

# Out of Bounds

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*Lawrence v. Texas creates a crisis for inclusive constitutionalism. Too often, advocates of inclusion and tolerance wish to include only those ideas and groups with which they agree. The test for true inclusion and tolerance, however, is whether we are willing to protect groups when they engage in conduct of which we disapprove. It follows that the boundaries of inclusion cannot be established simply by moral argument; yet, any plausible version of constitutional law must use some method to bound the people and activity that it protects. Defenders of inclusive constitutionalism have not been successful in identifying a method, independent of moral argument, for bounding constitutional rights. This difficulty can best be addressed by modifying our ambitions for constitutional law. Instead of a method for requiring agreement, constitutional law might be reconceptualized as a method for destabilizing all boundaries, thereby reconciling groups with widely different moral views to the political order.*

It is not possible to think seriously about *Lawrence v. Texas*<sup>1</sup> without contemplating boundaries.

Boundaries separate: right from wrong; male from female; free from coerced; gay from straight; public from private; top from bottom; the United States from Mexico; crazy from sane; politics from law; me from you.

Boundaries are the way that we impose order on our perceptions of the universe. Without them, the world would be unintelligible.<sup>2</sup> Part of the project of every preschool is to teach children what is out of bounds. Parents struggle to establish boundaries for their teenagers, and those of us who pretend to have grown up struggle every day with our own boundaries.

Yet boundaries are also artificial and constricting.<sup>3</sup> (That is, after all, why maintaining them involves struggle.) The policing of boundaries is always and

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>2</sup> For example, apparently people who have been blind for years and suddenly regain their sight have not learned (or have forgotten) how to see boundaries. Many of these individuals can “see” in a certain sense, but lack the ability to form coherent patterns out of visual stimuli. See OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS: SEVEN PARADOXICAL TALES* 108–52 (1995).

<sup>3</sup> Even boundaries that we take entirely for granted restrict possibilities that we never perceive. See, e.g., Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1170 (1985) (arguing that “[k]nowledge does not flow from a free subject perceiving independently existing objects; it is constructed in the relationships *between* things, in the metaphors we create,” and that “[t]ruth’ accordingly depends on the exclusion of other ways of dividing up the world, other metaphors for the way the world is experienced”).

inevitably authoritarian, even when we are our own dictators. Boundaries limit freedom, imagination, and empathy. They blind us to the pain and desperation (and possibilities) that lie just across the border.

Despite the century-long assault on constitutional formalism, constitutional law remains all about boundaries. The great constitutional struggles of our history have concerned the boundaries between legislative and executive power, between the public and the private, or between the national and the local.<sup>4</sup> Even at its most inclusive, constitutional law always takes care to impose boundaries on its inclusiveness. This is the dark side of even the most enlightened version of liberal constitutional law. Including more groups in our moral community presupposes that there is a moral community within which these groups can be included, for moral communities lose their meaning unless there is something outside them. The people remaining outside—the hidden victims of liberal constitutionalism—are stigmatized all the more because of its inclusionary pretensions.

Concrete examples help illustrate the point.<sup>5</sup> When the Supreme Court first extended a modicum of protection to gay men and lesbians in 1996, Justice Kennedy quoted from the first Justice Harlan's famous dissent in *Plessy v. Ferguson*<sup>6</sup> to assert that this nation "neither knows nor tolerates classes among [its] citizens."<sup>7</sup> Justice Kennedy neglected to mention a much less famous section of the dissent where Harlan stated, without evident disapproval, that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States,"<sup>8</sup> and complained that those he called Chinamen were allowed to ride in passenger coaches while black citizens were not.<sup>9</sup> Several generations later, in *Griswold v. Connecticut*,<sup>10</sup> when the Supreme Court first extended protection to people engaged in nonprocreative sex, Justice Harlan's grandson felt compelled to write a concurring opinion making clear that this new protection had nothing to do with the rights of homosexuals.<sup>11</sup> And

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<sup>4</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (legislative and executive); *Roe v. Wade*, 410 U.S. 113 (1973) (public and private); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (national and local).

<sup>5</sup> The paragraph that follows is drawn from Louis Michael Seidman, *Romer's Radicalism*, 1996 SUP. CT. REV. 67, 114–15.

<sup>6</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>7</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy*, 163 U.S. at 559).

<sup>8</sup> *Plessy*, 163 U.S. at 561.

