WASH. BLADE, July 18, 2003, at 10.

38. The salutary meaning of *Lawrence* for heterosexuality has largely been tacit in observations about what *Lawrence* means. Often it is entirely unexplored. A few have recognized the point expressly. See, e.g., *Sodomy Ruling*, *supra* note 22, at 6 (“Straight Americans should celebrate too, said Paul Greenberg in *The Washington Times*.”). The writers at THE WEEK captured the general sentiment, if not the exact wording, of Greenberg's commentary on *Lawrence*. The closest it actually comes to saying that “[s]traight Americans should celebrate, too,” is found in its second paragraph:

The highest court in the land now has agreed with the 19th century English lady who, when asked what she thought of homosexuality, replied that she had no objection “if they don't do it in the street and frighten the horses.” Which remains a good rule for heterosexual relations as well, while we're on the subject of the equal protection of the laws.

Paul Greenberg, *Privacy's Revival*, THE WASH. TIMES, July 2, 2003, at 15.

39. *Lawrence*, 539 U.S. at 568, 570 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

40. MICHEL FOUCAULT, HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION 43 (Robert Hurley trans., 1990). As Foucault observed:

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him,



person did not emerge until the late 19th century.”<sup>41</sup> Careful to avoid placing too much weight on this view, the Court continues, “early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”<sup>42</sup>

In saying so, the Court takes pains to point out that it does not mean to suggest historical *approval* of what it itself thinks of as “homosexual conduct”<sup>43</sup> in the early American period. But it does believe that the historical evidence “tend[s] to show that this particular form of conduct was not thought of as a separate category from like

less as a habitual sin than as a singular nature. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

*Id.* The idea that nothing in the homosexual’s “total composition was unaffected by his sexuality” adds suspension to the conceptual bridge spanning *Lawrence*’s recognition of a right to sexual intimacy and the otherwise almost ontological-sounding claim that *Lawrence* protects a constitutional right “to be gay.” The Editors of the Harvard Law Review venture such a claim in *Leading Cases*, 117 HARV. L. REV. 226, 298 (2003) (*Lawrence* “not only rejects the narrow notion that same-sex sexual activity is constitutionally unprotected, but also advances the broader notion that there is a fundamental right to be gay — to express one’s sexuality openly and without fear of state-sanctioned retribution, to engage in lasting, intimate relationships with members of the same sex, and to define the terms of those relationships, including by forming a family.” (footnote omitted)).

41. *Lawrence*, 539 U.S. at 568. Didier Eribon notes that, in work preceding *The History of Sexuality*, Foucault located the invention of the homosexual — if not “homosexuality” as such — in the seventeenth century. DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* 8, 267-72, 281 (Michael Lucey trans., 2004). As to “homosexuality,” Eribon remarks: “the word *homosexuality* itself . . . was coined in 1869 by Karl Maria Kertbeny, an Austro-Hungarian man of letters who was also struggling for the repeal of laws penalizing homosexual acts with imprisonment.” *Id.* at 288. For the (for-now) largely marginalized idea that there is a considerably longer history of gay culture than either of Foucault’s claims might be taken to suggest, see JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1981); see also, e.g., JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994). Eribon offers thoughts on Boswell’s work in ERIBON, *supra* at 325. According to Eribon, Foucault himself was far more sympathetic to Boswell’s views than many of his American interlocutors have been. *Id.* at 315, 318.

What the periodization of “homosexuality” may mean for its treatment as a “suspect classification” for equal protection purposes is unclear, even leaving aside the thoroughly-vetted (though likely to be on-going) “immutability” debate. What does seem worth noting, however, is that even as *Lawrence* seems to cut lesbians and gay men as such off from any longstanding history of (their) identity, it reconnects victims and survivors of sexual abuse to theirs. See *infra* text accompanying notes 46-48 (discussing the suggestion found in *Lawrence* that sodomy laws historically dealt with sexual abuse, filling in rape laws’ gaps). The classic, though incomplete, history of sexual violence remains SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

42. *Lawrence*, 539 U.S. at 568. George Chauncey writes: “For the Court to acknowledge an argument about the historicity of the category of the homosexual — or even to recognize the historical shift in state regulatory regimes — especially in a way that advanced the cause of gay rights, would have been almost unimaginable just a decade ago.” George Chauncey, “What Gay Studies Taught the Court,” *The Historians’ Amicus Brief in Lawrence v. Texas*, 10 GLQ: J. LESBIAN & GAY STUD. 509, 511 (2004).

43. *Lawrence*, 539 U.S. at 568.

conduct between heterosexual persons.”<sup>44</sup> If so, it follows that the history of sodomy laws could not support — much less justify — treating homosexuality as different than heterosexuality.

Having disposed of this old canard, the Court develops an affirmative history of sodomy laws that emphasizes their non-enforcement whether homosexuality or heterosexuality was involved. The Court states in broad terms — terms that on their own treat homosexuality and heterosexuality alike — that in the nineteenth century, “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”<sup>45</sup> Records of sodomy prosecutions and convictions in this era, for instance, are said to show that what the State sought to punish through sodomy bans were “predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault”<sup>46</sup> — same-sex and cross-sex sexual acts not otherwise covered by then-existing criminal rape prohibitions.<sup>47</sup> These prosecutions, if not also the underlying conduct, were “infrequen[t],”<sup>48</sup> the Court says. Thus, the Court reasons, it is “difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.”<sup>49</sup>

The Court does acknowledge that “there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices.”<sup>50</sup> (True enough: There were.) But reported cases in the period between 1880 and 1995, the years since homosexuality’s approximate invention,<sup>51</sup> while “not always clear in the details,”<sup>52</sup> indicate that even private, consensual *homosexual* conduct normally went unregulated. The Court makes this point by drawing attention to the type of homosexual conduct that was (sometimes) prosecuted: “[A] significant number [of sodomy decisions] involved [homosexual] conduct in a public place.”<sup>53</sup> More directly, the Court avers that recently, “[i]n those States where sodomy is still proscribed, whether

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44. *Id.* at 569.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 569-70.

50. *Id.* at 570

51. *But see supra* notes 40-41.

52. *Lawrence*, 539 U.S. at 570.

53. *Id.*

for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”<sup>54</sup>

Moving diachronically, the Court finds that this pattern held even though, starting in the 1970s, some States began to single out homosexual sodomy for criminal punishment.<sup>55</sup> Those laws, too, including Texas’s, typically were not enforced, the Court notes, adding that a good number of them have been abolished altogether, along with other state sodomy bans that (before their erasure) had operated across the board. Following Justice Felix Frankfurter’s submission that “[d]eeply embedded traditional ways of carrying out state policy . . . — or not carrying it out — ‘are often tougher and truer law than the dead words of the written text,’”<sup>56</sup> *Lawrence* practically teaches that the “true law” of sodomy, both historically and contemporaneously, has not entailed a prohibition against private sexual conduct between consenting adults. In this respect, homosexuality has been treated like heterosexuality under law, hence in fact. And this is true, the Court elsewhere explains, not only locally, but also internationally. Our legal system shares its norms about private, consensual expressions of sexuality in common with other civilized Western nations.<sup>57</sup>

The Court’s analysis of the historical and contemporaneous treatment of sodomy at law comes in a larger discussion of the Court’s own precedents, including *Hardwick*. In *Lawrence*, the Court

54. *Id.* at 573.

55. *Id.* at 570.

56. *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (Frankfurter, J., plurality opinion) (alteration in original) (quoting *Nashville, Chattanooga & St. Louis Ry. Co. v. Browning*, 310 U.S. 362, 369 (1940)). In its discussion of contemporaneous legal treatment of sodomy, *Lawrence* invokes Justice Lewis Powell’s separate *Hardwick* opinion, which suggested, among other things, that then-existing sodomy prohibitions “often were being ignored.” *Lawrence*, 539 U.S. at 572. It then (parenthetically) quotes his observation that “[t]he history of nonenforcement [of sodomy laws] suggests the moribund character today of laws criminalizing this type of private, consensual conduct.” *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 197-98 n.2 (Powell, J., concurring)). I discuss Powell’s *Hardwick* opinion in considerable detail, including its relationship to Frankfurter’s observations in *Poe v. Ullman*, in Spindelman, Reorienting *Hardwick*, *supra* note 4, at 402-27.

57. See *Lawrence*, 539 U.S. at 572-73 (citing THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Authorized Am. ed. 1963), and subsequent Parliamentary action substantially endorsing it, Sexual Offences Act, 1967, § 1 (Eng.), as well as *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981), a European Court of Human Rights decision that is described by the Court as “[a]uthoritative in all countries that are members of the Council of Europe”); *id.* at 576-77 (citing *Dudgeon*, 45 Eur. Ct. H.R. 52 (1981); *P.G. v. United Kingdom*, App. No. 00044787/98 ¶ 56 (Eur. Ct. H.R. Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); *Norris Case*, 142 Eur. Ct. H.R. (ser. A) (1988); Brief *Amici Curiae* of Mary Robinson et al. at 11-12, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief *Amici Curiae* of Mary Robinson]). For some limitations on *Lawrence*’s reliance on the British sources that it itself does not note, see JEFFREY WEEKS, *SEXUALITY* 109-110 (2d ed. 2003) (venturing, then explaining, the idea that “[t]he reforms conformed . . . to a liberal strategy which limited direct interference in private lives[,] [b]ut they did not necessarily abandon the idea of control . . . [or] positively enshrine new rights”).

interprets its prior decisions again and again in like-straight terms. That the Court deploys a like-straight interpretive lens to read — or re-read — its precedents becomes apparent no later than when it offers its gloss on the plurality opinion in *Planned Parenthood v. Casey*.<sup>58</sup>

The *Casey* plurality, says *Lawrence*, definitively provided that substantive due process requires respect for the autonomy of the person in making decisions “relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>59</sup> In *Casey*’s now-famous formulation, reiterated in *Lawrence*: “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.”<sup>60</sup> Offering a like-straight interpretation of *Casey*’s transcendent definition of “liberty,” *Lawrence* posits that, “[p]ersons in a homosexual relationship may seek autonomy for these purposes [of defining ‘one’s own concept of existence, of meaning, of the universe, and the mystery of human life’], just as heterosexual persons do.”<sup>61</sup> Homosexuals are persons too, and persons first: “[p]ersons in a homosexual relationship.”<sup>62</sup>

To establish that the Court’s like-straight thinking is basic, not peripheral, to its discussion of its own precedents, hence to its decision in *Lawrence*, one need not look beyond the Court’s announcement that the “analysis” Justice John Paul Stevens offered in his dissenting opinion in *Bowers v. Hardwick* “should have been controlling in

58. 505 U.S. 833 (1992).

59. *Lawrence*, 539 U.S. at 574. Indeed, I think this point is apparent a good deal earlier in its opinion. By the time that *Lawrence* opens, like-straight reasoning has already led the Court to assimilate homosexuality to a heterosexual norm, thus enabling the Court to speak in sexual-orientation-neutral terms about the rights of “persons,” which now, formally, includes lesbians and gay men. See *infra* text accompanying notes 63-71 (discussing Justice Stevens’ dissenting opinion in *Hardwick*).

60. *Casey*, 505 U.S. at 851, quoted in *Lawrence*, 539 U.S. at 574.

61. *Lawrence*, 539 U.S. at 574 (emphasis added).

62. *Id.* To similar effect is *Lawrence*’s description of *Hardwick*’s constitutional misprisions. *Lawrence* proposes, for instance, that *Hardwick* “demean[ed]” the right to sexual intimacy asserted in that case by describing it as “simply the right to engage in certain sexual conduct.” *Id.* at 567. Why? *Lawrence* gives its answer through a like-straight analogy. Saying that the right to sexual intimacy involved in *Hardwick* is nothing more than another way to refer to a right to homosexual sodomy is demeaning in “just [the same way] as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” *Id.* Accord *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985) (“The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.”); see also *supra* note 24. Competent legal readers are supposed to know, and fill in the missing conceptual gap: marriage is never about just sex. For the *Lawrence* Court, the insult of proposing that it is, is self-evident.

[*Hardwick*] and should control here.”<sup>63</sup> Even a casual perusal of Justice Stevens’s *Hardwick* dissent reveals that like-straight reasoning was its *grund-motiv*.

Justice Stevens opened his dissent by framing the controversy that *Hardwick* pressed, hence the error of Justice White’s opinion for the Court, in like-straight terms: “Like the statute that is challenged in this case, the rationale of the Court’s opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or *are of the same or different sexes*.”<sup>64</sup> The reason — unarticulated, but implicit, at this early point in the dissent — is that homosexuality is just like heterosexuality. Exposing its like-straight logic in terms, the dissent continued: “Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law. That condemnation was equally damning for heterosexual and homosexual sodomy.”<sup>65</sup> In the very next paragraph, the dissent returned to the equation between homosexuality and heterosexuality twice:

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy. . . . The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected . . . similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.”<sup>66</sup>

And once more in the next paragraph, in a fashion that would later be copied in the majority opinion in *Lawrence*: “the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it.”<sup>67</sup> “Regardless,” because homosexuals, like heterosexuals, are persons.

The dissent’s ensuing discussion proceeded to drive its like-straight point home. Consistent with then-existing privacy precedents, the State could not — as Georgia had — “totally prohibit” sodomy.<sup>68</sup> Doing so, the dissent maintained, “clear[ly]” violated the constitutional privacy rights heterosexuals, both married and single, enjoyed.<sup>69</sup>

63. *Lawrence*, 539 U.S. at 578.

64. *Bowers v. Hardwick*, 478 U.S. 168, 214 (1986) (Stevens, J., dissenting) (footnote omitted) (emphasis added).

65. *Id.* at 214-15.

66. *Id.* at 215-16.

67. *Id.* at 216.

68. *Id.* at 218.

69. *Id.* *Lawrence* expressly affirms the substance of this reasoning, quoting Justice Stevens’s *Hardwick* dissent on the point. See *Lawrence*, 539 U.S. at 578 (“[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment . . . [T]his protection extends to intimate choices by unmarried as well as married persons.”

This deduction from the Court's privacy precedents was the dissent's intermediate holding, and simultaneously the predicate for its reasoning that the Due Process Clause's right to sexual intimacy, having been recognized for heterosexuals, was to be offered on equal, which is to say, like-straight terms to lesbians and gay men. As the dissent observed:

Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the [heterosexual] majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.<sup>70</sup>

From a dissent in *Hardwick*, to a majority opinion in *Lawrence*: So it was written, so it is done. As *Lawrence* declares: Justice Stevens' analysis "should have been controlling in [*Hardwick*] and should control here."<sup>71</sup> It does.

Given only the position it takes on the relationship between homosexuality and heterosexuality, the *Lawrence* Court could have found itself in (complete) agreement with Justice O'Connor's concurring opinion in the case. Joining her, it might have said that because homosexuality is just like heterosexuality, Texas's

(omissions of footnotes and citations in original) (quoting *Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting)). *But see* Thomas C. Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 86 ("[T]he Court has given no support to the notion that the right of privacy protects sexual freedom."); *id.* at 88 n.31 (challenging the assertion that *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), established "a right of sexual freedom for the unmarried," with the suggestion that, "surely you can have a right to wear motorcycle helmets when you ride a motorcycle, without having a right to ride a motorcycle," and with the doctrinal observation that "the Court itself has continued to insist on the disjunction between the right of access to contraceptives and the right of sexual freedom" (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678, 688 n.5 (1976) (plurality opinion of Brennan, J.))); *accord* Halley, *Romer v. Hardwick*, *supra* note 18, at 448 (offering that *Hardwick* engaged in an "act of forgetting and thus protecting heterosexual sodomy"). As Justice Brennan wrote in *Carey*:

Contrary to the suggestion advanced in Mr. Justice Powell's opinion, we do not hold that state regulation must meet this standard "whenever it implicates sexual freedom," or "affect[s] adult sexual relations[.]" . . . As we observe below, "the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," and we do not purport to answer that question now.

431 U.S. 678, 688 n.5 (first and final alterations in original) (quoting *id.* at 703, 704 (Powell, J., dissenting) (citations omitted)). The *Lawrence* Court's discussion of *Carey*, *see* 539 U.S. at 566, does not acknowledge this limitation. *Cf.* *Zablocki v. Redhail*, 434 U.S. 374, 403 (Stevens, J., concurring in the judgment) ("When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently.")

70. *Hardwick*, 478 U.S. at 218-19 (Stevens, J., dissenting).

71. *Lawrence*, 539 U.S. at 578.

“homosexual sodomy” ban, which outlaws same-sex but not cross-sex sodomy, is void on Equal Protection grounds.<sup>72</sup> Without any adequate justification, it impermissibly treats homosexuality and heterosexuality as though they were unlike.<sup>73</sup>

The Court instead deems Justice O’Connor’s rationale “tenable,”<sup>74</sup> as it must to validate its own, but then speeds past it to declare that all sodomy bans — whether limited to same-sex sexual conduct or applicable to cross-sex conduct as well — are offensive to the Fourteenth Amendment’s Due Process Clause, which assures a right to sexual intimacy. In doing so, as some commentators have reminded us,<sup>75</sup> the Court dramatically reaches out in a way not required by the law nominally before it for review. It embraces a rationale that exceeds what is logically and jurisprudentially necessary to reverse the convictions and overturn the statute at issue in the case. Just so, the Court does not so much disregard the oft-cited principle against “formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied”<sup>76</sup> as it flouts it.

72. *Id.* at 579 (O’Connor, J., concurring). Kenneth Karst discusses Justice O’Connor’s concurring opinion in *Lawrence* in the context of a larger analysis of the substance of her “equal citizenship” jurisprudence in Kenneth L. Karst, *Justice O’Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 440-42 (2004).

