

The Road Not Taken: Sex Equality in *Lawrence v. Texas*

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Applying one standard tenet of heterosexual morality—that sex, when consensual, is free and private and, particularly when at home, should be left alone by the state¹—the United States Supreme Court in *Lawrence v. Texas*² invalidated a criminal law against same-sex sodomy. In so doing, it overruled *Bowers v. Hardwick*,³ which had held a sodomy prohibition constitutional under another tenet of traditional heterosexual morality: that sex is properly heterosexual—meaning between a man and a woman, preferably in marriage and through acts bearing some relation or resemblance to reproduction—rendering same-sex acts wrong, unnatural, and antisocial.⁴ Proceeding through substantive due process, the *Lawrence* majority’s substantive views on moral propriety in sexual relations distinguished *Bowers* on liberty’s substance.

The Court declined to invalidate the statute on Equal Protection grounds, although certiorari was granted on whether the Texas statute violated the Equal Protection Clause,⁵ and equality arguments were made in the litigation.⁶ Equality

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¹ For some legal examples reflecting this tenet in its liberal/libertarian form see *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (overturning a state law banning the use of contraception under the Fourth Amendment’s penumbral protection for “the sanctity of a man’s home and the privacies of life”); *id.* at 494 (Goldberg, J. concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“[The Fourth and Fifth Amendments] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”)).

² *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

⁴ While acts termed “sodomy” loom large in the dominant culture’s iconography of gay and lesbian sex, hence of gay and lesbian peoples, heterosexually-identified people routinely engage in the same acts with each other (and, in fact, with people of the same sex) even as the lives and identifications gay men and lesbian women do not uniformly revolve around these particular acts.

⁵ *Lawrence v. Texas*, 537 U.S. 1044 (2002) (granting certiorari on three questions, the first being: “Whether Petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?” (quoted in *Lawrence*, 539 U.S. at 564)).

⁶ In support of *Lawrence*, many briefs argued that the statute should be invalidated as a violation of equal protection of the laws on the basis of sexual orientation. In essence, the argument was that sodomy laws discriminate based on sexual orientation by criminalizing acts

as well as liberty was said to be advanced by the decision,⁷ reducing any tension between the two to a glancing gesture. While equality was undeniably promoted by *Lawrence*—straight or gay, the majority felt, sex is sex—significant inequalities were submerged beneath the lines. Equality was the obligato of the case. Treating gay sex like straight sex was what the decision *did*. But *Lawrence* was far from an equality decision.

Most strikingly, the inequality on the face of the statute was not mentioned: the Texas law discriminated on the basis of sex.⁸ In prohibiting “deviate sexual intercourse with another individual of the same sex,”⁹ Texas made sex acts into

that tend to define the intimate sexual expression of socially subordinated groups—gay men and lesbian women in particular—when they allow the same acts to be engaged in by people conventionally termed heterosexuals, commonly referring to people who have sex with people who are not of the same sex they are, the dominant socio-sexual arrangement. Even sodomy laws that are facially neutral as to the parties to the acts are typically disparately enforced against gay men and lesbian women. As Justice Blackmun’s *Bowers* dissent observed of a facially neutral sodomy prohibition, “Georgia’s apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals.” 478 U.S. at 201 (Blackmun, J., dissenting). See Petitioners’ Brief at 32, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Mary Robinson et al. at 22–23, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Human Rights Campaign et al. at 15, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Constitutional Law Professors at 10–11, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). Many briefs also argued against invalidation on grounds of equal protection for sexual orientation. See Respondent’s Brief at 30–31, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae Concerned Women for America at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae State of Alabama et al. at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae United Families International at 4–5, 24–26, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

⁷ *Lawrence*, 539 U.S. at 575 (“Equality 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 interests.”). It also explained that, in regard to the “most intimate and personal choices a person may make in a lifetime” such as “personal decisions relating to marriage, procreation, contraception, family relationships,” as well as “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, *just as* heterosexual persons do.” *Id.* at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added)).