<sup>9</sup> *Id.*

<sup>10</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>11</sup> Justice Harlan wrote the following:

"[T]he family . . . is not beyond regulation," . . . and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy . . . is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal

when Justice Kennedy wrote for the Court in *Romer v. Evans*<sup>12</sup> to recognize the rights of gay men and lesbians to inclusion within the political community, he took pains to say that, of course, this had nothing to do with those engaged in polygamy.<sup>13</sup>

The optimistic take on these decisions is that they mark gradual, halting, but nonetheless inexorable progress toward full inclusion. The real story is more complicated. On the one hand, liberal constitutionalists do not really aspire to achieve full inclusion because, on some level, they understand that boundaries are necessary to moral and constitutional argument.<sup>14</sup> To include everyone is to include no one in anything that matters. On the other hand, liberal constitutionalism's rejection of "otherness" and acceptance of analogical reasoning renders all borders problematic.

In the wake of *Lawrence*, the contradictions of this bounded inclusiveness surfaced yet again. Consider, for example, a debate between Michael Carvin and Pamela Karlan that aired on *The NewsHour* the day that *Lawrence* was decided.<sup>15</sup> Carvin is a former deputy assistant attorney general in the Reagan Department of Justice who opposed the decision; Karlan is a professor at Stanford University Law School who favored it. Unsurprisingly, Carvin's strategy was to efface boundaries and, in doing so, to push Karlan into an endorsement of a boundless moral community that had lost its meaning.<sup>16</sup> Following Justice Scalia's dissent in *Lawrence*,<sup>17</sup> he argued that to take *Lawrence* seriously is to admit that adult

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enquiry, however privately practiced. . . . But not to discriminate between what is involved in this case [contraception] and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

This quotation first appeared in its entirety in *Poe v. Ullman*, 367 U.S. 497, 552–53 (1961) (Harlan, J., dissenting). Justice Harlan incorporated by reference his *Poe* dissent into his concurring opinion in *Griswold*. See *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

<sup>12</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>13</sup> *Id.* at 634.

<sup>14</sup> See, e.g., Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998).

<sup>15</sup> *Expanding Privacy* (PBS television broadcast, June 26, 2003) (transcript at [http://www.pbs.org/newshour/bb/law/jan-june03/privacy\\_6-26.html](http://www.pbs.org/newshour/bb/law/jan-june03/privacy_6-26.html)) [hereinafter *Expanding Privacy*].

<sup>16</sup> *Id.*

<sup>17</sup> Justice Scalia wrote the following:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

*Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

incest, prostitution, and bigamy are also constitutionally protected.<sup>18</sup>

Realizing that liberal constitutionalism is vulnerable to this kind of challenge, Professor Karlan rushed to reenforce the boundaries that Carvin's argument threatened.<sup>19</sup>

[T]here's a principled distinction between laws that target one class of people for engaging in behavior that everyone else in the state is allowed to engage in and laws that prohibit things like prostitution or incest.

Prostitution is not just two consenting adults in a room. It implicates all sorts of other issues ranging from crime to the quality of neighborhoods to the subjugation of women. And those are not an issue when you're talking about consenting adults alone in their own home engaged in non-commercial intimate association with the people they're close to. That's just very different. And it surprises me when people put homosexuality on the same side of the line as incest or prostitution, rather than recognizing that it's intimate association between two people in the same way that other couples of opposite sexes engage in intimate association.<sup>20</sup>

Perhaps I should make clear at this point that Pamela Karlan is my good friend and coauthor. I am not ashamed to say that, in many ways, I think of her as a hero and a role model. Still, the arguments she made on this occasion are troubling. It will not do, for example, to insist that gay sex is different from incest because gay sex is "intimate association between two people in the same way that other couples of opposite sexes engage in intimate association."<sup>21</sup> Yes, gays and straights engage in sex "in the same way" in some respects, but in other quite obvious respects, the sex they engage in is different. The question, of course, is whether we should emphasize the sameness or the difference. All of the work in Karlan's argument is done by the undefended choice to emphasize the sameness of gay and straight sex and the difference between incestuous and nonincestuous sex. She provides no reason why one should not paraphrase her own argument to claim that adult incest is "intimate association between two people in the same

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Justice Scalia's parade of horribles suggests a sharper boundary than I would have imagined between his world-view and that of most of the people I know. Does he really believe, as his dire rhetoric suggests, that social unraveling would quickly befall us if laws against masturbation were declared unconstitutional?