73. Justice O’Connor’s concurrence in *Lawrence* formally declines to join in overruling *Hardwick*. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring) (“The Court today overrules *Bowers v. Hardwick*. I joined [*Hardwick*], and do not join the Court in overruling it.” (citation omitted)). What would remain of *Hardwick* after she has rejected its premise that homosexuality and heterosexuality are unlike, is unclear. Not much, I suspect.

74. *Id.* at 574. Technically, the Court affixes the adjective “tenable” to an equal protection argument that Lawrence and Garner and some *amici* made. But since this is the argument that Justice O’Connor’s separate opinion accepts and builds on, I treat “tenable” as a transitive adjective, applicable to the equal protection rationale found there, as well. I am in good company in doing so. Sherry Colb, for example, writes:

The Court might have ruled that, as Justice Sandra Day O’Connor said in a concurrence in the judgment, such targeting [of homosexuals by Texas’s sodomy law] violates the equality rights of homosexual persons.

Though “[t]hat is a tenable argument,” the Court explained, however, “[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” Implicitly, the Court was suggesting that the statute would fail Equal Protection analysis as well.

Sherry F. Colb, *Welcoming Gay People Back Into the Fold: The Supreme Court Overrules Bowers v. Hardwick*, FINDLAW’S WRIT, June 30, 2003, at <http://writ.findlaw.com/colb/20030630.html> (alterations in original) (quoting *Lawrence*, 539 U.S. at 574-75).

75. See, e.g., *Has the Supreme Court Gone Too Far?: A Symposium*, COMMENT., Oct. 2003, at 44-45 (response of Cass R. Sunstein) (“There was a narrower and more cautious ground [than the one the Court employed], emphasized by Justice O’Connor, for invalidating the Texas law.”); *id.* at 47-48 (response of James Q. Wilson) (“The Texas sodomy case could well have been decided on grounds that would not have broadened the notion of privacy or weakened the concept of state authority . . . This would have left the states free to ban sodomy for heterosexuals and homosexuals equally . . .”).

76. See, e.g., *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885), cited in RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON

Doctrinal lavishness like this cannot simply be touted and enjoyed. It must be explained. The Court's *Lawrence* opinion itself provides the outline of an account when it tells us that the like-straight logic found in Justice O'Connor's concurrence is too thin in its exclusive focus on the differential treatment of same-sex and cross-sex sodomy. The Court warns that Justice O'Connor's approach would leave "some [to] question whether a prohibition [against sodomy] would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."<sup>77</sup> In the Court's view, that is bad.

Foreclosing the possibility, the Court effectively exposes the relative thickness — the underlying substantivity — of its own like-straight logic. What leads the Court to surpass Justice O'Connor's conclusion to reach its own, as suggested by the touchstone of its like-straight reasoning, is its solicitude for heterosexual sexual rights. Lesbians and gay men receive the sexual rights that heterosexuals do by analogical extension.<sup>78</sup> Hence the Court's boast that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both

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CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 246 n.7 (3d ed. 1999). Interestingly, Tom Stoddard criticized *Hardwick* on just these grounds. "In resolving the issue of constitutionality," he explained, "the [*Hardwick*] Court undeniably exceeded its authority." Stoddard, *supra* note 16, at 651. He continued:

[The Court] also ignored the long-standing tenet that constitutional decisions, because of their gravity, should be issued only on the basis of a well-developed record and well-framed issues. The majority was apparently so eager to hand down a ruling on sexual privacy that it either overlooked or deliberately disregarded the posture of the case before it. Given the importance of the ultimate constitutional question raised in *Hardwick*, the majority's zeal is more than improper; it verges on scandalous.

*Id.*

77. *Lawrence*, 539 U.S. at 575.

78. Justice O'Connor offers reassurances in this regard. She is, she tells us, "confident" that sodomy laws will not long continue to stand once it is understood, as she would have let it be understood, that they must be written and applied in like-straight terms. *Id.* at 584 (O'Connor, J., concurring). "Heterosexual sodomites" are not without their political power, as Justice O'Connor surely knows. Her opinion seems to be relying on them, and others in the heterosexual majority, joined by their homosexual (and other sexually-identified) allies, to build the political coalitions capable of making her like-straight reasoning — hence the Equal Protection Clause — substantive. In this sense at least, it might be thought that Justice O'Connor's *Lawrence* concurrence is meant to recognize a right to sexual intimacy much as the *Lawrence* majority does, albeit through different — and (formally) more democratic — means. Remembering, perhaps, that notwithstanding Justice's O'Connor's "confidence," nine states still prohibited same-sex and cross-sex sodomy on the morning that *Lawrence* was decided, *see, e.g.*, Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171, 1178 n.40 (2004) (describing Justice O'Connor's confidence as "oblivious to the majority opinion's observation [not to mention the fact underlying it] that nine such laws, all of long standing, were among those invalidated by the Court's decision."), the majority refuses to take odds on her intuition. Thus, it makes her prediction real — today — as a formally new substantive due process rule.



interests.”<sup>79</sup> Translated: the Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and advances “equality of treatment” by extending that liberty to lesbians and gay men.<sup>80</sup> Rights that are made to the king’s measure are fit for a queen.

The Court reinforces this understanding of its opinion’s heterosexualized engine in various other ways. Perhaps the easiest to see is the one found in the analytic correspondence *Lawrence* creates between itself and Justice Stevens’ *Hardwick* dissent. That dissent, recall, explained that substantive due process decisions before *Hardwick* had made it “abundantly clear” that “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment[;]”<sup>81</sup> and that the same “protection extends to intimate choices by unmarried . . . persons,” by which the dissent meant (as its text elucidated) “unmarried heterosexual adults.”<sup>82</sup> Accordingly, the Due Process Clause protected heterosexual sexual intimacies,<sup>83</sup> hence prohibited bans on sodomy *tout court*. *Only after the dissent had reached this conclusion* did it go on to apply the distributive like-straight rule it had previously endorsed, to hold that the constitutional protections accorded to heterosexual sexual intimacies could not justifiably be denied lesbians and gay men. This is the structure of the decision whose analysis prefigures *Lawrence*. Iteratively, heterosexuals’ constitutional entitlements are the model for the constitutional rights lesbians and gay men receive.

79. *Lawrence*, 539 U.S. at 575. The Court continues:

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres.

*Id.* The “invitation to subject homosexual persons to discrimination,” like the “stigma” that produces and results from it, is measured against a heterosexual baseline. Lesbians and gay men, that is to say, are subordinated and stigmatized for their “deviation” from heterosexuality’s norms.

80. This, then, is the (short) answer to Robert Post’s question about why the *Lawrence* Court did not “use the Equal Protection Clause to overrule [*Hardwick*].” Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 1, 99 (2003).

81. *Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting).

82. *Id.* at 218; *see also id.* at 216.

83. *Id.* at 218 (“Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within ‘the sacred precincts of marital bedrooms,’ or, indeed, between unmarried heterosexual adults. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by” its sodomy law. (internal citations omitted)).

Seen in this light, *Lawrence*'s reversal of *Hardwick* nicely (and happily) follows. *Hardwick* is "contradict[ed]"<sup>84</sup> by those decisions "before and after its issuance"<sup>85</sup> — from *Griswold v. Connecticut*<sup>86</sup> through *Casey* — that affirm the constitutional protections heterosexuals have "taken for granted . . . either because they already have them or do not need them."<sup>87</sup> *Hardwick* is the anomaly in this doctrinal line, produced by the Court's failure "to appreciate the extent of the liberty at stake" in the case — for heterosexuals.<sup>88</sup> It "misapprehended the claim of liberty there presented to it, and thus [stated *Hardwick*'s] claim to be whether there [was] a fundamental right to engage in consensual [homosexual] sodomy" — a claim it rejected.<sup>89</sup> With Justice Stevens, *Lawrence* reads *Hardwick* effectively to have dealt a blow to heterosexual sexual rights. It placed them in a state of constitutional "uncertainty"<sup>90</sup> by bracketing them in order to have a clean shot at the suggestion it repudiated, that homosexuals were entitled to sexual liberty. Removing those brackets, hence rescuing heterosexuality from itself, *Lawrence*, citing principles of *stare decisis*, declares that *Hardwick* must give way. Overruling *Hardwick*, including its holding on homosexual sodomy, *Lawrence* restores the rule of law, whose own governing rules, it seems, remain heterosexually driven.<sup>91</sup> No wonder that Justice Scalia's very angry dissent, which correctly sees the like-straight writing on the wall, complains that *Lawrence* "dismantles the structure of constitutional

84. *Lawrence*, 539 U.S. at 577.

85. *Id.*

86. 381 U.S. 479 (1965).

87. *Romer v. Evans*, 517 U.S. 620, 631 (1996). *Lawrence*'s brief discussion of *Evans* can be placed in this line, read as a substantive affirmation of heterosexual rights — rights that heterosexuals had, in *Evans*' own language, largely "taken for granted . . . either because they already have them or do not need them." *Id.* Then again, even on the standard reading of *Evans* as a lesbian and gay rights, and not a heterosexual rights, Equal Protection case, it can be seen to have prefigured, and to have been precedent for, *Lawrence*'s like-straight analysis, hence *Lawrence*'s announcement of the heterosexualized "right to sexual intimacy," along with its extension to lesbians and gay men on equal terms. See *supra* notes 78-80 and accompanying text.

88. *Lawrence*, 539 U.S. at 567. In the very next sentence, *Lawrence* offers the following like-straight observation: To suggest, as *Hardwick* did, "that the issue in [*Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim [that *Hardwick*] put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* I discuss this language in note 62, *supra*.

89. *Lawrence*, 539 U.S. at 567.

90. *Id.* at 577.

91. Cf. Catharine A. MacKinnon, *The Road Not Taken: Sex Inequality in Lawrence v. Texas*, Presentation at The Ohio State University Moritz College of Law, Ohio State Law Journal Symposium on *Lawrence v. Texas* (Nov. 7, 2003) [hereinafter MacKinnon, *The Road Not Taken*] (describing *Lawrence* as "sexually driven").

law that has permitted a distinction to be made between heterosexual and homosexual unions.”<sup>92</sup> It has.

Interestingly, unlike the lesbian and gay rights briefs in the case, the *Lawrence* Court does not articulate an independent justification for heterosexuality’s entitlement to constitutional respect, particularly in its sexual intimacies. Perhaps it does not perceive the need. The Court might imagine, as many of *Lawrence*’s readers surely will, that its reaffirmation of all the rights that the Due Process Clause substantively protects, performs all the normative work required to establish the richness of heterosexual life — a life filled with the pride and joy of what substantive due process entails: marriage, family, procreation, and child rearing.<sup>93</sup> And now, sexual intimacy. In the Court’s words: “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.”<sup>94</sup> (How sweet.) Should *Lawrence* regard heterosexuality as deserving of constitutional rights, and homosexuality, too, precisely to the degree it is just like heterosexuality, who would seriously complain that the premise of the analogy is wrong? Judging from the massive outpouring of support for the Court’s decision in *Lawrence*, especially in the lesbian and gay communities, not many.<sup>95</sup> But there are a few,<sup>96</sup> sex-equality theorists foremost among them.

92. *Id.* at 604 (Scalia, J., dissenting).

93. See *Hardwick*, 478 U.S. at 190 (“The reach of this line of cases was . . . described as dealing with child rearing and education; with family relationships; with procreation; with marriage; with contraception; and with abortion.” (citations omitted)).

94. *Lawrence*, 539 U.S. at 567.

95. Cf. Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1722-23 (1993) [hereinafter Halley, *Reasoning About Sodomy*]. Halley suggests the possibility that:

gay men, lesbians, bisexuals, and their allies . . . can form new alliances along the register of acts. From that vantage point the instability of heterosexual identity can be exploited, and indeed, undermined from within. To be sure, adopting this approach requires that lesbians, gay men, and bisexuals place their identities as such in abeyance at least from time to time. This is dangerous, but it may be the only way that lesbians, gay men, and bisexuals can gain some kind of rhetorical leverage in a rhetorical system whose instability normally places us in a double bind.

*Id.* I am not certain whether the broad-based support for *Lawrence* is one of those “alliances along the register of acts.” It could be. See *supra* note 23. Thoughts on what it means if it is, and for whom, are found in Part II, *infra*.

96. Of the already-published work on *Lawrence*, Franke, *supra* note 4, should be counted here. Her objections aim in different directions than mine, but there are a few points of convergence.

## II. A CRITICAL APPRAISAL

Anyone who is seriously dedicated to equality between the sexes has to acknowledge the historic breakthrough for lesbian and gay rights that *Lawrence* represents. The elimination of discrimination against lesbians and gay men, integral to sexual hierarchy and the positioning of men and women within it, is indispensable to sexual equality's realization. As an affirmation of lesbian and gay rights, then, sex-equality theorists have some reason to be pleased about *Lawrence*. I, for one, am.

But there is more to the evaluation of a judicial text than a simple assessment of, or reaction to, its ostensible ends. Looking beyond what seems to be *Lawrence's* bottom line, its like-straight reasoning — especially its uncritical solicitude for heterosexuality, and the corresponding notion, reflected in its protection of a right to sexual intimacy, that heterosexuality is entitled to constitutional protections, in its intimacies above all — is cause for serious concern.<sup>97</sup>

To begin, empirical investigations into the conditions of sex inequality have demonstrated that heterosexuality is hardly as unproblematic as the Court's opinion in *Lawrence* may make it seem. These investigations have shown, for instance, that the institution of heterosexuality has largely been defined in male-supremacist terms — terms that include both the massive production and the massive denial of the sexual abuse and violence that women suffer at men's hands, along with the sexualized dimensions of the homophobic violence lesbians and gay men suffer at the hands of presumptively

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97. Sex-equality theorists see in *Lawrence* the invigoration of formal-equality thinking that requires members of socially subordinated groups — be they women or non-heterosexuals — to conform to the norms of socially dominant classes in order to be afforded their rights. As sex-equality theory has analyzed it, such formal-equality logic can be — and often is — a cover for social dominance posing as “equality,” hence a form of “unreason,” that is anything *but* a way to eradicate social hierarchy. It delivers rights, as *Lawrence* does, on the terms that the socially privileged set for themselves, assuming as it does that socially dominant groups — whether men, or in *Lawrence*, heterosexuals — should be the standard against which constitutional claims are judged and rights both discovered and delivered. *Lawrence's* status as a substantive due process decision does not change this; its underlying equality logic can easily expand to infuse equal protection reasoning. Justice O'Connor's concurrence in *Lawrence* demonstrates as much. See also, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); Karst, *Freedom of Intimate Association*, *supra* note 24, at 653 (“Equal protection doctrine has been employed frequently by the Supreme Court in the defense of the freedom of intimate association. [T]here is a historical sense in which today's version of that freedom is derivative from the ‘egalitarian revolution’ in modern constitutional law.” (footnote omitted)); *id.* at 659-64 (discussing intimate association and equal protection). The inequality logic animating *Hardwick's* substantive due process ruling certainly did. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 572 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). Should *Lawrence's* reasoning likewise expand to define equality rights, it could operate not simply as a new floor for lesbian and gay rights, but also as a ceiling, making it harder for them and other socially subordinated groups to gain substantive equality through law and in life.

heterosexual men. The commonplace that sexual intimacy of the sort *Lawrence* approves should be heralded as the measure of non-violation has been uncovered as a myth, a way of ignoring and protecting the widespread abuses, including sexual assault, domestic violence, and sexual abuse of children, by more powerful partners in intimate relationships, typically, though not exclusively, men.<sup>98</sup> When

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98. The myth is perpetuated, in part, through the non-enforcement and under-enforcement of laws that are supposed to protect individuals against gender-based violence, whether cross-sex, see *Developments in the Law — Legal Responses to Domestic Violence: IV. Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1555-56 (1993) (“[C]ases of domestic violence have been assigned low priority . . . . Furthermore, because of the special complications that surround the prosecution of batterers, prosecutors have too often dropped domestic abuse cases under the misperception that they are unwinnable or have too readily conceded to the victim’s request not to prosecute.”), or same-sex. See, e.g., MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 216-18 (1997) (discussing “police insensitivity” to victims of same-sex rape); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1257-58 (1997) (discussing the now-infamous episode in which three white police officers who discovered fourteen-year-old Konerak Sinthasomphone running down the street naked in an attempt to flee from Jeffrey Dahmer, returned him to Dahmer’s custody after Dahmer informed them that “Konerak’s name was ‘John Hmong,’ that he was 19 years old, that they were lovers, and that Konerak had drunk too much and wandered naked into the street while Dahmer was out getting more beer”); Rus Ervin Funk, *Men Who Are Raped: A Profeminist Perspective*, in SCARCE, *supra*, at 221, 229-30 (offering first-hand account of male rape survivor’s engagement with the criminal justice system, including pressure by prosecutors “to leave out the sexual assault part of the attack” he suffered, because the “district attorney felt strongly that we could get a longer conviction if we ignored the rape”; “[i]n retrospect,” Funk writes, “the district attorney was probably right”); Wendy Kaufman, *All Things Considered: Profile: Federal Efforts to Define and End Prison Rape*, NATIONAL PUBLIC RADIO, Oct. 29, 2003 (quoting Association of State Correctional Administrators’ President Reginald Wilkinson saying about rape in prison (while apparently confusing it with bad sex): “We’re not naive enough to say that it doesn’t exist from time to time. Typically when it does exist, it’s a consensual sex act and typically one that’s gone bad”). The legal system has also affirmatively allowed intimacy to serve as a justification for sexual and sexualized violence. See, e.g., Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1470-71 (2003) (“[T]wenty-six states retain marital immunity in one form or another.”); Kwan, *supra*, at 1261-62 (“Gabrish and Balcerzak claim[ed] that they had in fact been deceived and convinced by Dahmer,” and also “that the circumstances, including what they observed and heard from Dahmer, justified their handling of the situation and should mitigate the official finding of negligence on their part.” (internal citations and emphasis omitted)). One egregious, as well as blatant example, is the so-called “homosexual panic” defense, sometimes alternatively known as the “gay panic” or “homosexual advance” defense, in which an (ostensible) overture to same-sex sexual intimacy can be enough to turn what would otherwise be murder into manslaughter. Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 134 (1992) (“As the law now stands . . . a homosexual advance can mitigate murder to manslaughter.” (internal citations omitted)). See also, e.g., Martha C. Nussbaum, “*Secret Sewers of Vice: Disgust, Bodies, and the Law*,” in THE PASSIONS OF LAW 19, 35-38 (Susan A. Bandes ed., 1999) (challenging the rule). For one defense of some forms of the non-violent “homosexual advance” defense, see Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995). My colleague Joshua Dressler reminds me that a “homosexual panic” claim is sometimes offered as a kind of insanity defense in an effort to avoid all criminal responsibility for a same-sex homicide involving a decedent who was (or was thought to be) gay and who had allegedly made a sexual advance

sexual intimacy is thought to be normatively good, the basis for relationships “more enduring,” as it is in *Lawrence*, how can it (also) be a prison of abuse? Can it be? What about when, not if, in actuality, it is?