⁸ For *Lawrence* briefs discussing sex discrimination, some only in passing, see, for example, Brief of Amicus Curiae NOW Legal Defense and Education Fund *passim*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae National Lesbian and Gay Law Association et al. at 7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amici Curiae Texas Eagle Forum et al. at 5–12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae American Center for Law and Justice at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

⁹ *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (quoting TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003)).

crimes on the basis of the sex of the individuals who engaged in them. Obviously, under this law, if men who were sexual with men had been women, or if women who were sexual with women had been men, the sex acts they shared would not have been crimes. But for their sex, they would not have been criminals. Yet even Justice O'Connor, who would have resolved the case on Equal Protection grounds, elided this facial feature. She observed that "Texas treats the same conduct differently based solely on the participants."¹⁰ In fact, Texas treated the same conduct differently based solely on *the sex of* the participants. Justice Scalia to the contrary notwithstanding,¹¹ the fact that the Texas statute was gender-neutrally sex discriminatory did not make it non-sex-discriminatory. The Court's constitutional sex equality doctrine (whatever you think of it) centrally revolves around the use of sex as a classification. Discriminating against men because they are men does not become non-sex-based because the same law also discriminates against women because they are women; it is sex-based twice over.¹²

Where did the sex in the sex in *Lawrence* go? Surely a Court that could imagine facial sex discrimination against men only in a statutory rape law that criminalized "sexual intercourse . . . with a female"¹³ could discern the facial sex discrimination in a statute that made criminals of people who would not have committed a crime had they been of another sex. The *Lawrence* majority, not distinguishing between sex and sexual orientation, termed a possible Equal Protection invalidation "tenable."¹⁴ But "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both

¹⁰ *Id.* at 581 (O'Connor, J., concurring in the judgment).

¹¹ *Id.* at 599–600 (Scalia, J., dissenting) ("Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. . . ."). Justice Scalia's view that criminalizing same-sex sex cannot violate Equal Protection because, if it did, state laws prohibiting same-sex marriage would be void as well, *see id.*, is not an Equal Protection analysis. It merely points to yet another law to which a simple sex equality analysis has yet to be widely applied.

¹² The doctrinal question then becomes whether the classification can be justified. For analysis in this setting, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996). If my analysis supports same-sex marriage, so arguably did the *Lawrence* Court's approach, if perhaps not as strongly. It may be that an equal protection analysis of sodomy would have supported same-sex marriage without substantive due process's wiggle room, but if a law violates the Equal Protection Clause, it is not saved by not violating the Due Process Clause.

¹³ *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 466 (1981). The Court seemingly did not envision women having sexual intercourse with females. Of course, the distinction was permitted in *Michael M.*, but the point here is that it was not facial, but was seen as being, while a distinction that was facial was not seen as being sex-based at all in *Lawrence*.

¹⁴ *Lawrence*, 539 U.S. at 574.

between same-sex and different-sex participants.”¹⁵ On this suggestion, if this sodomy statute had been facially neutral as to sex, eliminating the facial sex-based and sexual orientation discrimination at once, the inequality would have been eliminated, leaving the law standing. Or some might think so. Or the Court feared some might so think. This was unacceptable, so the Court chose the substantive due process liberty route.

Note first the fairly extraordinary technical maneuver. Choice of doctrine in a case before the Court was justified by its potential effect on facts and laws *not* before it. The Texas statute could have been disposed of narrowly had the facial sex discrimination been recognized; but because the narrow theory might have let *other* statutes stand, it was rejected in favor of a broader one. Substance reinserted, the *Lawrence* Court, concerned in part to ensure that heterosexuals—“different-sex participants”—could be free beyond shadow of constitutional doubt to engage in “deviate sexual intercourse,” decriminalized sodomy for homosexuals. Heterosexual sodomy must be allowed; no distinction between same-sex sex and different-sex sex could be made; so homosexual sodomy must be protected. This underlying syllogism was animated by a “rule of law” type of formal equality logic, but its substance was sexually driven, almost openly so.