<sup>18</sup> Carvin insisted that the "logic of the [Court's] principle" meant that laws involving bigamy and incest were unconstitutional, although he "doubt[ed] seriously [that the Justices would] follow that logic because they are politicians." *Expanding Privacy*, *supra* note 15.

<sup>19</sup> *Expanding Privacy*, *supra* note 15.

<sup>20</sup> *Expanding Privacy*, *supra* note 15.

<sup>21</sup> *Expanding Privacy*, *supra* note 15.

way that other couples [who are not related] engage in intimate association.”<sup>22</sup>

Nor is it obvious why laws against sodomy, but not laws against prostitution and incest, “target one class of people for engaging in behavior that everyone else in the state is allowed to engage in. . . .”<sup>23</sup> Both sets of laws “target” the class of people who engage in prohibited behavior, but not the class of people who engage in permitted behavior. True, there is a sense in which gay people constitute a coherent social class, while people in incestuous relationships do not. Gay men, lesbians, and bisexuals self-identify as a group that is defined by more than just their sexual behavior. As Karlan has argued elsewhere, laws that outlaw gay *sex* are influenced by the desire to stigmatize gay *people*.<sup>24</sup> In contrast, incest and prostitution are behaviors that are “not tied as an empirical matter in contemporary America to membership in a recognized social group.”<sup>25</sup>

This is an important point that ties *Lawrence* to the general theme of anti-subordination in American constitutional law. It cannot be a complete answer, however. Suppose that people in incestuous relationships were able to organize themselves (or were organized by oppression) into a social group.<sup>26</sup> Surely, this change alone would not cause Karlan to change her views about their constitutional rights. Some groups are subordinated because they deserve to be subordinated. Even if (especially if!) rapists and pederasts managed to form their own political action committees, the laws against their conduct would remain perfectly legitimate.

This leaves the argument that prostitution produces other social evils like crime, destruction of neighborhoods, and the subjugation of women. The implicit assumption behind this argument is that the Constitution embodies something like the “harm principle” that permits government regulation if, but only if, the regulated conduct is not self-regarding.<sup>27</sup> Many opponents of *Lawrence* deny this proposition, and we need to take their objections seriously.<sup>28</sup> Reading the harm principle into the Constitution elevates a particular and contestable moral theory over its many plausible rivals. In effect, it establishes an official morality in the teeth of the *Lawrence* Court’s own claim that the government has no business

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<sup>22</sup> *Expanding Privacy*, *supra* note 15.

<sup>23</sup> *Expanding Privacy*, *supra* note 15.

<sup>24</sup> See Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. \_\_\_\_ (forthcoming 2004) (draft on file with author).

<sup>25</sup> *Id.* See also Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004).

<sup>26</sup> Perhaps prostitutes are already moving in this direction.

<sup>27</sup> The “harm principle” prohibits government regulation of self-regarding conduct that does not harm other individuals. For the classic formulation, see JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., 1978). *Cf.* McGowan, *supra* note 25, at 1315–32 (arguing that *Lawrence* is not based on the harm principle).

<sup>28</sup> McGowan, *supra* note 25, at 1313.

enshrining official moral principles.

Moreover, one reason to be skeptical of a constitutionalized harm principle is that the concept of “harm” itself is difficult to cabin. Defenders of gay rights should be especially sensitive to this difficulty. There is a long history of cloaking homophobic bigotry in the rhetoric of harm.<sup>29</sup> Gay relationships are said to spread AIDS, promote promiscuity, and cause the breakdown of families.<sup>30</sup> We should recognize these arguments for what they are: deeply biased stereotypes that cannot justify government regulation of intimate choices.

But what, then, are we to say about Karlan’s stereotyping of prostitution?<sup>31</sup> Consider, first, the destruction of neighborhoods. It is unclear precisely what Karlan has in mind here. If she means that neighborhoods where prostitution occurs are blighted by the public sexual transactions, the same might be said of neighborhoods where noncommercial gay or straight sex is publicly displayed. Karlan’s distinction works only because she juxtaposes public prostitution with gay sex that occurs behind closed doors. But some prostitution occurs behind closed doors, and some gay sex is public.