*Lawrence*, which validates heterosexuality and trumpets its intimacies, elides these questions, and the realistic, if unflattering, portraits of heterosexuality’s social life that precipitate them, not to mention the male supremacy that, in turn, produces them. The Court’s opinion thus leads and leaves us to wonder: does the upbeat analogy between homosexuality and heterosexuality it embraces, hence the right to sexual intimacy to which it gives rise, suggest that homosexuality, like heterosexuality, can be ignored when it involves sexual injury?<sup>99</sup> That it should be? That, after *Lawrence*, it will be?<sup>100</sup>

Precisely these worries first surfaced in the course of the *Lawrence* litigation,<sup>101</sup> triggered by the like-straight position lesbian and gay

toward the defendant. Conversation with Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law (Aug., 19, 2004).

99. Some estimate that the incidence of same-sex sexual violence, including domestic violence, approximates that of its cross-sex counterpart. See, e.g., NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE IN 2001, at 2-3 (Rachel E. Baum & Clarence Patton eds., 2002) (offering such an estimate). Others speculate for various reasons, including gender, that “gay men’s domestic violence may occur at a rate *greater* than domestic violence in the heterosexual community.” DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE 14 (1991). It is too soon to provide a definitive, empirically-based assessment, in part, because “[o]fficial statistics on same-sex intimate partner violence are not available,” and “[o]nly a handful of studies have examined the prevalence of intimate partner violence.” Patricia Tjaden et al., *Comparing Violence Over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants*, 14 VIOLENCE & VICTIMS 413, 415 (1999). Existing studies, however, do provide support for the more modest suggestion that gay men are more likely victims of domestic violence than heterosexual men. The study that Tjaden and co-authors conducted, to give one example, “found that same-sex cohob[it]ants reported significantly more intimate partner violence than did opposite-sex cohobitants. For example, 23.1% of same-sex cohobiting men said they were raped and/or physically assaulted by a spouse or cohobiting partner at some time in their lives, compared with 7.7% of opposite-sex cohobiting men.” *Id.* at 421. Accord Michael King et al., *The Prevalence and Characteristics of Male Sexual Assault, in MALE VICTIMS OF SEXUAL ASSAULT* 1, 9 (Gillian C. Mezey & Michael B. King eds., 2000) (“Men who had had sex with men were six times more likely to suffer an assault as an adult.”); *id.* at 12 (“Gay men are more likely than their straight counterparts to be assaulted and there is some evidence that sexual assaults against gay men may be a disguised form of ‘queer bashing’ in which sexual humiliation of gay men by (presumably) straight assailants is the principal aim.” (citation omitted)); see also *infra* note 129.

100. See, e.g., *Anderson v. Morrow*, 371 F.3d 1027, 1040-44 (9th Cir. 2004) (Berzon, J., concurring in part and dissenting in part).

101. Well, actually, they preceded the *Lawrence* litigation. Institutionally speaking, the lesbian and gay communities, with the notable exception of the few lesbian and gay anti-sexual-violence organizations within them, have persistently policed a closet around sexual abuse. The muted reactions of the leadership of the lesbian and gay communities to the sexualized murder of thirteen-year-old Jesse Dirkhising several years ago, for instance, was so notable that even Andrew Sullivan, hardly a sex-equality theorist, could not help but notice and comment on it, if chiefly to chastise the gay community’s liberalism, including (from his perspective) the moral deformation produced by its “identity politics.” Andrew

rights advocates invited the Court to adopt in the case, and what it implied for lesbian and gay victims of same-sex sexual abuse.<sup>102</sup> Disturbingly, while advancing their like-straight arguments and drawing attention to heterosexuality's glories, lesbian and gay rights advocates completely avoided any serious and engaged analysis of the existing problems of sexual abuse, whether cross-sex or same-sex, even when their realities were staring them right in the face.

A number of lesbian and gay rights briefs, for instance, including the principal brief for the parties, cited approvingly — and not a single one criticized — the 1998 decision by the Georgia Supreme Court in *Powell v. State*,<sup>103</sup> invalidating the state's sodomy law (the same law upheld in *Hardwick*) under the state constitution's privacy guarantee.<sup>104</sup> The defendant, Anthony Powell, had been accused of

Sullivan, *Us and Them*, NEW REPUBLIC, Apr. 2, 2001, at 8. Sullivan himself sought to distinguish the sexualized violence that led to Jesse Dirkhising's death as both extreme and aberrant. It was, he suggested, "the actions of [a] depraved [gay] couple." *Id.* In this way, Sullivan uncoupled the tragedy from other forms of sexual inequality. Elizabeth Birch, then-Executive Director of the Human Rights Campaign, countered that: "the Human Rights Campaign . . . condemned the murder in news accounts when it occurred." Elizabeth Birch, Correspondence, NEW REPUBLIC, May 14, 2001, at 6; see Joyce Howard Price, *Media Tune Out Torture Death of Arkansas Boy: Homosexual Charged with Rape, Murder*, WASH. TIMES Oct. 22, 1999, at A1; David M. Smith, Letters, *Times Prints 'Disgusting' Front-Page Article on Gays*, WASH. TIMES, Oct. 28, 1999, at A22. Birch's letter "categorically reject[ed] . . . the notion that pedophilia is an inherent part of gay culture, values, or behavior," and declared that "[t]he abuse and exploitation of any child should be uniformly condemned, regardless of the sexual orientation of the perpetrator." Birch, *supra*. Having thus reconstructed Dirkhising's sexualized murder as a not-gay phenomenon, notwithstanding suggestions in press accounts, including Sullivan's, see Sullivan, *supra*, that Jesse Dirkhising himself may have been gay, Birch's letter avoids acknowledging any problem of sexual violence within the communities the Human Rights Campaign represents. A not entirely dissimilar move can be found in the Brief that the Lambda Legal Defense and Education Fund filed in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Brief of Lambda Legal Defense and Education Fund et al. as *Amici Curiae* in Support of the Petitioner, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568). I have discussed other, praiseworthy dimensions of this brief elsewhere. See Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 20-21 nn.59-60 (2004) [hereinafter Spindelman, *Sex Equality Panic*].

102. See Marc Spindelman *Sodomy Politics* in *Lawrence v. Texas*, JURIST, June 12, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew115.php>.

103. 510 S.E.2d 18 (Ga. 1998).

104. The principal merits brief for *Lawrence* cited *Powell* approvingly. Brief of Petitioners at 23 n.17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Powell*, among other legal developments, in a list of legal rules that repealed or invalidated "facially evenhanded sodomy laws since [*Hardwick*]"); *id.* at 24 (citing *Powell*, as an example of a "strong national consensus reflecting profound judgments about the limits of [the] government's intrusive powers in a civilized society," and as "another objective indicator of the fundamental rights at stake" in *Lawrence*). The lesbian and gay rights amicus briefs in *Lawrence* that also did include the Brief of the CATO Institute as *Amicus Curiae* in Support of Petitioners at 26, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter CATO Brief] ("State courts have been unimpressed with *Hardwick's* expansive view of the government's police power. Typical is *Powell v. State* . . ."); HRC Brief, *supra* note 36, at 21 (citing *Powell* as an illustration of the repeal or invalidation of sodomy laws after *Hardwick*); Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioners at 23, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) (citing *Powell* in a series of state court judgments rejecting

having sex with his seventeen-year-old niece *against her will*. She testified at trial that the sex acts she engaged in with her uncle were *forced*, that she did *not* consent to them, and that during the encounter she wept, but otherwise “kept silent during the incident because she was afraid Powell would hurt her if she yelled.”<sup>105</sup> While this was happening, Powell’s wife, the girl’s aunt, who was then a month shy of delivering Powell’s child, was asleep in the next room.

When the Georgia high court announced its decision in *Powell* overturning both Powell’s conviction and the law under which it was obtained, Lambda Legal Defense and Education Fund’s Stephen Scarborough cheered.<sup>106</sup> “This,” he was quoted as saying, “is especially sweet.”<sup>107</sup> It “really sends the signal to other states [that] may be considering similar challenges that we are in a day and age where the government simply does not belong in bedrooms.”<sup>108</sup> Whoever else may have found the Georgia court’s decision, with its invalidation of Powell’s conviction, “especially sweet,” it was not the seventeen-year-old girl who maintained that Powell had violated her sexually.

Tracing a like-straight line on sexual violence without ever commenting on it, some of the lesbian and gay rights briefs in

*Hardwick* as “inconsistent with rule-of-law norms”); Brief of Constitutional Law Professors, *supra* note 25, at 12 n.6 (commenting on the difference between Texas’s same-sex sodomy prohibition and what was, before *Powell*, Georgia’s generalized prohibition against sodomy, and noting that *Powell* struck down Georgia’s sodomy prohibition, which has not since been reinstated); ACLU Brief, *supra* note 36, at 22 (“Recent state court decisions striking down sodomy laws reflect the social consensus that the state should not intrude into the most intimate of personal decisions in the home. See, e.g., . . . *Powell v. State* . . .”); *id.* at 27 n.51 (mentioning *Powell* as an illustration of legal trends). As an aside, the Court’s *Lawrence* opinion does not miss the symbolic significance of *Powell*, and cites it with approval to support its position that legal (and cultural) norms about sodomy have changed in an ostensibly gay-friendly direction since *Hardwick*. See *Lawrence*, 539 U.S. at 576 (“The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see . . . *Powell v. State* . . .”).

105. Larry Hartstein, *Sodomy Opinion Protested Force, Not Privacy, Called Issue in Case*, ATLANTA J. & CONST., Nov. 24, 1998, at 1 (“[District Attorney Danny] Porter said the case wasn’t about consenting adults but about a man assaulting a girl. He said the girl cried and kept silent during the incident because she was afraid Powell would hurt her if she yelled.”).

106. Lambda had filed an amicus brief in the case urging the Georgia Supreme Court to overturn Powell’s conviction and the state’s sodomy ban. Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc. et al., *Powell v. State*, 510 S.E.2d 18 (1998) (No. S98A0755). Scarborough has written that the brief “argue[d] that the Georgia statute, which prohibits consensual conduct in a private home, cannot be reconciled with long-held concepts of personal privacy and human dignity.” Stephen R. Scarborough, *Georgia Man Gets Prison Term for Consensual Oral Sex*, LAMBDA LEGAL, July 2, 1998, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=267> (on file with author).

107. Kevin Sack, *Georgia’s High Court Voids Sodomy Law*, N. Y. TIMES, Nov. 24, 1998, at A16.

108. *Id.*



*Lawrence* also endorsed *People v. Onofre*,<sup>109</sup> a 1980 decision by the New York State Court of Appeals overturning the state's sodomy ban on both privacy and equality grounds.<sup>110</sup> Integral to the *Onofre* decision was the court's conclusion that the sex that the thirty-something Ronald Onofre had had with seventeen-year-old Russell Evans was consensual. The sexual acts for which Onofre was initially convicted came to police attention when Evans told them what he and Onofre had done together.<sup>111</sup> Evans explained that he hoped that, by telling his story to the police, Onofre might be kept from similarly injuring others through sex.<sup>112</sup> Among other things, Evans told the police: "[M]y anus was bothering me and I even at one point went to a doctor . . . and got treatment because my rearend was tore up."<sup>113</sup>

Initially, Onofre, a self-described "minister[] and assembler,"<sup>114</sup> sought to help Evans, who was experiencing family problems.<sup>115</sup> "I have even tried to get full custody of him,"<sup>116</sup> Onofre said. At some

109. 415 N.E.2d 936 (N.Y. 1980). The lesbian and gay rights briefs in *Lawrence* that cited *Onofre* with approval, in addition to Lawrence's Reply Brief, Reply Brief at 9, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) (citing *Onofre* along with other state court decisions that "struck down their sodomy laws (or narrowly construed them not to apply to private consensual conduct) in light of the laws' invasion of a realm that belongs to individuals, not the State"), include the Brief of the Institute for Justice as *Amicus Curiae* in Support of Petitioners at 14-15, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Institute for Justice Brief] ("Cf. *People v. Onofre* (holding that law prohibiting sodomy by any unmarried persons did not advance public morality and instead 'imposed a concept of private morality chosen by the State')." (citation omitted)); ACLU Brief, *supra* note 36, at 14 n.18 (describing *Onofre* as a case that "involved private consensual conduct."); CATO Brief, *supra* note 104, at 8 ("[S]ome state courts ruled that consensual sodomy laws violate the Due Process Clause. E.g., *People v. Onofre* . . ."). For two critical views on *Onofre*, see CATHARINE A. MACKINNON, *SEX EQUALITY* 1090-92 (2001), and RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 52 (1988). Mohr describes *Onofre* as "[a] successful attempt to overturn New York's sodomy law [that] was occasioned by an odd series of events in which a grand jury indictment for the raping of a child was basically reconstructed by the district attorney and judge into a charge of sex between consenting adults." *Id.* The facts of the case are, he writes, "contorted, peculiar, but undisputed." *Id.* at 52 n.11.

110. See *Onofre*, 415 N.E.2d at 940-43. The *Onofre* court explained that:

Personal feelings of distaste for the conduct sought to be proscribed . . . and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution — areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked.

*Id.* at 941-42; see also *id.* at 943 ("The statute therefore must fall as violative of the right to equal protection enjoyed by persons not married to each other.").

111. Affidavit of Russell Evans, Sept. 6, 1977 (on file with author).

112. *Id.*

113. *Id.*

114. Voluntary Affidavit of Ronald E. Onofre, Feb. 23, 1977 (on file with author).

115. *Id.*

116. *Id.*

point, Onofre told the authorities, “[b]efore I knew what was happening, things started happening between us.”<sup>117</sup> (So much for sexual “choice.”) Although both Onofre and Evans eventually agreed that the relationship, including the sex, was consensual, Onofre reflected in writing to the police that:

I know Russell to be a deeply emotionally disturbed boy who is i[n] need of tender loving care and attention. To the best of my ability, this is what I have tried to provide for Russell. Russell knows that I am gay, so h[e] may have thought to repay me for my kindness, that he had to have an intimate relationship with me.<sup>118</sup>

Plenty is amiss here, including a range of inequalities — of age, of emotional vulnerability, of social position, to mention a few — in addition to abuses of power, as well as the physical harms. How then, did *Onofre* become a symbol for gay rights? The answer is that the sex in *Onofre* was consensual (we know this because they both said so), and that *Onofre* protected sexual rights. Never mind that the “consent” in *Onofre* was stacked on top of inequalities and abuses of power. Never mind that *Onofre*’s respect for sexual freedom was achieved on the back of the multiple sexual injuries to the less powerful person that the sex it protected involved.<sup>119</sup>

*Powell* and *Onofre* and their reappearance in the *Lawrence* litigation before the U.S. Supreme Court underscored the urgency of determining exactly what the lesbian and gay rights briefs in the case implied when they maintained that lesbians and gay men were “just like” heterosexuals. Did their like-straight arguments indicate to the Court that lesbians and gay men, like heterosexuals, did not and would not take claims of sexual abuse seriously? That gays, like

117. *Id.*

118. *Id.*

119. The amicus brief filed in *Bowers v. Hardwick* by the Lambda Legal Defense and Education Fund, Inc., both for itself and for the Gay and Lesbian Advocates and Defenders, the Bar Association for Human Rights of Greater New York, the Massachusetts Lesbian and Gay Bar Association, and the Gay & Lesbian Alliance Against Defamation, Inc., *Amicus Curiae* Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc. et al., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), did not. It repeatedly cited *Onofre* with approval. *Id.* at 6, 10 n.8, 11, 23 & n.20, 24. At one point, the Brief relied on *Onofre* to help rebut the “myths which seek to link homosexuality with child molestation, health threats, public lewdness, and so on.” *Id.* at 23 n.20. “[H]aving reviewed the record and considered actual evidence,” the Brief claimed, the *Onofre* court (like the court in another decision) “found that the state could [not] show the . . . statute[] in question served any valid interest.” *Id.* Indeed, on the very next page, the Brief went on to maintain that: “The *Onofre* court found that the state had failed to demonstrate how statutes such as Georgia’s [meaning: sodomy statutes] ‘serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the [s]tate.’” *Id.* at 24 (quoting *Onofre*, 51 N.Y.2d at 489-90). Presumably, the Lambda Brief offered these thoughts on *Onofre* only after “review[ing] the record and consider[ing] actual evidence [in the case].” *Id.* at 23 n.20. How it could if, in fact, it did, the Lambda Brief, did not pause to say.

heterosexuals, would celebrate relations of unequal power between sexual partners? Were the lesbian and gay rights briefs telling the Court that lesbians and gay men, like heterosexuals, would regard any victory for sex in *Lawrence* as sweet — even if that meant that the sex that would be protected by the Court's ruling was — or included — sexual violation?<sup>120</sup>

Beyond the predictable platitudes about “consent” interspersed throughout the lesbian and gay rights briefs in *Lawrence*<sup>121</sup> —

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120. This is not to suggest, as I make clear later on, that the sex *Lawrence* and *Garner* had was — or included — sexual violation. Neither made such a claim in the case. *But cf.* Bruce Nichols, “*We Never Chose to Be Public Figures*”: *Houston Men Were Surrounded By Secrecy Throughout Appeal*, DALLAS MORNING NEWS, June 27, 2003, at 19A; Lisa Teachey, *Defendant in Sodomy Case Out of Jail After Assault Charges Dismissed*, HOUSTON CHRON., Nov. 25, 1998, at A23. For a post-*Lawrence* illustration of the gay community's support for hierarchical sex in a case in which it was alleged as fact that at least some of the sex at issue was nonconsensual, as well as unwanted, see Brief of *Amici Curiae* in Support of Appellant on Behalf of the American Civil Liberties Union et al., *United States v. Marcum*, 69 M.J. 198 (C.A.A.F. 2004) (No. 02-0944).