Sex equality was *Lawrence*’s “road not taken.”¹⁶ Due process was chosen over equal protection because “[i]f 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.”¹⁷ Equal protection has no standards of substantive validity.¹⁸ Due process has a substantive dimension; equal protection does not. Equality is procedural, so to speak; it is formal only, regulating how a law is drawn but not its content. To this Court, even concerns of “stigma,” “dignity,” and whether a law’s existence “demeans” people¹⁹ properly resonated in freedom’s “more transcendent dimensions,”²⁰ not in equality.

A similarly constrained view of sex equality was taken by the Supreme Court of Zimbabwe in rejecting a challenge to a sodomy law that criminalized sex between men but not between women and men or between women and

¹⁵ *Lawrence v. Texas*, 539 U.S. 558 at 575 (2003).

¹⁶ See ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 11 (Henry Holt & Co. 1924) (1916) (evoking the inevitable foreclosures when paths diverge, even paths that appeared relatively equal at the time, while suggesting with an undertone of deflating irony that too much can retrospectively be made of how right one was in going down one rather than the other: “and that has made all the difference”).

¹⁷ *Lawrence*, 539 U.S. at 575.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 562.

women.²¹ The sex equality attack by a man prosecuted under it was found “technically correct”—the U.S. Supreme Court was less generous in finding it “tenable”—but lacking in “common sense and real substance;” penalizing heterosexual sodomy in Zimbabwe was thought legislatively “unrealistic.”²² Sharing the view that regulating heterosexual sodomy is politically impractical, Justice O’Connor found the Texas provision lacked rational basis and was directed against gay people as a class.²³ Yet she envisioned a scarcely more robust equal protection than did the majority and did not discuss sex discrimination at all.

If anything, Due Process might have been the natural home of the more procedural approach, Equal Protection of the more substantive one. Who due-processified the Equal Protection Clause? If the thin abstract “likes alike, unalikes unlike” of Aristotelian logic was not still the Court’s major conceptual tool in the equality area, or if the substance it ratifies sub rosa was faced as far from an empty abstraction;²⁴ in other words, if the inability to distinguish victim from victimizer, advantaged from disadvantaged, privileged from oppressed—equal from unequal—did not still define the Court’s notion of equality’s principled high ground to the degree it does; if equality jurisprudence centered more on real harms and less on categorizations (and perpetrator psychological states) that ratify and reify social group hierarchy; if the Court could tell the difference between the moral outrage of onlookers and real injury to those damaged;²⁵ if, in other words, a substantive equality jurisprudence was recognized and applied to sex, how might it have reshaped *Lawrence*?

The substantive sex equality question is not the formal process-of-rationality question of whether men and women are correctly boxed when criminalized for the same sexual acts. It is the social question of whether a law and its application institutionalize the “gender caste”²⁶ system of sex: male dominance. A substantive sex equality approach asks not whether men and women are the same or different, are treated the same or differently, and whether the two fit, although

²¹ *Banana v. State*, 8 B.H.R.C. 345 (Zimb. 2000).

²² *Id.* at 387.

²³ *Lawrence v. Texas*, 539 U.S. 558, 584 (2003).

²⁴ See generally CATHARINE A. MACKINNON, *SEX EQUALITY* (2001) [hereinafter MACKINNON, *SEX EQUALITY*] (providing an extended analysis of this proposition).

²⁵ For further consideration, see Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 146 (2000) [hereinafter MacKinnon, *Disputing Male Sovereignty*] (“The Court expressed repeated concern for the fate of other laws and the governmental balance if the VAWA was upheld but no concern at all for the fate of violated women if it was invalidated.”), and Catharine A. MacKinnon, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 672–704 (Catharine A. MacKinnon & R. Siegel eds., 2004).