Perhaps, then, Karlan means that prostitution destroys neighborhoods simply because “neighbors” do not want to live in close proximity to it. Unfortunately, there are also “neighbors” who do not want to live in close proximity to gay couples. Surely, Karlan does not mean to endorse this sort of bigotry. Maybe there is, as Karlan claims, an association between prostitution on the one hand and crime or the subjugation of women on the other,<sup>32</sup> but critics of *Lawrence* claim that consensual gay sodomy also harms its “victims” and degrades the moral climate.<sup>33</sup> A central teaching of *Lawrence* is that the right to engage in consensual, intimate activity cannot be held hostage to contingent and contestable

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<sup>29</sup> See, e.g., Robert H. Knight, *How Domestic Partnerships and “Gay Marriage” Threaten the Family*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 116 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (promiscuity and AIDS); *id.* at 119 (family stability); GEORGE GRANT & MARK A. HORNE, *LEGISLATING IMMORALITY: THE HOMOSEXUAL MOVEMENT COMES OUT OF THE CLOSET* 34–37, 123–41 (1993) (promiscuity and disease).

<sup>30</sup> See, e.g., Knight, *supra* note 29, at 119.

<sup>31</sup> *Expanding Privacy*, *supra* note 15.

<sup>32</sup> *Expanding Privacy*, *supra* note 15.

<sup>33</sup> See, e.g., Knight, *supra* note 29, at 119:

Crime scholar James Q. Wilson describes “the broken window effect,” in which failure to curb breaches in civil order leads to more breaches. He noticed that a building in a tough part of a city had all its windows intact, unlike others around it. After one window was broken, however, all the other windows soon met the same fate. Likewise, if a culture does not discourage extramarital sexuality, the stable marriages are threatened because of the erosion of cultural, social, and, finally, legal support. Plagued by a high rate of divorce, teen pregnancies and STD epidemics, America can only unravel the social fabric further by legitimizing homosexuality.

*Id.*

overgeneralizations of this sort.<sup>34</sup>

As I hope this brief discussion demonstrates, Carvin's attack on boundaries is an effective rhetorical device for challenging inclusive constitutionalism. Is there a cogent response to this challenge? Before outlining what I think is the right approach, I want to discuss three other approaches that strike me as wrong.

First, Karlan might have made a more straightforward moral argument. She might have said that gay sex is a moral good, whereas prostitution, incest, and polygamy are moral evils. She might have then devoted her time to explaining why this is so without resort to the language of constitutionalism. This is an attractive response, for, as explained below,<sup>35</sup> it is impossible entirely to divorce the boundaries of constitutional protection from the boundaries of our moral community. Moreover, for many advocates of gay rights, this response has the great virtue of candor. These advocates favor gay rights not because they think that we should "tolerate" behavior that is wrong, but because they think that the behavior is not wrong.<sup>36</sup> Surely, what really divides Karlan and Carvin is a deep disagreement about the moral status of gay relationships, not an abstract controversy about constitutional methodology.

This fact also explains a phenomenon that is otherwise quite mysterious: the cold fury that gay rights advocates express when confronted with analogies involving practices like prostitution, incest, pederasty, and bestiality. Gay rights advocates find these arguments deeply offensive precisely because the arguments seem to put gay relationships on the same moral plane as these other practices when, in fact, they could not be more different.<sup>37</sup>

There are good reasons, then, to be sympathetic to this approach, but it is nonetheless misguided. Of course, consensual gay relationships are morally different from, say, human sexual relationships with animals, but the anger

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<sup>34</sup> At least this is my understanding of the Court's holding that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. The *Lawrence* Court nowhere specifies the standard of review it utilizes or the strength a state interest must have in order to overcome the right it delineates. Still, the holding makes obvious that the liberty interest it recognizes is not the sort of liberty interest that can be overcome by any barely rational state policy. *Cf., e.g., Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

<sup>35</sup> See *infra* notes 38–41 and accompanying text.

<sup>36</sup> *Cf. McGowan, supra* note 25, at 1343 ("[T]he Court only recognizes and protects those groups whose common conduct is seen as worth protecting.").

<sup>37</sup> See, e.g., Alan Cooperman, *Santorum Angers Gay Rights Groups*, WASH. POST, Apr. 22, 2003, at A4 ("Gay rights groups called . . . for Senate Republicans to repudiate remarks by Sen. Rick Santorum (R-Pa.) comparing homosexuality to bigamy, polygamy, incest, and adultery.").

directed at the analogy nonetheless misses its point. Its point is not that we should believe that gay relationships and bestiality are morally analogous, but rather that inclusive constitutionalism has bite only when it provides protection for conduct that we believe is disanalogous. After all, one hardly need resort to toleration and inclusion to protect activity that one already supports. Toleration and inclusion are required for precisely the activities of which we disapprove. The point of the analogy, then, is to distinguish between true inclusiveness and self-interested special pleading. Professor Karlan cannot claim to be a truly inclusive constitutionalist unless she can point to a difference based on something other than her own moral judgments that distinguishes prostitution and incest, on the one hand, from gay sex, on the other.