121. To mention a few examples of the many more that can be found in these briefs, see Brief of Petitioners at 13-14, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“[T]he physical, bodily dimensions of how two persons express their sexuality in intimate relations are profoundly personal. Indeed, consent is a critically important dividing line in legal and societal views about sexuality for the very reason that individual control over sexual activity is of fundamental importance to every person's autonomy.”); CATO Brief, *supra* note 104, at 11 (“Indeed, a man could not be convicted of sodomy based upon the testimony of a sexual partner who was his ‘accomplice’; conversely, the partner's testimony was admissible if she or he were an unwilling participant or a minor (incapable of giving consent). This well-established proof requirement created an immunity for sodomy within the home between consenting adults.”); Institute for Justice Brief, *supra* note 109, at 14 (“There is a crucial difference, however, between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere — something that falls under the police power of state — and criminalizing private consensual conduct that harms neither the individuals involved nor the general public — something that is outside the bounds of the police power.”); *id.* at 14 (“The State's power to promote public virtue and govern conduct in public spaces ends when individuals conduct their private lives behind closed doors in ways that harm no one.”); HRC Brief, *supra* note 36, at 2 (“We think it manifestly clear that Texas' sodomy law infringes on a fundamental right shared by the entire community — the right to be free from governmental intrusion into, and criminalization of, private sexual relations between consenting adults.”); ACLU Brief, *supra* note 36, at 2 (arguing that the Court “should hold that the Due Process Clause . . . protects the liberty of consenting adults to decide what sexual intimacies they will share in private”); *id.* at 4 (“The Court's privacy cases recognize a fundamental right on the part of consenting adults to form and conduct intimate personal relationships within the protective shelter of the home.”); *id.* at 12 (“[A] thorough review of American history shows that, at least since the Revolution, Americans have believed that government has no place in the bedrooms of consenting adults.”); *id.* at 13 (“From as early as the post-Revolutionary period, states have very rarely applied laws banning sodomy, fornication, or adultery to consenting adults in private.”); *id.* at 25 (“Our nation's history and tradition thus show . . . a longstanding, virtually universal refusal to apply sodomy laws to private, consensual conduct by adults — a deliberate policy [reflecting] . . . [the] conviction that government has no business dictating to consenting adults what sexual intimacies they may have in private.”). *But see, e.g.*, ACLU Brief, *supra* note 36, at 13 (“More critically, sodomy laws have almost always been applied in cases involving children, the use of force, public sex, or prostitution.”); *id.* at 15 n.20 (“Prosecutions for sodomy today are almost entirely limited to either sexual conduct in a public place . . . or sexual conduct involving force or lack of consent where a sexual assault charge would be difficult to prove.” (alteration in original) (quoting RICHARD A. POSNER &

platitudes incapable on their own of addressing, much less resolving, the inequality problems in cases like *Powell* and *Onofre* — the briefs had nothing purposeful to say about the contemporary problems of sexual violence among lesbians and gay men. Not even the “international law” brief in *Lawrence* did,<sup>122</sup> though this is a problem that transcends borders.<sup>123</sup>

One of the few briefs supporting *Lawrence* and *Garner* that, however remotely, crafted an argument for lesbian and gay rights around same-sex sexual violence as such was the brief that William Eskridge wrote for the CATO Institute. (Its influence on the Court’s analysis of sodomy laws’ history at least appears to be not insubstantial.<sup>124</sup>) The CATO Brief submitted that in the nineteenth century, sodomy laws were partly an attempt to address same-sex sexual abuse.<sup>125</sup> This, the Brief explained, stood in contrast to modern sodomy laws, which — until *Lawrence* declared them unconstitutional

KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS 66 (1998)); Brief Amici Curiae of Mary Robinson, *supra* note 57, at 16 (“[T]hree limiting principles [harm, consent, and commerce] can be found in the jurisprudence of the European Court of Human Rights. In *Laskey, Jaggard & Brown v. United Kingdom*, 24 Eur. H.R. Rep. 39 (1997), . . . the Court emphasized the harm principle in declining to extend *Dudgeon* to protect consensual, sado-masochistic sexual activity in the home. The *Laskey* Court stressed ‘that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8’ privacy.”).

122. See *supra* note 121.

123. See, e.g., King et al., *supra* note 99, at 5 (“A British study of 930 gay male volunteers reported that just over a quarter had been ‘subjected to sex without . . . consent’ and that 99 of these men had been raped.” (alteration in original) (quoting Ford C.I. Hickson et al., *Gay Men as Victims of Nonconsensual Sex*, 23 ARCHIVES SEXUAL BEHAV. 281 (1994))); Lee Vickers, *The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective*, 3 MURDOCH U. ELECTRONIC J.L. ¶ 2 (1996) (“Whilst media attention on the [Western Australia] case focused exclusively on the use of the ‘battered wife syndrome’ . . . the case importantly draws attention to the little discussed problem of domestic or intimate violence in same sex relationships.” (footnote omitted)); Mark Levy, *Male Rape ‘Impossible’ In South Africa*, 365 GAY.COM NEWSCENTER, Aug. 11, 2003 (on file with author) (“Professor Divya Singh, executive director of police practice at Technikon Southern Africa in Pretoria, says the general attitude to male rape is largely disbelief, blame and mockery.”); *The Domestic Violence Officer — a vital role*, BBC, at [http://www.bbc.co.uk/threecounties/read\\_this/hitting\\_home/dvlo.shtml](http://www.bbc.co.uk/threecounties/read_this/hitting_home/dvlo.shtml) (last visited Sept. 9, 2004) (“If we had more publicity and more resources available such as a male refuge, it would encourage more [male victims] to come forward. To my knowledge there’s still not a refuge for men in this country.” (quoting Domestic Violence Liaison Officer Graham Pearson)).

124. The Court, for example, endorses the CATO Brief’s suggestion that, historically, sodomy laws supplemented rape laws as a means of addressing sexual abuse. Compare CATO Brief, *supra* note 104, at 9-12, with *Lawrence*, 539 U.S. at 568-71. Another example of the CATO Brief’s influence on the Court can be found by comparing the CATO Brief, *supra* note 104, at 15, with *Lawrence*, 539 U.S. at 571-73.

125. CATO Brief, *supra* note 104, at 11 (“A second, and in practice the primary, purpose of nineteenth century sodomy laws was protection of children, women, and weaker men against sexual assault.”).

— were grounded in homophobia.<sup>126</sup> Unnoticed in the CATO Brief, unfortunately, was the possibility that this historical purpose may have been implicated in some recent sodomy cases, including *Powell* and *Onofre*, both of which it mentioned approvingly.<sup>127</sup> The other briefs in *Lawrence* that repeated the CATO Brief's historical claims did not notice the possibility either.<sup>128</sup> From aught that appears in the lesbian and gay rights briefs filed in *Lawrence*, one could easily, if mistakenly, believe that inside the lesbian and gay communities there is only ever sex, never sexual abuse.<sup>129</sup>

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126. To be clear, the word "homophobia" does not itself appear anywhere in the CATO Brief. But its discussion of how sodomy laws came to target homosexuals in the twentieth century, and its evident disapproval of that targeting, makes the point plainly enough. See *id.* at 13-17. But see RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 66 (1996) (maintaining that "[p]rosecutions for sodomy are today almost entirely limited either to sexual conduct in a public place . . . or sexual conduct involving force or lack of consent, where a sexual assault charge would be difficult to prove"); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1896 n.11 (2004) (taking note of the "fairly common" practice "prior to *Lawrence's* invalidation of all statutes prohibiting consensual sodomy, of using consensual sodomy in charge bargaining — that is, of charging defendants prosecuted for forcible rape or sexual assault with consensual sodomy, to which they might plead guilty in exchange for a prosecutor's agreement to drop the more serious charge rather than to make the uphill attempt to prove absence of consent," but putting it aside as "[i]rrelevant" for purposes of analyzing the decision).

127. Also unnoticed in the CATO Brief are the possible applications of Eskridge's own independent observations about the limits of sexual consent. Describing the idea that "consent is negated by physical coercion or threats of coercion" as rape law's "core concept," he has proposed expanding that concept to "consider other forms of coercion" — what he has described as "undue pressure." William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 66 (1995). Within this approach, "conceptions of status [would] reenter the policy calculus — not to render consent irrelevant, but instead to consider whether apparent consent ('yes') has been rendered meaningfully." *Id.* "In situations in which one party stands in a position of authority or power over the other party, the latter's acquiescence in sexual relations might be doubted and more easily negated." *Id.* at 66-67 (footnote omitted). To clarify, Eskridge added in a footnote that he was "thinking specifically about employer-employee, minister/rabbi/priest-religious observant, guardian-ward, psychiatrist/doctor-patient, or teacher-student relationships." *Id.* at 67 n.57. What light this may shed on the CATO Brief's treatment of *Onofre* has yet to be explained, as does why Eskridge chose on his own behalf to close off his list at the point he did, rather than opening it up to other status-based, hierarchical relationships, gender itself, of course, being one, like class and age and race. See, e.g., Berta E. Hernandez-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. (forthcoming 2004) (on file with author) (Of *Lawrence* and Garner: "Their potential disparity — based on race, class, age, and perhaps gender expression — provides grounds to inquire about the existence of consent — an element the majority assumes (but would be irrelevant to the dissent).").

128. Nor, for that matter, does the Court's opinion in *Lawrence*, which recognizes the ideas in the CATO Brief. See *supra* note 124; cf. MOHR, *supra* note 109, at 51 n.9 ("In the nation's capital, for instance . . . there are no laws that particularly address the problem of males raping males. The [rape] statute defines rapes as involving only female victims. D.C. Code Ann. sect. 23-3502 (1981). Thus sodomy laws are used to fill this breach of the legal imagination. Male victims are left to plead necessity.").

129. As if sex, structured the way that it predominantly is under existing social conditions, could so easily and so neatly be dissociated from sexual abuse. The fantasy that sexual violence within the lesbian and gay communities at large tends to an empty set — and it is a fantasy, see *supra* note 99 — is one to which many cling. Richard Posner, for example,

Lesbian and gay rights advocates did not only suggest the non-existence of sexual violence within the lesbian and gay communities tacitly. During the oral arguments in *Lawrence*, Justice Antonin Scalia pressed Paul Smith, Lambda's representative before the Court,<sup>130</sup> on the implications of the like-straight principle he was advancing. Justice Scalia asked Smith: "What about rape laws? There are . . . rape laws . . . that only apply to . . . male/female rape . . . [Are they] unconstitutional?"<sup>131</sup> "Suppose the State has a rape law that — that, you know, that really requires the penetration of the female sex organ by — which is the classic common-law definition . . . of rape, and it has no law of . . . homosexual rape. You think that that law would be unconstitutional?"<sup>132</sup>

This was a perfect opportunity to acknowledge that yes, gays, just like heterosexuals, have a problem of sexual violence, and to say, yes, laws that do not offer meaningful and equal protection to lesbians and gay men, as well as heterosexuals, from sexual abuse should be declared unconstitutional. Indeed, Smith might have reminded the Court that under Texas law, men and women, straight and gay, were already at least formally protected against acts of sexual assault, and that many states had "gender-neutralized" their rape laws.<sup>133</sup> The

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has suggested that "rape of either men or women by women is exceedingly rare, as is male homosexual rape outside of prisons." RICHARD A. POSNER, *SEX AND REASON* 383 (1992). His sole citation for this proposition is PAUL H. GEBHARD ET AL., *SEX OFFENDERS: AN ANALYSIS OF TYPES* 791 (1965). (Just a page later, Posner again relied on Gebhard, this time for the proposition that "resort to force in male homosexual encounters" is "infrequen[t].") POSNER, *supra*, at 384 (citing GEBHARD, *supra*, at 791.) Some years ago, Richard Mohr sounded a similar note, commenting that: "It used to be that external sexual relations were the typical venting mechanism for pressures and tensions in male relations. *Gay males have never had much of a problem with spousal battering* — but such venting is now deadly." MOHR, *supra* note 109, at 237 (emphasis added). Susan Estrich was undoubtedly on to something where she remarked that: "[t]he apparent invisibility of the problem of male rape, at least outside the prison context, may well reflect the intensity of the stigma attached to the . . . homophobic reactions against its gay victims." Susan Estrich, *Rape*, 95 *YALE L. J.* 1087, 1089 n.1 (1986). A useful, if brief, discussion of these matters, including a few additional sources on prevalence, can be found in Deborah W. Denno et al., Panel Discussion, *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 125-38 (1994) (introductory remarks of the moderator, Deborah W. Denno).

130. In a technical sense, Smith served as Lawrence's and Powell's lawyer, but of course, he was also representing Lambda, in the name of the lesbian and gay communities. For literature bearing on these and related representational issues, see, for example, Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., 3d ed. 1998); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623 (1997); William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 *HASTINGS L.J.* 1101 (1997).

131. Oral Argument at 15 (Mar. 26, 2003), *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter *Lawrence* Oral Argument].

132. *Id.* at 16.

133. Jurisdictions that have include: Alaska, *ALASKA STAT.* § 11.41.410 (Michie 2002), Arizona, *ARIZ. REV. STAT. ANN.* §§ 13-1401, -1406 (West 2001), Arkansas, *ARK. CODE*

ANN. §§ 5-14-101, -103 (Michie 1997 & Supp. 2003), Colorado, COLO. REV. STAT. §§ 18-3-401 to -402 (2003), Connecticut, CONN. GEN. STAT. ANN. §§ 53a-65, -70 (West 2001 & Supp. 2004), Delaware, DEL. CODE ANN. tit. 11, §§ 761, 773 (2001), the District of Columbia, D.C. CODE ANN. §§ 22-3001 to -3002 (2001 & Supp. 2004), Florida, FLA. STAT. ANN. § 794.011 (West 2000 & Supp. 2004), Hawaii, HAW. REV. STAT. §§ 707-700, -730 (1993 & Supp. 2003), Illinois, 720 ILL. COMP. STAT. 5/12-12 to -13 (2003), Iowa, IOWA CODE ANN. §§ 702.17, 709.1 (West 2003), Louisiana, LA. REV. STAT. ANN. §§ 14:41, :42 to :43 (West 1997 & Supp. 2004), Maine, ME. REV. STAT. ANN. tit. 17-A, §§ 251, 253 (West Supp. 2003), Massachusetts, MASS. ANN. LAWS ch. 265, § 22 (Law. Co-op. 2002), Michigan, MICH. COMP. LAWS ANN. §§ 750.520a-.520b (West 1991 & Supp. 2004), Minnesota, MINN. STAT. ANN. §§ 609.341-.342 (West 2003), Mississippi, MISS. CODE ANN. §§ 97-3-95 to -97 (2000), Montana, MONT. CODE ANN. §§ 45-2-101, 45-5-502 to -503 (2003), Nebraska, NEB. REV. STAT. ANN. §§ 28-318 to -319 (Michie 2003), Nevada, NEV. REV. STAT. ANN. 200.364-.366 (Michie 2001 & Supp. 2003), New Hampshire, N.H. REV. STAT. ANN. §§ 632-A:1 to :2 (Supp. 2003), New Jersey, N.J. STAT. ANN. § 2C:14-1 to -2 (West 1995 & Supp. 2004), New Mexico, N.M. STAT. ANN. § 30-9-11 (Michie 1994 & Supp. 2003), North Dakota, N.D. CENT. CODE §§ 12.1-20-02 to -03 (1997), Ohio, OHIO REV. CODE ANN. §§ 2907.01-.02 (West 1997 & Supp. 2003), Oklahoma, OKLA. STAT. ANN. tit. 21, § 1111 (West 2002), Pennsylvania, 18 PA. CONS. STAT. ANN. §§ 3101, 3121 (West 2000), Rhode Island, R.I. GEN. LAWS §§ 11-37-1 to -2 (2002), South Carolina, S.C. CODE ANN. §§ 16-3-651 to -652 (Law. Co-op. 2003), South Dakota, S.D. CODIFIED LAWS §§ 22-22-1 to -2 (Michie 1998 & Supp. 2003), Tennessee, TENN. CODE ANN. §§ 39-13-501 to -503 (2003), Texas, TEX. PENAL CODE ANN. § 22.011 (Vernon 2003 & Supp. 2004-2005), Vermont, VT. STAT. ANN. tit. 13, §§ 3251-3252 (1998), Washington, WASH. REV. CODE ANN. §§ 9A.44.010, .040 (West 2000), West Virginia, W. VA. CODE ANN. §§ 61-8B-1, -3 (Michie 2000), Wisconsin, WIS. STAT. ANN. § 940.225 (West 1996 & Supp. 2003), and Wyoming, WYO. STAT. ANN. §§ 6-2-301 to -302 (Michie 2003).

Those that have not include: Alabama, ALA. CODE § 13A-6-61 (Supp. 2003) (rape in the first degree is opposite-sex sex crime), Georgia, GA. CODE ANN. § 16-6-1 (2003) (rape is offense perpetrated by men against women by use of “male sex organ”), Idaho, IDAHO CODE § 18-6101 (Michie 2004) (rape is offense “accomplished with a female” by male, using penis), Indiana, IND. CODE ANN. 35-42-4-1 (West 1998 & Supp. 2004) (rape is cross-sex crime), Kansas, KAN. STAT. ANN. §§ 21-3501 to -3502 (1995 & Supp. 2003) (rape requires “sexual intercourse,” defined as “any penetration [however slight] of the female sex organ by a finger, the male sex organ or any object”), Kentucky, KY. REV. STAT. ANN. §§ 510.010, .040 (Michie 1999), Maryland, MD. CODE ANN., CRIMINAL LAW § 3-303 (2002 & Supp. 2003) (rape requires “vaginal intercourse”), Missouri, MO. REV. STAT. §§ 566.010, .030 (2000 & Supp. 2003) (rape requires “sexual intercourse,” defined as “penetration, however slight, of the female sex organ by the male sex organ”), New York, N.Y. PENAL LAW §§ 130.00, 25-.35 (McKinney 2004) (rape, including to the third degree, requires “sexual intercourse,” which “has its ordinary meaning and occurs upon any penetration, however slight”), North Carolina, N.C. GEN. STAT. §§ 14-27.2 to .3 (2003) (rape — both first and second degree — requires “vaginal intercourse”), and Oregon, OR. REV. STAT. §§ 163.305, .355-.375 (2003) (rape entails “sexual intercourse,” which “has its ordinary meaning and occurs upon any penetration, however slight”).

In California, Utah, and Virginia, rape is defined in statutory language broad enough to be described as “gender neutral,” CAL. PENAL CODE §§ 261, 286, 288a, 289 (West 1999 & Supp. 2004); UTAH CODE ANN. § 76-5-402 to -407 (2003); VA. CODE ANN. § 18.2-61, -67.1, to -67.4 (Michie 1996 & Supp. 2004), but the highest court in each jurisdiction has supplemented that language in such a way as (to appear) to make rape a cross-sex crime. See *People v. Holt*, 937 P.2d 213, 250 (Cal. 1997) (holding that “sexual intercourse” “require[s] vaginal penetration”); *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988) (“[P]enetration” involves “entry between the outer folds of the labia.”); *Tuggle v. Commonwealth*, 323 S.E.2d 539, 549 (Va. 1984) (“To prove rape, the evidence must establish beyond a reasonable doubt that an accused has had sexual intercourse with a female by force and against her will.”), *vacated and remanded on other grounds*, 471 U.S. 1096 (1985), *aff’d on remand*, 334 S.E.2d 838 (1985), *cert. denied*, 478 U.S. 1010 (1986); *Carter v. Commonwealth*, 428 S.E.2d 34, 41 (Va. App. 1993) (“To prove that sexual intercourse occurred, the evidence must establish that ‘there has been an actual penetration to some extent of the male sexual organ into the female sexual organ.’”) (quoting *Spencer v. Commonwealth*, 384 S.E.2d 775, 779 (1989), *cert.*

Lambda Brief in *Lawrence* that Smith signed, after all, had made direct (albeit passing) reference to Texas's sexual assault law, one of only two lesbian and gay rights briefs in *Lawrence* to do so.<sup>134</sup> (None of the published opinions in *Lawrence* makes any mention of this law at all.) To bear out this point, Smith might have invoked Justice Scalia's opinion for the Court in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>135</sup> which extended sex-equality protections to male victims of sexual abuse, thus casting doubt on sex-differentiated and sexual-orientation-differentiated protections against it.<sup>136</sup> "This is a lesson that you, Justice Scalia, taught us on the Court's behalf in *Oncale*," Smith could easily have said.

Alternatively, Smith might have responded to Justice Scalia's question with reference to *Limon v. Kansas*,<sup>137</sup> a case that the Supreme Court was holding at the time of the oral arguments in *Lawrence*, which had reached the Court even before *Lawrence* did, by pointing to the difficulties that can arise for lesbians and gay men when same-sex sexual abuse is not treated the same as its cross-sex counterpart.

*denied*, 493 U.S. 1036, (1990) (quoting *Tuggle*, 323 S.E.2d at 549)). Nothing here is meant to suggest that, in those jurisdictions that have not gender-neutralized their rape laws, same-sex rape is not a crime.

134. The other direct reference in the lesbian and gay rights briefs in *Lawrence* to Texas's law against sexual assault appears in a footnote in the Law Professors' Brief. See Brief of Constitutional Law Professors, *supra* note 25, at 20 n.10 (observing that Texas's sexual assault law, like the state's ban on public sex and its ban on sex with minors, applies "to heterosexual and homosexual conduct alike"). Needless to say, this is hardly an analysis of how that law has operated in practice or how the acts it addresses are related to sex inequality.

135. 523 U.S. 75 (1998). For my reading of *Oncale*, see Spindelman, *Sex Equality Panic*, *supra* note 101.

136. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1211 (9th Cir. 2001) (Nelson, J., dissenting) ("While gay-baiting insults and teasing are not actionable under Title VII, a line is crossed when the abuse is physical and sexual."). Judge Nelson added:

Rene has alleged that his attackers shoved their fingers into his anus and grabbed at his genitals. If his attackers were women or if they were gay men — or if Rene were a lesbian attacked by straight men — there is no question that the plaintiff's openly gay status would not be a complete defense to his Title VII claim. Nor would sexual orientation provide a defense for a gay male who harasses a female employee. That Rene's attackers were ostensibly heterosexual men is no basis for a different outcome — the attack was homosexual in nature, and his case involves allegations of sexual abuse that female employees did not have to endure. Rene's attackers may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming their own heterosexuality, or any combination of a myriad of factors, the determination of which falls far beyond the competence of any court. The effect was to humiliate Rene as a man. Enforcing Title VII in the mixed-gender context does not involve determining which pleasure center in the attackers' brains was stimulated by the attacks, nor should it in this case.

*Id.* at 1211-12. Judge Nelson's conclusion was vindicated by an *en banc* panel of the Ninth Circuit in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*). Not all courts have recognized the doubt that *Oncale* heaps on the contrary view — a view that *Lawrence*'s like-straight reasoning could likewise, as a principle, be understood to disaffirm.

137. *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002), *aff'd* *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).



*Limon*, as Smith undoubtedly knew,<sup>138</sup> involved a constitutional challenge to Kansas's statutory rape regime by a developmentally disabled defendant who, prior to the conviction at issue in *Limon*, had twice been convicted as a teen of aggravated sodomy for the sex he had with younger boys. With the support of the lesbian and gay communities as *amici*, Limon urged the Court to set his conviction aside, in part, because the Kansas law that provided for it did not treat homosexuality and heterosexuality alike. Limon's sentence was much, much more severe than it otherwise would have been — only because he and M.A.R., the developmentally disabled, younger boy with whom Limon admitted having sex, were of the same sex. Central to the Kansas Court of Appeals' initial decision upholding Limon's conviction and sentence, since reaffirmed,<sup>139</sup> was a flat-footed rejection of the idea that homosexuality and heterosexuality were, constitutionally speaking, alike, hence that same-sex statutory rape should be treated in just the same way as cross-sex statutory rape was under state law. For doctrinal support, the Kansas court invoked and relied on the authority of *Bowers v. Hardwick*.<sup>140</sup> Smith could have said, "our like-straight argument does not admit of such results. Sexual violence is sexual violence irrespective of the sex and sexual orientation of the perpetrator and the victim. There is no good justification for not treating them the same."

Or Smith might have returned Justice Scalia's volley by asking, "What, exactly, Justice Scalia, do you mean by 'homosexual rape'? Same-sex sexual assault generally? Same-sex sexual assault committed by straight men? Against them? Is 'homosexual rape' only rape that is committed by 'provably' or out gay men? Does it refer to a form of sexual violence that, socially speaking, can make a heterosexual victim wonder whether he is, or might be, gay? Does the term construe any man who sexually assaults another man as 'homosexual' by definition?<sup>141</sup> Does it make same-sex rape a crime that only gay men

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138. One of the *amici* in *Limon* — DKT Liberty Project — was (and is) represented in the litigation by lawyers at Jenner & Block's Washington, D.C. office, where Smith is a senior partner. See Brief of *Amicus Curiae* The DKT Liberty Project in Support of Appellant, *Limon v. Kansas*, 41 P.3d 303 (Kan. Ct. App. 2002) (No. 00-85898-A).

139. *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004). The Kansas appeals court does not persuasively reconcile its reaffirmation of Limon's conviction with *Lawrence's* like-straight reasoning, much less its declaration that majoritarian morality *simpliciter* is not an adequate constitutional justification for laws regulating consensual sex. *Lawrence*, 539 U.S. at 577-78; *id.* at 582-83, 584 (O'Connor, J., concurring). The dissenting opinion of Judge Pierron in *Limon* offers a more faithful reading of *Lawrence*. *Limon*, 83 P.3d at 243 (Pierron, J., dissenting).

140. *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002).

141. Examples of such homophobic thinking are numerous. See, e.g., Editorial, *Media Have Two Standards on Crimes Involving Gays*, GREENSBORO NEWS & REC., Jan. 28, 2000, at A12 ("[I]f the two men [responsible for Jesse Dirkhising's death, see *supra* note 101] had not been homosexuals, they would not have raped a 13-year-old boy.").

commit? Is there any room in the notion of ‘homosexual rape’ for lesbian women at all?”

What Smith said instead was: “I didn’t suggest that [laws prohibiting only male-on-female rape are] unconstitutional.”<sup>142</sup> The reason Smith offered to shore up his view was this: A State might justify a law that prohibited only male-on-female rape by coming forward with evidence that “homosexual rape” “is not a problem that needs to be addressed or that the victims are more able to protect themselves.”<sup>143</sup> To repeat the relevant point: A State may justifiably choose not to regulate so-called “homosexual rape,” either because there is “evidence that this is not a problem that needs to be addressed or that the victims [ — presumably men, including gay men — ] are more able to protect themselves.”<sup>144</sup>

But what about gay victims of “homosexual rape,” the very people who, among others, have not, by definition, been able to protect themselves? Should we maybe believe that they wanted it, so they were not raped?<sup>145</sup> That they were sexually actualized by it? How circular, providing evidence that same-sex rape is “not a problem that needs to be addressed.”<sup>146</sup> If one believes that men “are more able to

142. *Lawrence* Oral Argument, *supra* note 131, at 15.

143. *Id.* at 16. As for the idea that victims of same-sex sexual abuse are better able to protect themselves, it is powerfully belied by the facts. See, e.g., Anthony Glassman, *Man Gets Ten Years for Kidnapping Akron Student*, GAY PEOPLE’S CHRON., Mar. 19, 2004, at 4 (reporting on the conviction of Patrick C. Geiger for the abduction, kidnapping, and felony assault — but not the rape — of the University of Akron student, and observing that one juror explained the non-conviction for rape on the grounds that it was believed that “the sex was consensual but became violent”); Eric Resnick, *Man Says Akron Police Move Too Slowly on Male Rape*, GAY PEOPLE’S CHRON., Sept. 5, 2003 (detailing the documented physical violence that punctuated the alleged rape of a thirty-four-year-old University of Akron student); see also Eric Resnick, *Police Arrest Suspect in Rape of Akron Student*, GAY PEOPLE’S CHRON., Oct. 10, 2003, at 3. Other reports on this case include: Carl Chancellor, *Kidnapper Guilty in Assault of Man*, AKRON BEACON J., Mar. 13, 2004, at B1 (describing the victim in the case as having “escaped” “half-naked” “from Geiger’s apartment” and the assistance provided by “another tenant in the building, who called police”); Ed Meyer, *HIV-Positive Rape Suspect in Custody*, AKRON BEACON J., Feb. 25, 2004, at A1; Ed Meyer, *Man Wrongly Released Back in Police Custody*, AKRON BEACON J., Feb. 24, 2004, available at 2004 WL 56254342; Phil Texler & Ed Meyer, *HIV Rape Suspect Set Free by Error*, AKRON BEACON J., Feb. 24, 2004, at A1; *Law and Order*, PLAIN DEALER, Mar. 17, 2004, at B3; *Law and Order*, PLAIN DEALER, Mar. 13, 2004, at B3 (“The victim said there was no one else at the apartment and Geiger, who is HIV-positive, forced him to have sex, then beat him and choked him. Geiger said the sex was consensual and the victim knew that Geiger carried the virus that causes AIDS. The jury acquitted Geiger of rape.”). For several first-hand accounts of same-sex rape that similarly rebut it, see, for example, SCARCE, *supra* note 98, at xiii-xvii; Funk, *supra* note 98, at 221-22; Christopher B. Smith, *Survival*, in SCARCE, *supra* note 98, at 183, 183-195 (describing rape and aftermath).

144. *Lawrence* Oral Argument, *supra* note 131, at 16.

145. Cindy Struckman-Johnson & David Struckman-Johnson, *Acceptance of Male Rape Myths Among College Men and Women*, 27 SEX ROLES 85, 87 (1992) (“Some male victims — especially gay men — are made to feel that they ‘asked for’ the rape by their own indiscreet or risky behavior.” (citation omitted)).

146. *Lawrence* Oral Argument, *supra* note 131, at 16.

protect themselves,<sup>147</sup> and so is willing to disbelieve men's claims of rape when they have not, the problems of same-sex sexual violence disappear. All men, gay or straight, are apparently alike: sexually inviolable and unviolated.<sup>148</sup>

Leaving aside how Smith's remark naturalized, hence justified, male sexual aggression, and how it reinforced the notion that women are defined by their capacity to be sexually violated by men,<sup>149</sup> someone might have thought to ask Smith from the Bench, "why, if the like-straight analogy you are advocating is to be taken seriously, should cross-sex sexual violence be any different?" Nobody did.

For some of us at least, the message that emerged from the *Lawrence* litigation, addressed directly to lesbian and gay victims of sexual abuse, was clear. It said: *Lawrence* is not for you; it is about unleashing and protecting what was done to you. In anticipation of the Court's decision in the case, the question was whether the Court would follow suit. How would the Court address the problems of same-sex sexual violence within the lesbian and gay communities? Would it, or would it ignore the problems altogether?

Signs of what the Court has done — of how it has answered the questions — are found in various places in the Court's *Lawrence* opinion.<sup>150</sup> But the most disconcerting indications of what the Court's view of same-sex sexual violence among lesbians and gay men is, emanate from the right to sexual intimacy *Lawrence* introduces. A sketch of that right, to explain, is thus a useful place to begin.

From its opening paragraph, *Lawrence* makes clear that the substantive due process right to sexual intimacy it embraces is a quintessentially individual right:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an

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147. *Id.*

148. See, e.g., ISLAND & LETELLIER, *supra* note 99, at 102-103 ("Given our socialization in American culture, it is expected, even 'natural,' to see women as victims. . . . Men, however, according to our culture, are not victims, but victimizers: strong, tough, powerful, decision-making, self-reliant, and controlling. Men may be victimizers . . . but not victims.").

149. *C.f.* Dothard v. Rawlison, 433 U.S. 321, 336 (1977) ("The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."). But see Ruth Colker, *Pregnant Men*, 3 COLUM. J. GENDER & L. 449, 483 (1993) ("The victims of sex offenses are not limited to women. In addition, irrespective of the sex of the victims of sex offenses outside prison, men are routinely raped in prisons.").

150. The Court's approving citation of *Powell*, *Lawrence*, 539 U.S. at 576, without any discussion of its facts, and its avoidance of any reference to Texas's rape laws, offer independent reasons for hesitation. See also *infra* note 163.

autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.<sup>151</sup>

In the Court's view, all persons, without distinction, including any distinction along sexual-orientation lines, enjoy freedom in the social world, "autonomy of self," prior to state intervention. The principal threat to this freedom is "unwarranted government intrusions." Through its powers of regulation — including regulation over what the Court refers to as "certain intimate conduct," which is to say sex, in both "its spatial and more transcendent dimensions" — the State may vex, oppress, even occupy and define "lives and existence" themselves. To allow it to do so would be to allow the State to disrespect "liberty," hence mock freedom — or worse: destroy it altogether.

Accordingly, the Court introduces the right to sexual intimacy, which is to serve as a bulwark against these unsavory possibilities. Its recognition, *Lawrence* explains, functions to guarantee that, "as a general rule," neither the State nor its courts, will be in a position to "attempt[] . . . to define the meaning of [personal] relationship[s] or to set [their] boundaries."<sup>152</sup>

There are, to be sure, limited circumstances in which State intrusions into the sexual arena may not be "unwarranted"<sup>153</sup>: When there is, in the Court's words, "injury to a person or abuse of an institution the law protects."<sup>154</sup> But these are exceptions to the "general rule" that the State is not to superintend sex.