It is for just this reason that the rhetoric of moral neutrality plays such a strong role in Justice Kennedy's opinion for the Court and an even stronger role in Justice O'Connor's concurrence.<sup>38</sup> These opinions do not argue that gay relationships deserve protection because they are good. On the contrary, Justice O'Connor insists that "[m]oral disapproval . . . like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."<sup>39</sup> Were this not the case, she might have added, constitutional obligation would add nothing to moral obligation. We do not need constitutional law to get people to do what they would do anyway. Constitutional law serves its function only when it gives people reasons to accede to outcomes that they otherwise oppose.

These observations lead to a second possible response. As I discover regularly when my efforts at Socratic dialogues go wrong in the classroom, the *reductio ad absurdum* technique fails if people are willing to follow an analogy all the way to the bottom. Perhaps, then, Karlan should have done just this. She might have said that prostitutes and their customers, people who sleep with their parents and children, and people with multiple spouses also deserve constitutional protection. Of course, this was precisely the response that Carvin was trying to elicit, and, for reasons I have already discussed, Karlan was right to resist the bait. Reasonable people can disagree about whether Karlan drew the right boundary, but no sensible person thinks that there should be no boundary at all. Even if incest and prostitution deserve constitutional protection, surely rape and pederasty do not. Carvin was trying to trap Karlan into endorsing this position because it would rightly discredit her views.

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<sup>38</sup> See *Lawrence*, 539 U.S. at 571 ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)); *id.* at 585 ("A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.") (O'Connor, J., concurring).

<sup>39</sup> *Id.* at 582 (O'Connor, J., concurring).

This leaves a third theoretical possibility: Karlan might simply have acknowledged that Carvin had convinced her that he was right. But apart from the fact that such a concession would flagrantly violate the deep structure of programs like *The NewsHour*, it is simply unwarranted. Carvin's argument rests on a large *non sequitur*. From the premise of moral disagreement, he purports to reason to the conclusion that collective decision making is appropriate: *Because* we do not agree about the moral status of gay relationships, *therefore* the legislature should conclusively resolve the matter.<sup>40</sup>

This syllogism is deeply flawed. One might just as forcefully argue—indeed, ironically, conservatives regularly do argue—that *because* we disagree about how we should live our lives, *therefore* each person should decide for herself how to live her own life. No one believes, for example, that because some people disapprove of the intimate associates Carvin has chosen for himself, therefore a democratically accountable government Bureau of Intimate Relations should resolve the dispute. Americans disagree about the nature and existence of God, but it hardly follows that the legislature should choose an official religion for all of us.

Nor will it do to claim that the boundary between individual and collective decision making can be read directly off the constitutional text. On a practical level, this position is deeply implausible. Nothing on the face of the constitutional text prohibits the outlawing of heterosexual intimacy or the forced impregnation of women. Does Carvin really want to defend the proposition that the constitutional law has nothing to say about these matters?

Even apart from its practical problems, the position runs into serious theoretical difficulties. We need to face the fact that the constitutional text requires supplementation by nontextual and strongly contested moral values. If straights are allowed to marry, does it violate the Equal Protection Clause to deny the same right to gays? Only if gays and straights are relevantly similar. But, as the previous discussion demonstrates, gays and straights are both similar and different. We cannot make a judgment about the relevance of the similarities and differences without some moral theory. Unfortunately, we cannot agree on such a theory, and the constitutional text does not resolve the disagreement.

Perhaps Carvin thinks that in the absence of text, the default position should be collective decision making, but this returns us to the *non sequitur* with which we started. Moreover, it robs the Equal Protection Clause of any independent force—a position that is, itself, in contravention of the text. This is so because if, for instance, some other provision of the Constitution guaranteed a right to gay marriage, resort to the Equal Protection Clause would be superfluous. Equal protection analysis does work only in cases where other constitutional text provides no protection, but it is in just these cases that the text fails to resolve the moral issues of likeness and difference on which equal protection analysis

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<sup>40</sup> *Expanding Privacy*, *supra* note 15.

depends. It follows that if we are to be loyal to the text of the Equal Protection Clause, we must also be loyal to some set of norms that is not specified by the text.