To police the boundaries of these exceptions, hence to check the State's dominion over sex, the *Lawrence* Court rules that the State and its courts must ordinarily treat sex as consensual absent proof it was not. As much as anything else, the Court issues this rule by its own example. During oral arguments in the case, Charles Rosenthal, Jr., for Texas, pointed out that the record the Court had before it contained no proof that Lawrence and Garner consented to the sex they were convicted under Texas law for having had. "[C]onsent may be *alleged* in this case," he remarked, "but consent is *not proven in the record*."<sup>155</sup> Rosenthal's observation fell on deaf ears during his oral

151. *Id.* at 562.

152. *Id.* at 567.

153. *Id.* at 562, 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

154. *Id.* at 567.

155. *Lawrence* Oral Argument, *supra* note 131, at 35 (emphasis added); see also Respondent's Brief, at 6 n.7, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102) ("While neither of the petitioners was charged with any variant of sexual assault, prosecution for such an offense would require an acknowledgment from at least one of the parties that the sexual activity was non-consensual. Because there are any number of reasons why a person might choose not to cooperate with authorities in the investigation and prosecution of a sexual offense, *mutual consent cannot necessarily be inferred from the parties' silence.*" (emphasis added)).

arguments, and is unmentioned as such in the Court's *Lawrence* opinion, which renders the fact that consent was not established in the record irrelevant by declaring that, well, it was. According to the Court: "The petitioners [Lawrence and Garner] were adults at the time of the alleged offense. Their conduct was in private and consensual."<sup>156</sup> Later: these "two adults . . . with full and mutual consent from each other[] engaged in sexual practices common to a homosexual lifestyle."<sup>157</sup>

The Court's indulgence of a presumption that the sex Lawrence and Garner had was "full[y] and mutual[ly]" consensual is integral to its constitutional project of deregulating sex "as a general rule,"<sup>158</sup> though not logically required by it. Without it, the Court might have held, for instance, that Texas's sodomy law violated a right to sexual intimacy, because it did not permit Lawrence and Garner to defend themselves against a charge of engaging in sodomy with proof they had done so with "full and mutual consent." Treating the sex at issue in *Lawrence* as though they had, because the State had not proved that they had not, thus functions as the fulcrum on which *Lawrence* sets — then turns — the scope of its right to sexual intimacy. Making it part of its constitutional ruling in the case expands the right to sexual intimacy considerably from what it might have been to what it is: from a right that might have required the State to allow a consent defense to a charge of sodomy to one that precludes State regulation of sodomy altogether until the State has proved "injury to a person." The right to sexual intimacy, including its presumption that sex is consensual when it takes place, is not to be enjoyed at the State's pleasure. It is the State's pleasure to regulate sex that the right to sexual intimacy protects *against*.

To be certain, there is nothing particularly novel here on a conceptual level, except perhaps that same-sex sexual conduct is afforded the same presumption that it was engaged in with the consent of the parties to it that, as a practical and legal matter, if not exactly as a matter of constitutional right, heterosexual sexual conduct has long enjoyed. The principal novelty of *Lawrence* is doctrinal: its constitutionalization of an individual's right to sexual intimacy that entails a rich presumption of consent, which applies equally to cross-sex and same-sex sex.

This is not a singularly happy development.<sup>159</sup> Male supremacy, sexually expressed, chiefly, but not exclusively, in the form of sexual

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156. *Lawrence*, 539 U.S. at 564.

157. *Id.* at 578.

158. *Id.* at 567.

159. Thanks to Charlotte Croson for conversations that were especially helpful in hammering out a number of the points that follow.

abuse of women by men, is a constitutive element in the production and reproduction of the inequalities between the sexes. In this sense, “[s]exuality . . . is not a discrete sphere of interaction or feeling or sensation or behavior in which preexisting social divisions may or may not be played out.”<sup>160</sup> What it is, is:

a pervasive dimension of social life, one that permeates the whole, a dimension along which gender occurs and through which gender is socially constituted; it is a dimension along which other social divisions, like race and class, partly play themselves out. Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity. So many distinctive features of women’s status as second class — the restriction and constraint and contortion, the servility and the display, the self-mutilation and requisite presentation of self as a beautiful thing, the enforced passivity, the humiliation — are made into the content of sex for women. Being a thing for sexual use is fundamental to it. This approach identifies not just a sexuality that is shaped under conditions of gender inequality but reveals this sexuality itself to be the dynamic of the inequality of the sexes. It is to argue that the excitement at reduction of a person to a thing, to less than a human being, as socially defined, is its fundamental motive force. It is to argue that sexual difference is a function of sexual dominance. It is to argue a sexual theory of the distribution of social power by gender, in which this sexuality that is sexuality is substantially what makes the gender division be what it is, which is male dominant, wherever it is, which is nearly everywhere.<sup>161</sup>

Sandra Bartky has summarized the modest theoretical point necessary for present purposes where she observes that: “the eroticization of relations of domination . . . surely perpetuates” “the system of male supremacy.”<sup>162</sup>

If this is so, *Lawrence*’s individuation of sexuality, hence its individuation of sexual abuse, takes a substantive position on existing inequalities between the sexes. They are the product of autonomously made sexual decisions that are constitutionally protected as such. The ideological determinants of all these decisions,<sup>163</sup> as well as their social

160. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 130 (1989).

161. *Id.*

162. SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 51 (1992).

163. The Court could have forestalled some of the sex-equality concerns with its *Lawrence* decision had it confronted, and disavowed, male supremacy, which has not only conditioned heterosexuality and its sexual violence, but also prohibitions against homosexuality. Within male supremacy, homosexuality is seen as an act of sexual violence per se; in the words of William Blackstone, quoted with approval in Chief Justice Burger’s concurring opinion in *Hardwick*, sodomy — long the master metonym for homosexuality — is “an offense of even ‘deeper malignity’ than rape.” *Bowers v. Hardwick*, 478 U.S. 168, 197 (Burger, J., concurring) (citations omitted). This position serves to stigmatize homosexuality and, simultaneously, to obscure the realities of same-sex sexual violence, treating the phenomenon both as a justification for homophobic abuse when its victims are (or are

and political effects, are never analyzed. In silence, have they been affirmed?

I hope not. Still, the Court's choice not to tell us leaves perpetrators of sexual abuse free to argue that *Lawrence* reauthorizes, in formally new doctrinal terms, old-fashioned constraints on sex equality measures designed to redress sex inequality through limitations on sexual abuse. To appreciate the potential stakes, consider the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, the fountainhead of the Supreme Court's sexual harassment jurisprudence — perhaps *the* classic example of a doctrinal regime in which limitations on sexual violence in the form of prohibitions against sexual harassment are grounded in sex-equality concerns. In *Meritor*, the Supreme Court announced that sexual harassment rules were not to be governed by the criminal law's ordinary sexual injury standards. According to *Meritor*, the touchstone of a “hostile work environment” sexual harassment claim under Title VII is whether a plaintiff can establish, inter alia, “that the alleged sexual advances were unwelcome, not whether . . . actual participation in sexual intercourse was voluntary.”<sup>164</sup> Thus, the Court went on to hold, “the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.”<sup>165</sup> In saying so, *Meritor* opened, but left unsettled, whether the State could, as a general matter, replace “‘voluntariness’ in the sense of consent”<sup>166</sup> with a

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thought to be) heterosexual, and with derision when victims are (or are thought to be) gay. Addressing the male-supremacist dimensions of sodomy prohibitions, and declaring them unconstitutional because of them, would have thus set the Court well on its way to delivering lesbian and gay victims of sexual abuse a right to sexual freedom they could have enjoyed. Given the Court's own like-straight reasoning, this result would have been good for survivors of sexual abuse across the board. But the Court chose not to follow this course, even though it had the perfect opportunity to do so, presented both by the Texas law before the Court, sex discriminatory on its face, see MacKinnon, *The Road Not Taken*, *supra* note 91, as well as by the amicus brief submitted by the NOW Legal Defense and Education Fund, which made a sex-equality argument against sodomy bans, see Brief of Now Legal Defense and Education Fund as *Amicus Curiae* in Support of Petitioners at 4-25, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102). Rather than taking advantage of these opportunities to clarify that neither its like-straight reasoning nor its corresponding right to sexual intimacy is aligned with male supremacy, the Court lets them pass without mention, hence leaves open — even invites — sex-equality theory's question about what its decision means for lesbian and gay (and other) victims of sexual abuse. The opinion of Judge Marsha Berzon in *Anderson v. Morrow*, 371 F.3d 1027, 1033 (9th Cir. 2004) (Berzon, J., concurring in part and dissenting in part), is in certain respects a predictable consequence of the Court's decision in *Lawrence*.

164. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986). Cf. Brief of Respondent Mechelle Vinson at 23, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) [hereinafter *Vinson Brief*] (“It is false that the Court of Appeals ‘eliminates unwelcomeness as an issue.’ Perhaps the Bank perceives this because it does not distinguish, as do the Court of Appeals and respondent, between sexual *advances* that are welcome and sexual *intercourse* that appears voluntary.” (citation omitted)).

165. *Meritor*, 477 U.S. at 68.

166. *Id.* at 69.

welcomeness<sup>167</sup> standard as the crease between legally actionable sexual violence and sex, including as a matter of criminal law.<sup>168</sup>

This is the point at which the sex-equality concerns with *Lawrence* can be articulated in doctrinal terms: Citing *Lawrence*, with its individuation of sexual violence and sex, and its reliance on “consent” as the dividing line between them, perpetrators of sexual harassment might insist that, in order to respect *Lawrence*’s constitutional right to sexual intimacy, sexual harassment rules, which are (at least as the Supreme Court has affirmed them, to date) statutorily grounded,<sup>169</sup> must be rewritten to allow for a “voluntariness” or “consent” defense

167. *Id.*

168. For a “rereading protocol” that calls for “*not believing* Mechelle Vinson on the crucial questions of unwantedness and consent,” hence for disputing her credibility on both grounds, in order to challenge sexual-harassment law and its sex-equality underpinnings as part of a queer-theoretic effort to oppose the legal regulation of sex, see Janet Halley, *Roundtable Discussion: Subversive Legal Moments*, 12 TEX. J. OF WOMEN & L. 224, 226-29 (2003); cf. Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter Halley, *Sexuality Harassment*] (offering a similar type of rereading of the facts of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). *But see generally* Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra*, at 201 (providing a critical assessment of this interpretive protocol, its aims, including its sexual politics, its ethics, and its dangers); Spindelman, *Sex Equality Panic*, *supra* note 101.

169. A number of lower courts have held that they are constitutionally, and not just statutorily, guaranteed. *See, e.g.*, *Moring v. Arkansas Dep’t of Corr.*, 243 F.3d 452, 455 (8th Cir. 2001); *Riley v. Buckner*, 1 Fed. Appx. 130, 133 (4th Cir. 2001) (citing *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994)); *Noland v. McAdoo*, 39 F.3d 269, 271 (10th Cir. 1994); *Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994); *Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994); *Pontarelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991); *King v. Bd. of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (citing *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986)); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478-79 (3d Cir. 1990); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 575-76 (2d Cir. 1989); *Starrett v. Wadley*, 876 F.2d 808, 814-15 (10th Cir. 1989); *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989); *Volk v. Coler*, 845 F.2d 1422, 1433 (7th Cir. 1988); *Long v. Laramie County Cmty. Coll. Dist.*, 840 F.2d 743, 752-53 (10th Cir. 1988); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); *Huebschen v. Dep’t of Health and Soc. Servs.*, 716 F.2d 1167, 1171-72 (7th Cir. 1983); *Quinn v. Nassau County Police Dep’t*, 53 F. Supp. 2d 347, 356-57 (E.D.N.Y. 1999); *Collins v. Christopher*, 48 F. Supp. 2d 397, 405 (S.D.N.Y. 1999); *Carney v. City of Shawnee*, 38 F.Supp. 2d 905, 911 (D. Kan. 1999); *Beattie v. Farnsworth Middle Sch.*, 143 F.Supp.2d 220, 231-32 (N.D.N.Y. 1998); *Vandermeerv. v. Douglas County*, 15 F. Supp. 2d 970, 984 (D.Nev. 1998); *Huffman v. City of Prairie Vill.* 980 F. Supp. 1192, 1205 (D. Kan. 1997); *Chapin v. Univ. of Mass. at Lowell*, 977 F. Supp. 72, 80 (D. Mass 1997); *Murray v. Kutzke*, 967 F. Supp. 337, 345 (N.D. Ill. 1997); *Wise v. New York City Police Dep’t*, 928 F. Supp. 355, 364 (S.D.N.Y. 1996); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1531-32 (D. Ala. 1994); *Stafford v. State of Missouri*, 835 F. Supp. 1136, 1140 (W.D. Mo. 1993); *Fuchilla v. Prockop*, 682 F. Supp. 247, 255 (D.N.J. 1987); *Estate of Scott v. deLeon*, 603 F. Supp. 1328, 1332 (E.D. Mich. 1985); *Gobla v. Crestwood Sch. Dist.*, 609 F. Supp. 972, 978-79 (M.D. Pa. 1985); *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1216-17 (D.N.J. 1984); *Woerner v. Brzeczek*, 519 F. Supp. 517, 519-20 (N.D. Ill. 1981); *County of Los Angeles v. Sup. Ct.*, 981 P.2d 68, 71 (Cal. 1999). The Supreme Court’s own opinion in *Davis v. Passman*, 442 U.S. 228 (1979), as well as its ruling in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), to mention two relevant precedents, lend support to the notion that they are constitutionally required. But so far, no Supreme Court decision has squarely held they are.



to a sexual harassment charge. If the State is constitutionally required to presume that sex is consensual if it took place, and if sex that has not ultimately been proved not to have been consensual is, as such, beyond the State's regulatory authority, harassers might assert there is no principled, constitutional justification for holding that the voluntariness of sexual activity backgrounding a sexual harassment claim (when it does) "ha[s] no [legal] materiality whatsoever."<sup>170</sup> It is, they might say, the whole ballgame.

Continuing, perpetrators of sexual harassment might contend that if non-consent is a constitutional precondition for state intervention into the sexual arena, even assuming all other elements of a sexual harassment cause of action can be met and are constitutionally adequate, proof that sexuality was "unwelcome" is not a sufficient warrant for state action.<sup>171</sup> Only "non-consent" will do. From this, it is a relatively small step to the proposal — not wholly unlike those recently floated by some queer theorists and other sexual libertarians — that sexual harassment, because sexual, is individual, hence personal, hence protected.<sup>172</sup> *Lawrence* does generally see sexuality, if

170. *Meritor*, 477 U.S. at 62.

171. Brenda Cossman, for example, while speaking about *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), sketches an argument along these lines in the name of "sex radical feminism":

Sex radical feminism, in keeping with its insistence on sex and sexuality as ambivalent, producing the possibilities of pleasure and danger, would focus attention on the question of consent. While the absence of consent could justify legal intervention, if the sexual encounters *appeared* to be consensual, if Sheila Twyman agreed to participate in the bondage, then the fact that she did not *enjoy* the sex encounter would not be sufficient to make it actionable. Sex radical feminism would emphasize that although consensual S/M may not be to everyone's erotic *taste*, it should be recognized as a legitimate sexual choice.

Brenda Cossman, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 617, 622 (2003) (italics added). Cossman does not cite, and I am otherwise unaware of, any sex equality argument in the legal academic literature that calls for unpleasant or unpleasurable or even unenjoyed sex to be legally actionable as sexual abuse.

172. Cf. Vinson Brief, *supra* note 164, at 15-16. A number of academic commentators, writing in the name of feminism, have recently begun to emphasize the "regulatory" nature of anti-sexual-violence regimes. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003). Some so-called "sex radicals" and "queer theorists" — sometimes donning a feminist mantle, sometimes not — are unambiguously hostile to the "regulatory" nature of anti-sexual-violence rules, seeing them as a form of (sexual) oppression because sexuality is their object. See, e.g., Jane Gallop, *Resisting Reasonableness*, 25 CRITICAL INQUIRY 599, 608 (1999); Halley, *Sexuality Harassment*, *supra* note 168; Ann Pellegrini, *Pedagogy's Turn: Observations on Students, Teachers, and Transference-Love*, 25 CRITICAL INQUIRY 617 (1999). In these and other analyses, see, e.g., Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was It a Victory?*, 6 DUKE J. GENDER L. & POL'Y 113 (1999), it is sometimes suggested that lesbians and gay men as "sexual minorities" will be (have been) (are being) victimized by feminist law reform projects, claimed to be susceptible of homophobic manipulation. See, e.g., Halley, *Sexuality Harassment*, *supra* note 168, at 190-193, 195-96. In at least one case, feminist reform projects are maligned as homophobic themselves. *Id.* at 190-93; cf. Halley, *Reasoning About Sodomy*, *supra* note 95, at 1723 n.5 (noting the "occasional[...]" but "disturbing male-homophobic drift," of "feminist analysis of legal sanctions against homosexuality"); *id.* at 1725 ("[A]ny assumption that hetero/homosexual dynamics must originate in, or ultimately produce, gender hierarchy or

not sexual harassment *per se*, this way, and protects it through the Due Process Clause for that very reason. With *Lawrence*, if the inequalities between the sexes are the product of choices that individuals make, which are constitutionally protected as such, why is the choice to have sex with co-workers, supervisors, supervisees,<sup>173</sup> classmates, teachers, students,<sup>174</sup> even fellow prisoners,<sup>175</sup> in an institutional setting, not

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gender identity gives analytic priority to heterosexuality, with its definitional dependence on the concept of male and female, of masculine and feminine, as matching opposites.”); accord EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 31 (1990). The scope of the dangers for lesbians and gay men are typically unsubstantiated as an empirical matter. See, e.g., Spindelman, *Sex Equality Panic*, *supra* note 101, at 12-13 n.25, 13-14 (noting this); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 680 (1998) (same). Also absent from these attacks on sexual harassment law and theory is why the possibility of homophobic abuse should defeat feminist law reform efforts, which are themselves opposed to homophobia, and their successes. I engage these problems in greater detail in Spindelman, *Sex Equality Panic*, *supra*.

173. For one recent effort that would seem sympathetic to this conclusion, see Schultz, *supra* note 172, at 2184-91 (arguing for workplace intimacy on various grounds). Schultz maintains:

[A] number of scholars and popular writers recommend that companies create open climates and take a permissive approach to romantic relationships, intervening *only where it is clear that genuine conflicts of interest exist or where it is clear that productivity is being undermined*. . . . [B]y recognizing the inevitability of sexuality in organizational life and addressing it with openness and tolerance, as sociologists Christine Williams and Dana Britton put it, “we can begin to formulate less oppressive forms of organizational life, ways of living in organizations that allow for diversity in sexual norms and expressions and that encourage mutual respect. . . . [This] is a crucial first step in making the workplace a more equitable environment for everyone.”

*Id.* at 2188 (final omission and alteration in the original) (quoting Christine L. Williams & Dana M. Britton, *Sexuality and Work, in* INTRODUCTION TO SOCIAL PROBLEMS 1, 13 (Craig Calhoun & George Ritzer eds., 1995)) (emphasis added) (footnotes omitted); see also *id.* at 2189-90 (“In a world in which sexual harassment law no longer creates pressures to desexualize, most organizations should have less incentive to address potential favoritism charges by banning and punishing intimacy.”). Then again, no less sympathetic with it are some now-discredited sexual harassment decisions. See, e.g., *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (no sex-equality remedy for “what amounts to a physical attack motivated by sexual desire”); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977) (no liability for sex discrimination where the sexual conduct of a supervisor was based on a “personal urge”).

174. See, e.g., Gallop, *supra* note 172; Pellegrini, *supra* note 172.

175. For an analysis of male-on-male sexual violence in prisons, not oblivious to sex-equality theory, but built largely on the Supreme Court’s Eighth Amendment “deliberate-indifference” jurisprudence, chiefly *Farmer v. Brennan*, 511 U.S. 825 (1994), rather than its Fourteenth Amendment sex-equality doctrine, see Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127 (2001). Included in the data Man and Cronan cite is evidence that “[h]omosexual or bisexual inmates often report that prison officials refuse to investigate their claims seriously because the officials presume that any sex that these inmates engage in is consensual.” *Id.* at 145 & n.94 (citing PETER L. NACCI & THOMAS R. KANE, *SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS* 16 (1982)). See *supra* note 98 (referring to the views of Association of Association of State Correctional Administrators’ President Reginald Wilkinson on same-sex prison rape). They do also comment that “courts have noted that at some prisons ‘there appears to be a strong

protected as well? Doesn't *Lawrence* announce in its opening breath that liberty, which protects freedom, extends "outside the home" and has both "spatial and more transcendent dimensions"?<sup>176</sup>

More modestly, perpetrators of sexual violence and others could advance their cause by arguing that *Lawrence* etches the distinction between "unwelcome" and "involuntary" sex, articulated and followed in *Meritor*, into the Constitution. Building on this suggestion, they could say that *Lawrence*, while perhaps not a justification for the total erasure of existing sex-equality protections against sexual violence, does stand as an affirmative road-block to efforts designed to extend them beyond their current (institutional) settings. Countenancing their expansion past their present limits into the remainder of the social world, they could continue, would be tantamount to reauthorizing State-sponsored coercion of individual choice in sex, inviting the State to become "omnipresent" in the sexual sphere, once again, and "to define the meaning of [intimate] relationship[s] [and] to set [their] boundaries"<sup>177</sup> without adequate constitutional justification.<sup>178</sup> It is a familiar, if tired, trope to caricature sex-equality theory as creeping toward totalitarianism,<sup>179</sup> as if it were sex equality, rather than its opposite, that moved in those directions. Through its express mobilization of anti-totalitarian rhetoric and its failure to recognize

presumption on the part of prison officials that, in the absence of outward physical harm to assaulted inmates, such as cuts, abrasions, and bruises, no sexual assault occurred." *Id.* & n.95 (quoting *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 918 (S.D. Tex. 1999), *rev'd and remanded sub nom. Ruiz v. United States*, 243 F.3d 9421 (5th Cir. 2001)). That these norms may amount to deliberate indifference in violation of the Eighth Amendment, as the authors argue, does not also make them not gendered, hence (in addition) a violation of sex-equality rights.

176. *Lawrence*, 539 U.S. at 562. *Lawrence* itself may offer an answer through its cryptic reference to "abuse of an institution the law protects," *id.* at 567, as an independent reason justifying governmental regulation of sex, in addition to prohibiting sexual injury to a person. It could be mobilized to block these lines of argument, thus keeping the principle of *Lawrence* from being driven as a stake into the body of the Court's sex-equality — or at least its sexual-harassment — doctrine. Sex equality, after all, is supposed to be an institution that the law protects. See *United States v. Virginia*, 518 U.S. 515 (1996).

177. *Lawrence*, 539 U.S. at 567.

178. What will happen to rape-shield laws, and other feminist law reform successes in the sexual violence arena, is unclear. Cf. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799-800 (1988) (describing some of the successes that *Lawrence* may draw into question).

179. The smear is advanced, among others, by WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 93 (1995). For recent, not unqualified, criticism of Brown's work for recasting feminist struggles against sexual violence in a Nietzschean framework of *ressentiment*, "endowed with a 'slave morality' that makes it react to pain emotionally by inflicting suffering in return," and, correspondingly, for its anti-feminist theoretical and political alignments, see Carine M. Mardorossian, *Toward a New Feminist Theory of Rape*, 27 SIGNS: J. WOMEN IN CULTURE & SOC'Y 743, 758-66 (2002) (quote on 760).

that “domination by private individuals”<sup>180</sup> can totally occupy a life, *Lawrence* succors these lies.

Without losing all of them, the concerns with *Lawrence*’s possibilities can be transposed into its own conceptual register. Even if one takes the position *Lawrence* does — that sexual violence can be handled on an individualized basis, rather than as a class-based problem with individual dimensions — one still has to engage the fact that observable patterns emerge from the “individual choices” that individuals make in sex; dominance and aggression, hence inequality and force, operate in sex *as sex*, through desire, making sex what it (typically) is, socially speaking. They define the context in which consent to sex is often given, hence give meaning to “consent” itself under existing sex-unequal social conditions. Beyond noting that anal sex is a sexual practice that is common to a “homosexual lifestyle,” by which the Court presumably means that it is a common practice among gay men, hence a reason to protect it, the Court does not discuss sexuality’s normalized and normalizing, as opposed to its interpersonal, features — not, at least, as a reason to question its own assumptions about the meaningfulness of consent. *Lawrence* has nothing to say, for instance, about inequality and force in sex, treating them as completely beneath notice.

Not mentioning them, of course, does not make them disappear. Where, though, have they gone? Could it be, as was the case in *Powell* and *Onofre*, that they have been absorbed into the Court’s version of “consent,” been built into it, so to speak? If they have, the Court may have effectively doomed the State to under-regulate sexual abuse by converting a good amount of it, definitionally, into consensual sex, hence placing it beyond the State’s reach. The Court may believe it has given the State all the room it could want or need to provide optimal levels of sexual-violence prohibitions, by formally recognizing that the State retains the authority under its “general rule” to regulate sexual harm as a crime against a person.<sup>181</sup> Without acknowledging the

180. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 407 (1984).

181. Some commentators, anyway, do. As Chai Feldblum, for example, wrote shortly after the Court handed down its *Lawrence* decision:

It is easy for me to say that a state can regulate “deviant activities” that also *harm other people*. So, for example, I think a state can regulate all forms of private incest and sexual abuse because doing so protects people who would be harmed by those acts.

And nothing in the *Lawrence* opinion diminishes the right of government to regulate sexual activities that *harm* other people. (Anyone who says otherwise is engaging in absurd scare tactics and does not understand the compelling government interest in preventing harm!)

Chai Feldblum, *Interview*, at [http://www.e-thepeople.org/static/cfeldbloom\\_interview.html](http://www.e-thepeople.org/static/cfeldbloom_interview.html) (last visited Aug. 15, 2004). Various reasons I offer in these pages suggest why I disagree. In addition, it should be noted that it may simply not be enough to offer that limitations on sexual abuse are (or should be held to be) a legitimate infringement on the “fundamental right to sexual intimacy.” *But see* David B. Cruz, “*The Sexual Freedom Cases?*”

pervasiveness of inequality and force in sex and their role in constituting it as such, and more importantly, their actual capacity to vitiate, which is to say, to compel consent, hence to produce harm, it may not. It should have.

Thinking, apparently, that it is simple to protect sexuality from “unwarranted governmental intrusion”<sup>182</sup> while simultaneously offering the State the requisite authority to address the injuries that sex can produce by making “consent” its touchstone,<sup>183</sup> the Court avoids noticing or grappling with the questions its opinion in *Lawrence* throws down. To voice a few: Will the State be allowed, after *Lawrence*, to void the constitutional presumption that sex is consensual if it happens, for example, by proving in individual cases that consent was given because of inequality and force? If so, how much inequality and force, and what kinds, will be enough? Will the standard vary depending on how “intimate” the relationship is?<sup>184</sup> Will there be one rule for long-term sexual partners and another for flings and one-night stands?<sup>185</sup> Another altogether for anonymous sex? How

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*Contraception, Abortion, Abstinence and the Constitution*, 35 HARV. C.R.-C.L. REV. 299, 315 n.92 (2000) (arguing that, under a “sexual autonomy” approach, “criminal rape laws, which forbid some sexual encounters . . . need not be subject to strict scrutiny — even though they would certainly be sustained.” (quoting STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998))); accord Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 61 (2004) [hereinafter Sunstein, *What Did Lawrence Hold?*] (“If consensual sex is not involved, there is no fundamental right that would require the state to provide a compelling justification.”). Doctrinally-speaking, even if harm regulation, if not also sex-equality, is, indeed, a sufficiently strong, even compelling, governmental justification for enacting and enforcing laws against sexual abuse, those restrictions would still be subject to a “tailoring” or “narrow tailoring” analytic. What will happen to them there? On the margins, will the needs and interests of victims of sexual violence be sacrificed in the name of protecting sexual freedom? Formally, *Lawrence* leaves these questions open. But in just this way, through its declaration of a right to sexual intimacy, *Lawrence* cabins — at the very least, it reframes — the field of sexual regulation, including regulation designed to put an end to sexual abuse.

182. *Lawrence*, 539 U.S. at 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

183. See Sunstein, *What Did Lawrence Hold?*, *supra* note 181, at 61 (referring to consent as “the predicate for *Lawrence*”).

184. See *Lawrence*, 539 U.S. at 567 (“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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

185. As Kenneth Karst explains:

[A]ny effective legal shelter for this value [of intimate association] must offer some protection to casual associations as well as lasting ones. . . . One reason for extending constitutional protection to casual intimate associations is that they may ripen into durable intimate associations. Indeed, the value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or enduring. A doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including state of mind.

do the “spatial dimensions” of sexual intimacy fit in here? Will inequalities and force that are recognized as such in a public space — on the street, say, or in a public restroom, or in a car parked on a lover’s lane — be erased when sex takes place in a “private” space, such as a private club, fraternity house, boarding school, or a marital bedroom?<sup>186</sup>

How much sexual abuse the Court may be willing to tolerate, because it sees it as just sex, hence how much it may be willing to limit the State’s authority to regulate sexual intimacies, misapprehending what those are, is suggested by what *Lawrence* goes out of its way to tell us expressly about sexual violence among gay men. As it draws to a close, the Court indicates that it has heard and, it seems, been moved by Paul Smith’s suggestion that “homosexual rape” is “not a problem that needs to be addressed,” or that its “victims are more able to protect themselves.”<sup>187</sup> In its own words, the Court writes: This case

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Karst, *Freedom of Intimate Association*, *supra* note 24, at 633. In a footnote, he adds, “There is irony here, because casual sexual intimacy usually is the exact antithesis of the intimacy that involves caring. Yet if the freedom of intimate association is to extend to lasting nonmarital relationships, the practical argument for protecting casual association becomes conclusive.” *Id.* at 633 n.45; *see also id.* at 688 (reiterating the point that “any constitutional protection of enduring sexual relationships can be effective only if it is extended to the choice to engage in casual ones”). Karst qualifies the divorce of casual sex from intimacy with the claim that “even a casual sexual relationship involves intimacy in the sense of selective disclosures of intimate information.” *Id.* at 634 n.48. For other views on the connection between casual sex and sexual intimacy, *see*, for example, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 115 (1999) (“The most fleeting sexual encounter *is*, in its way, intimate.”); *id.* at 176-77 (“I think [Richard Mohr] is right to point to a kind of privacy — *even intimacy* — in the gay male practice of public sex . . . .” (emphasis added)); Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM* 197, 215 (Douglas Crimp ed., 1988) (proposing that the “inestimable value of sex [is] — at least in certain of its ineradicable aspects — [that it is] anticommunal, antiegalitarian, antinurturing, antiloving”); *see also* LEO BERSANI, *HOMOS* 7 (1995) (exploring “in gay desire. . . . a redefinition of sociality so radical that it may appear to require a provisional withdrawal from relationality itself”).

186. Michael Warner, in an interview with Annamarie Jagose, discussing “public sex,” has observed that “in the usual sense of the term . . . [it] also retains an important kind of privacy. People who seek out sex in the parks or in toilets or in bathhouses do not usually do so indiscriminately and for the whole world’s involvement. *There is a presumption of consent, and a reasonable presumption of the exclusion of anyone who does not consent.*” Annamarie Jagose, *Queer World Making: Annamarie Jagose Interviews Michael Warner*, 31 *GENDERS* 2, ¶ 30 (2000) (emphasis added), at [http://www.genders.org/g31/g31\\_jagose.html](http://www.genders.org/g31/g31_jagose.html). Others, including Richard Mohr, agree. Taking the point farther than many have (and, I think, most would), Mohr writes: “[M]any may find orgy rooms at bathhouses and backrooms in bars not to be private. This view is wrong, for if the participants are all consenting to be there with each other for the possibility of sex polymorphic, then they fulfill the proper criterion of the private in the realm of the sexual.” MOHR, *supra* note 109, at 105 (footnote omitted). He continues: “If, as is the case, gay cruising zones of parks at night have as their habitués only gay cruisers, police cruisers, and queerbashers, then they too are private in the requisite sense . . . .” *Id.*

187. *See supra* notes 130-149 and accompanying text.

“does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”<sup>188</sup>

It would have been understandable had the Court modestly ventured that *Lawrence* did not involve persons who were claiming, or had claimed, they had been sexually violated. Again, the Court does tell us twice that the sex *Lawrence* and *Garner* had was consensual. In offering that *Lawrence* does not “involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused,” the Court is thus saying something else again: The sex they had could not have been violative. Roughly consistent with its belief that “[w]hen 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,”<sup>189</sup> the Court’s opinion seems to imagine that the sexual conduct the men engaged in could not produce injury because it was relationship-based, hence intimate. Why it does — as in, how it could — is unclear. The most the Court knew, based on the record before it, was that *Lawrence* and *Garner* had anal sex.<sup>190</sup> It happened. That is all. It may or may not have been intimate. With respect to the Court, sex need imply nothing more, and when it does, it need not be the felicitous “personal bond that is more enduring” the Court imagines. Sexual abuse can produce personal bonds that are “more enduring,” too.

In any event, the Court’s description of what *Lawrence* does not involve, of what it is not about, is in conceptual conflict with its understanding of what it does, and is. But the tension never registers within *Lawrence*, and is, therefore, never resolved. The Court shows no indication it is aware, for instance, that its finding that the sex

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188. *Lawrence*, 539 U.S. at 578.

189. *Id.* at 567.

190. *Id.* at 563. And, of course, that it took place in *Lawrence*’s apartment. *Id.* The Court’s opinion does not actually describe the sex *Lawrence* and *Garner* had, as such, as either “relationship-based” or “intimate,” though it repeatedly implies, as in the passage I am dealing with in the text, that it was one or the other — or both. *Cf., e.g., Franke, supra* note 4, at 1408 (observing that facts about the kind of relationship *Lawrence* and *Garner* had, including whether it was, in fact, a relationship, were absent from the record, that “none of the briefing in the case indicated that they were in a relationship,” and then going on to comment that the Court “[n]evertheless . . . took it as given that *Lawrence* and *Garner* were in [one]”). At certain points in the opinion, sexual intimacy seems to follow from the actual or assumed existence of a relationship, *see supra* text accompanying notes 189-190, whereas at others, the inference runs in the other direction, *see Lawrence*, 539 U.S. at 567 (“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.”). *Lawrence* persistently refuses to settle the lexical priority of the terms (if there is any). It also avoids any final decision on what matrix of factual considerations are necessary or sufficient to give rise to either of them, even as it suggests that “the most private human conduct, sexual behavior,” *id.*, that occurs “in the most private of places, the home,” *id.*, is enough to underwrite the announcement that sodomy laws, which step on both, “seek to control a . . . relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” *Id.*

Lawrence and Garner had was consensual loses much — if not all — of its normative force should it be true, as the Court maintains, that they cannot be sexually abused. If gay men like Lawrence and Garner, and perhaps lesbian women as well, are not persons who might be violated through same-sex sex, what does it mean for them to say “yes” to sex when they do? When sex takes place, does it matter that they might have actually said — and meant — “no”? That they may have limited (or conditioned) their consent?<sup>191</sup> That they might not have thought about the relationship as “intimate”?<sup>192</sup> As equal? Does it matter that age, race, and socio-economic differences between them may have structured the erotics of this sexual exchange? Why — or more exactly, why not?