Thus, none of these alternative stances is entirely satisfactory. Unfortunately, though, rejecting them leaves us in an uncomfortable position. We seem driven to the following three conclusions:

1. Even inclusive constitutionalism must be bounded in some way if it is to be at all attractive;

2. If constitutionalism is to provide an independent reason for action, then there must be some gap between the boundaries that it requires and boundaries based on our own moral beliefs—boundaries that we would draw in any event even if there were no constitutional obligation;

3. The boundaries that constitutionalism demands cannot be drawn without reliance on the moral beliefs that constitutionalism excludes.

These three propositions form the contradiction at the core of inclusive constitutionalism, and there is no simple rhetorical move that will make the contradiction go away. Is there nonetheless a coherent response to this challenge?

Such a response might begin by modifying our ambitions for constitutional law. So far, we have assumed that the point of the exercise is to provide constitutional grounds that will cause Karlan and Carvin to agree about the proper outcome of *Lawrence*. Of course, this is not the point of the exercise. Karlan and Carvin are not on *The NewsHour* so that they will agree. Moreover, trying to get them to agree is a waste of time. Perhaps others, who are less deeply committed than Karlan and Carvin, will eventually change their minds about the status of gay relationships, but it is unlikely that even they will do so because of a constitutional argument. In our culture, constitutional arguments about divisive social issues reflect, rather than settle, our differences.

What, then, is a more realistic ambition for constitutional argument? Even if Karlan and Carvin cannot agree, perhaps they can come away from their encounter with a better understanding of each other's positions. The wall separating them cannot be dismantled, but it might be eroded to an extent that would allow them to perceive a just basis for accepting defeat on an issue about which they are deeply committed.

Oddly, inclusive constitutionalism's contradictory relationship to boundaries might help to produce an environment where this attitude takes hold. On the one hand, we need to understand that constitutional law requires boundaries even when they are contested. On the other hand, inclusive constitutionalism destabilizes the very boundaries it insists upon. This destabilization means that those who remain out of bounds can retain a justified hope that the lines may be moved yet again. A similar understanding by the victors in our constitutional struggles might cause them to recognize that their victory is temporary and that no boundaries are beyond challenge.

So how would I have responded to Carvin's argument? I should acknowledge

at the outset that if I were good at this sort of thing, I might have been invited on *The NewsHour* instead of Pamela Karlan. Alas, my best responses tend to come to me the next day in the shower. Fortunately, I have had quite a few showers since I watched the program, so by now I have a pretty good response. It goes something like this:

Does it seem to me that gay relationships are like incest and prostitution? Well, no, just as, I must concede, it doesn't seem to you, Mr. Carvin, that gay relationships are like straight relationships. Can I defend that position without a contestable moral theory? Of course not. We all have our boundaries, even if we draw the lines in different places, and those boundaries cannot be drawn without reference to some moral theory. I have to confess that the realization that I, like you, am bounding the moral community leaves me a little more sympathetic to your fear and outrage that a boundary has been breached. I know you will like that, but I must add that it also causes me to push on moral boundaries in the other direction. At least at the margin, it also makes me more sympathetic to people engaged in a variety of other non-mainstream sexual practices of which I currently disapprove.

It is important to understand that this sort of destabilization of boundaries does not mean giving up on our moral positions. I still think that good gay sex is, in important moral respects, "like" good straight sex and unlike, say, bad gay or straight sex or "good" prostitution if, indeed, there is such a thing. But destabilization does mean giving up some of our moral outrage. That is too bad. I like my moral outrage as much as the next person, and it is moral outrage, after all, that fuels political engagement and social change. But outrage also requires a suspension of imagination. It is hard to be too angry at Michael Carvin if I can manage to see that, if a few things had gone somewhat differently in my life, I would have views similar to his. It is just this kind of moral imagination that holds the best hope of supporting a structure that we can justly impose upon a diverse populace with widely differing moral views.

To badly paraphrase Robert Frost, "the something there is that doesn't love a wall" is the best version of our constitutional tradition.<sup>41</sup> We reenforce that tradition when we argue for the "right" boundaries, even as we recognize the contingency and uncertainty of our own arguments. This sobering point is especially worth remembering at the very moment when, flush with victory, we celebrate the *Lawrence* Court's willingness to breach a boundary that has caused so much misery, for so many, for so long.

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<sup>41</sup> Robert Frost, *Mending Wall*, in *THE CLASSIC HUNDRED POEMS: ALL-TIME FAVORITES* 230 (William Harmon ed., 1998).