Perhaps one reason the Court does not pursue this line of inquiry is that its opinion seems to approve of sexual initiation. Remarkably, it does not disavow it when it takes form as sexual aggression. The Court appears willing, for example, to treat sex as consensual if it is not “refused.”<sup>193</sup> Sexual initiation, according to this familiar logic, which may reflect one person’s desire for sex, makes the sex that follows, without more, mutually consented-to. Too bad that it does not. Acquiescence, even silence, in the face of sex “does not mean nothing happened, and it does not mean consent.”<sup>194</sup> Especially not when victims’ claims of sexual violation are, as they are, so commonly disbelieved. Should refusal of consent be a measure of sexual violence, why not escalate a “request” for sex until a partner finally submits or stops refusing? When it is said that in this very escalationist dynamic lies a joy of sex<sup>195</sup> — a joy that sexual regulation could (or would) deny

191. See Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” But What Does “Yes” Mean?*, 117 HARV. L. REV. 2341, 2360 (2004) [hereinafter Note, *Acquaintance Rape and Degrees of Consent*] (proposing one benefit of acknowledging the phenomenon of post-penetration rape is that it “creates a mechanism through which sexual intercourse can be conditioned on terms established prior to the actual act,” and suggesting that, conversely, “[i]f postpenetration rape is not recognized, then whatever terms the two parties set as a condition to intercourse can be ignored by the man once intercourse has begun, even if the woman revokes her consent”).

192. See *supra* note 190.

193. *Lawrence*, 539 U.S. at 578.

194. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 170 (1987). In this way, T.S. Eliot’s “welcome of indifference,” T.S. Eliot, *The Waste Land* (1922), reprinted in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, 1475, 1484 (M.H. Abrams ed., 1962), cited in Donald Dripps, Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 145-46 & n.66 (1994), turns out to be neither, but a myth, although not one the law invariably sees as such. See Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2689 (1991) (suggesting that courts have interpreted “consent” in rape cases to include “absence of consent or silence”).

195. As Donald Dripps declaims:

[T]ypical sexual encounters begin at a low level of physical intimacy and escalate. Women are expected to object when male advances exceed female preference. Unless a man either exploits an unconscious or incompetent victim, or induces a woman’s acquiescence by



— whom will we believe: the person who claims that this was “just sex,” or the one who maintains that he was sexually abused? Entirely unconsidered by the Court is the possibility that consent that is not initially refused is, at some point along the way, withdrawn. What is to happen then?<sup>196</sup> Constitutionally speaking, what can the State do?<sup>197</sup> After *Lawrence*, the answer is, at best, unclear.

To infer that sex was consensual from the mere fact that it occurred, as the Court’s *Lawrence* opinion does, tips the constitutional scales in favor of sex, which is to say, in favor of perpetrators of sexual

violence or some other wrongful pressure, this doesn’t seem like so much to ask. The critical thing is to avoid discontinuous, catastrophic moves from one stage of intimacy to the next.

...

... [T]he transition from penetration of the mouth by the tongue to the penetration of an orifice by the penis is neither instantaneous nor unscripted. The partners will have time to object to sex acts they don’t like, typically before those acts occur, and in any event immediately upon their initiation.

Dripps, *supra* note 194, at 146. *But see infra* note 199 and accompanying text.

196. There are not many reported cases involving withdrawn consent — or more exactly, consent that is withdrawn after penetration. Note, *Acquaintance Rape and Degrees of Consent*, *supra* note 191, at 2356. “Courts in three states — Maryland, North Carolina, and California — have explicitly rejected the idea that a woman can withdraw consent after penetration.” *Id.* (The decisions are: *Battle v. State*, 414 A.2d 1266 (Md. 1980), *State v. Way*, 254 S.E.2d 760 (N.C. 1979), and *People v. Vela*, 218 Cal. Rptr. 161 (Ct. App. 1985), respectively.) “Seven state courts — in Alaska, California (overturning the decision in *Vela*), Connecticut, Kansas, Maine, Minnesota, and South Dakota — have explicitly held that a woman can withdraw consent after penetration.” *Id.* at 2358. Those decisions (in the same order) are: *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001), *People v. John Z.* (*In re John Z.*), 60 P.3d 183 (Cal. 2003), *State v. Siering*, 644 A.2d 958 (Conn. App. Ct. 1994), *State v. Bunyard*, 75 P.3d 750 (Kan. Ct. App. 2003); *State v. Robinson*, 496 A.2d 1067 (Me. 1985), *State v. Crims*, 540 N.W.2d 860 (Minn. Ct. App. 1995), and *State v. Jones*, 521 N.W.2d 662 (S.D. 1994)). Just last year, Illinois passed a law that makes postpenetration rape criminally actionable. Public Act 93-389, ch. 38, sec. 12-17, § 5(c), 2003 Ill. Legis. Serv. 2217, 2217 (West) (“A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”). Resistance to efforts to define post-penetration consent revocation as rape testifies volumes to the continuing vitality of the associations between penetration and possession, *see, e.g.*, Note, *Acquaintance Rape and Degrees of Consent*, *supra*, at 2361 (“Where’s Daddy? Who didn’t teach this girl the rules of engagement? . . . You don’t take a boy to bed and then say ‘no.’ . . . John Z. wasn’t guilty of rape; he was guilty of being male.” (quoting Kathleen Parker, Editorial, *In California, Rape Becomes Her Choice*, GRAND RAPIDS PRESS, Jan. 11, 2003, at A12)), not to mention what “loss of self-control” during sex can mean when inscribed as protected in law. *Cf.* Dripps, *supra* note 194, at 147 (“Call it ‘eroticized domination,’ call it the ‘robust, uncomplicated lay’ — call it whatever you like, but don’t deny that, from whatever causes, the loss of control is a central feature of sexual experience.”). As to what ought to be the analytically prior matter, Richie McMullen describes how “consent can shift to non-consent during love-making” in same-sex relationships, no less than in cross-sex ones, in RICHIE J. MCMULLEN, MALE RAPE: BREAKING THE SILENCE ON THE LAST TABOO 50 (1990).

197. Does the constitutional right to sexual intimacy *Lawrence* announces, for instance, entail a “reasonable time” for a perpetrator to “quell his primal urge” when consent to sex, initially given, has been revoked? *See* Note, *Acquaintance Rape and Degrees of Consent*, *supra* note 191, at 2362-63 & n.115 (discussing cases).

violence, by dictating that consent must be affirmatively refused — a far cry from affirmatively sought and given.<sup>198</sup> Desire and sex patterned on a hierarchical model of sexuality are privileged in this scheme.<sup>199</sup> What does this mean for sexual abuse? Does it enhance, rather than diminish, an unwilling sexual partner's ability to make his (sexual) will known and followed? The Court offers no reply beyond its opinion's empty reassurance that the case "does not involve persons who *might be* injured or coerced or who are situated in relationships where consent might not easily be refused."<sup>200</sup> Again, why not? What has *Lawrence* freed?

To be clear, the point here is not that gay sex is always harmful, whether in a meaningfully intimate relationship or not. Nor is it that there can never be consent to sex. Rather, the point is that there are hazards that attend the Court's announced right to sexual intimacy, particularly its deep presumption of consent to sex, for victims of sexual violence, most of all. It is also to ask what will count as sexual injury in a regime like *Lawrence's* that renders serious State inquiry into the circumstances of sex and consent beyond the pale as a legal norm. Whatever the definition, how will we know if someone has been sexually injured if investigation, surveillance, and prosecution by the State are themselves thought to be repressively sex-intrusive?<sup>201</sup> For the Court, it should be kept in mind, it is State-sponsored sexual *regulation* that is the quintessence of constitutionally cognizable sexual coercion, the Due Process violation.<sup>202</sup> By contrast, *Lawrence* does not recognize a constitutional sex-equality right to meaningful State protection from sexual violence. There still is no constitutional right not to be raped.<sup>203</sup> Federal legislative efforts that might have signaled a

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198. An important feature of *Lawrence's* novelty, that is to say, is its constitutionalization of existing cultural and legal norms that have long favored sex, hence privileged and protected perpetrators of sexual abuse at victims' expense. Cf. *Anderson v. Morrow*, 371 F.3d 1027, 1033 (9th Cir. 2004) (Berzon, J., concurring in part and dissenting in part).

199. Measuring violation by the refusal of consent, hence treating acquiescence to sexual initiation as tantamount to consent to it, puts the burden on those who do not want sex to make their lack of desire for it known and respected. Survivors of sexual abuse may react to sexual initiation through silence without meaning to signal "yes." They may also experience unwanted sexual initiations as an encore of their abuse, hence violation. What does that matter? Within *Lawrence*, not much. It may even not matter at all. The ongoing nature of intimate relationships in which lesbians and gay men find themselves gives rise to a presumption of consent to sex, which is always already there before it is affirmatively taken away. In law, it may be. That alone does not make it so as a matter of life.

200. *Lawrence*, 539 U.S. at 578 (emphasis added).

201. See *supra* note 172.

202. Robin L. West, Lecture, *Reconsidering Legalism*, 88 MINN. L. REV. 119 (2003).

203. Prisoners may, in name, enjoy such a right. See *Farmer v. Brennan*, 511 U.S. 825, 843-44 (1994). According to the *Farmer* Court:

change in the social and legal, hence institutional landscape, thus providing constitutional grounding for a right to protections against sexual abuse,<sup>204</sup> have already been beaten back as unconstitutional.<sup>205</sup> If anything, *Lawrence* strengthens the case against them, substantively and substantially.

Consider in this regard the Supreme Court's decision in *United States v. Morrison*, which struck down an important provision of the federal Violence Against Women Act that had created a federal cause of action for victims of gender-motivated violence, including rape and domestic abuse. For the *Morrison* Court, this conclusion followed from the formalism that sex-based violence is non-economic and local, hence properly a matter of state, as opposed to federal, concern. For the *Lawrence* Court, sexual violence is not sex-based at all, but a crime against a person, following on the idea that sexuality is a matter of individual choice. As a constitutional judgment, it thus seems to suggest that the substantive flaw of the Violence Against Women Act's civil remedy provision was that it proceeded from a constitutionally problematic formulation of sexual abuse as a class-based gender problem. Does the local, if not non-economic, "nature" of sexual violence place it (or at least some of it) within the right to sexual intimacy's protective sphere? Either way: So long as the Court adheres to the vision of sexuality that drives *Lawrence*, it is difficult to see how it could recognize a sex-equality right to be free from violating sex.<sup>206</sup>

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If, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station," it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.

*Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 681 n.3 (1978)); see also, e.g., Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003); Kaufman, *supra* note 98 ("Rape is often described as a fact of prison life. But no one knows exactly how widespread the problem really is. The Prison Rape Elimination Act is the federal government's attempt to define and end the problem."). See also *supra* note 175.

204. See Spindelman, Reorienting *Hardwick*, *supra* note 4, at 446-84 (discussing the relevance of federal legislation, *inter alia*, to substantive constitutional interpretation); see also, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

205. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000).

206. It may be true that *Lawrence* has broadly adopted an "emerging consensus" method of constitutional interpretation. See, e.g., *Has the Supreme Court Gone Too Far?*, *supra* note 75, at 42 (response of Jeffrey Rosen) ("Was the Court wrong to appeal in *Lawrence* to an 'emerging democratic consensus' in America and Europe? I certainly think so."); see also *id.* at 32 (response of Robert H. Bork) ("*Lawrence* said little more than that attitudes toward homosexual sodomy have changed in the past 50 years . . ."); *id.* at 44 (response of Cass R. Sunstein) (noting that *Lawrence* "referred to evolving social values" in its course, but "celebrat[ing] the Court's decision" in the case); *id.* at 46 (response of George Weigel) (criticizing *Lawrence* for "the standards the Court now invokes for its decision-making," including "'emerging' democratic consensus"). But that still does not mean that

All this positions us squarely to engage *Lawrence's* assertion that gay men are sexually invulnerable — an assertion, that, for whatever it is worth, does make gays seem very much like straight men.<sup>207</sup> The reply to this — the *real* substratum of the like-straight reasoning *Lawrence* endorses — should by now be clear. That gay relationships are by definition same-sexed does not mean that they do not involve persons who might be injured or coerced. They do.<sup>208</sup> There can be inequalities between people of the same sex — in sexuality itself, including same-sex sexuality, structured on inequality in its hegemonic, male-dominant form.<sup>209</sup> At the same time, that gay relationships are same-sexed does not mean that, by definition, they are relationships where sex is freely and coequally willed or determined — or equal. They are not.<sup>210</sup> That is not the dominant structure of sexuality under the sexually unequal social conditions that frame the Court's understanding of sex — social conditions that its opinion in *Lawrence* reaffirms. If only it were. Without a doubt, it could be.

The Court regrettably ignores these realities of sexuality and sexual abuse within the lesbian and gay communities. It thus drains "consent" of any real meaning through an act of judicial fiat that presumes consent from the fact that sex happens and that, finally and broadly, calls for sexuality's deregulation. The decision is underwritten by an ideology that holds that sex is fundamentally autonomous and mutual, thus consensual, hence harmless, because intimate. In lock step with the tautology that sexual relations are intimate because sexual, *Lawrence* discredits, hence legitimates, the harms that gay sex (like cross-sex sex) can entail.

Seen in this light, a new perspective on the shift from *Hardwick* to *Lawrence* emerges — one not as cheery as the one on display in the lesbian and gay communities. The difference between *Hardwick* and

*Lawrence* itself does not in important ways shape — or choke off — the evolution of constitutional norms.

207. See *supra* text accompanying notes 142-148.

208. See, e.g., John L. Baier et al., *Patterns of Sexual Behavior, Coercion, and Victimization of University Students*, 32 J.C. STUDENT DEV. 310 (1991); Pamela A. Brand & Aline H. Kidd, *Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads*, 59 PSYCHOL. REP. 1307 (1986); Gregory L. Greenwood et al., *Battering Victimization Among a Probability-Based Sample of Men Who Have Sex With Men*, 92 AM. J. PUB. HEALTH 1964 (2002); Tjaden et al., *supra* note 99; Lisa K. Waldner-Haugrud & Linda Vaden Gratch, *Sexual Coercion in Gay/Lesbian Relationships: Descriptives and Gender Differences*, 12 VIOLENCE & VICTIMS 87 (1997).

209. This is contrary to the notion that gay sex is definitinally non-subordinating, hence egalitarian, because same-sexed. It surfaces almost off-handedly, as it does in many other places, in Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1788-89 (1992).

210. See, e.g., John Leland, *Silence Ending About Abuse in Gay Relationships*, N.Y. TIMES, Nov. 6, 2000, at A18; Struckman-Johnson & Struckman-Johnson, *supra* note 145.

*Lawrence* can be defined as the movement from a decision in which all gay sex is regarded as “an offense of ‘deeper malignity’ than rape”<sup>211</sup> to one in which there is presumably no such thing as gay-on-gay sexual abuse. When the alternative is criminal punishment for having sex one does not want to have, as well as sex that one does, this may properly be seen as progress. But neither *Lawrence* nor *Hardwick*, each of which stops short of constitutionally recognizing even the existence of lesbian and gay victims of sexual violence, requires the State to take action to deal with their sexual injuries — nothing, that is, actually to deliver them the freedom of sexual choice the opinion affirms in their name. To the contrary, by affirmatively denying the possibility of sexual injury in gay relationships and erecting a doctrinal edifice that, at the margins at least, is supposed to prefer less State regulation of sex to more,<sup>212</sup> the Court’s *Lawrence* opinion may unleash and safeguard the sex that *as abuse* is inflicted in them. In this respect, *Lawrence* goes farther than *Hardwick* does in the wrong direction.

Nor, unfortunately, is that all. Remembering that the Court’s like-straight logic can run both ways,<sup>213</sup> why should heterosexual sex be any different?<sup>214</sup> When homosexuality can be defined phantasmatically and ideologically by the absence of sexual abuse, thus confusing perpetrators’ fantasies and lies for victims’ facts, why not heterosexuality, as well? Could it possibly be that, just as heterosexuality guides the Court’s thinking about the need to afford constitutional protections to sexuality, it provides the organizing principle for the *Lawrence* Court’s thinking about same-sex sexual abuse?

Nobody appears seriously to doubt that *Lawrence* has given sex a constitutional boost. But whose, what kind, and at whose expense? Begged by the Court’s opinion, the question’s urgency is magnified, not dissipated, by the Court’s unwillingness to address it — an unwillingness many academic commentators seem all too eagerly to share, having effectively affirmed it as their own. What *Lawrence* and the commentary about the case have given victims and survivors of sexual abuse so far is nothing — unless silence counts as something when it reaffirms the longstanding preference that victims of sexual abuse, along with their injuries, remain closeted, in which case, to be

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211. *Hardwick*, 478 U.S. at 197 (Burger, J., concurring).

212. See *supra* note 181.

213. See, e.g., Janet E. Halley, “Like Race” Arguments, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 66 (Judith Butler et al. eds., 2000) (“To put it simply, a ‘like race’ argument that A is like B also implicitly claims that B is like A.”).

214. Cf. SHEILA JEFFREYS, *UNPACKING QUEER POLITICS: A LESBIAN FEMINIST PERSPECTIVE* 145 (2003).

fair, *Lawrence* and the commentary about it, give them quite a bit. But survivors deserve better than that. And they deserve more.

Meanwhile, *Lawrence* may offer those injured through sex a small, sliver of hope — a hope that sits on the horizon of tomorrow with which the Court's opinion ends. “[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>215</sup>

Turning to those women and men, straight and gay, and others who are sexually violated: one day, some day, freedom will be yours.

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215. *Lawrence*, 539 U.S. at 579.