²⁶ See Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 2 (1994).

that can indicate a substantive problem. It asks fundamentally whether a law promotes equality or inequality on the basis of sex in a domain in which the sexes are socially unequal, specifically whether gender hierarchy and sex-based dominance, or its progressive dissolution, is promoted.²⁷ Substantive sex equality does not require strict scrutiny because it does not proceed through rationality review's life-mirroring-law methodology, in which progressively fewer outliers can invalidate sex-based generalizations. It has no tiers of scrutiny. Its agenda is not reducing exceptions to sex-based default rules but the rules themselves; not just generalizations that misreflect reality, but generalizations that become reality. Reality is its agenda. Under a substantive sex equality analysis sensitive to gender hierarchy, it is telling that it is an abomination for people who are equal on the basis of sex to engage in sex acts that are legal for people who are unequal on the basis of sex. Criminal same-sex sodomy laws function to keep women sexually for men, and men sexually invulnerable.

A substantive sex equality approach to *Lawrence* could proceed much as the Court did in *Loving v. Virginia*.²⁸ as anti-miscegenation laws discriminate on the basis of race to maintain traditional racial and ethnic divisions to subordinate nonwhite people to maintain white supremacy, sodomy laws discriminate on the basis of sex to maintain traditional sex and gender roles to subordinate women to maintain male supremacy.²⁹ The Court was not ultimately stopped in applying equality analysis by a *Loving* statute that symmetrically prohibited people of color from marrying white people and white people from marrying people of color. It did not conclude that, because the parties were equally restricted by race in choosing who to marry, there was no discrimination. It did not throw up its hands over the worry that, even if the law was unenforceable as drawn, its stigma might remain, because it could still be on the books to enforce a traditional morality. The state law in *Loving* institutionalized the dominant social race/sex arrangement by prohibiting interracial marriages with "white" people only. The Court, without demanding evidence of how a law that kept one group from marrying out elevated rather than harmed that group; without agonizing over whether the law revealed bad thoughts; and, without feeling constrained from recognizing the law's actual substantive meaning in concrete historical context,

²⁷ As to equality in general, the Supreme Court of Canada has expressly embraced such an approach in its constitutional equality adjudication. See *Andrews v. Law Soc'y of British Columbia*, [1989] S.C.R. 143. For one application of this analysis to lesbian and gay rights issues, see MACKINNON, *SEX EQUALITY*, *supra* note 24, at 1073–1394.

²⁸ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁹ Used somewhat differently, the *Loving* parallel has produced much argument and scholarly analysis in the gay rights field. See, e.g., Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Marc Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001); Sunstein, *supra* note 26, at 11.

forthrightly invalidated it under the Equal Protection Clause as what it was: a “measure[] designed to maintain White Supremacy.”³⁰

The *Loving* Court’s Equal Protection Clause examined the statute for its *substantive* validity. Recognizing substantive hierarchy when it saw it, this Equal Protection Clause could tell who was elevated and who was denigrated, even though the elevated group was given less freedom of personal action than the denigrated groups. Justice Scalia to the contrary notwithstanding once again,³¹ perceiving social hierarchy when legally imposed is not a special feature of suspect classification doctrine. It is what equal protection of the laws means if it means anything at all. Then, rather than being stymied at the prospect that “some might think” that a racially neutral law that prohibited all people from marrying each other outside their racial group could be an equal law; rather than reducing equality to the symmetrical imposition of inequality; rather than seeking another doctrinal approach to allow wider invalidation of other statutes not before it, the *Loving* Court simply stated that, actually, all marriage laws based on race—not only this especially racially one-sided one but also evenhanded ones confining each race the way only white people were confined here—violated the Equal Protection Clause as well.³² And one unreal hypothetical bit the dust.

While an anti-sodomy law that criminalized same-sex sex acts between men only would have made a strict parallel to *Loving* most obvious, the *Lawrence* Court could have prohibited Texas’s same-sex sodomy law as a facially sex-based means of institutionalizing compulsory heterosexuality,³³ an institution of male supremacy, in ways that hurt both sexes on the basis of their sex. Homophobia would be understood as a reflex of male dominant ideology against challenges to the heterosexually gendered sexuality that is made compulsory to keep women sexually for men and men sexually inviolable.³⁴ It could have gone on to observe that, actually, all sodomy laws criminalizing mutually and equally wanted adult sexual practices, given the place of sexuality in gender, discriminate

³⁰ *Loving*, 388 U.S. at 11.

³¹ *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (“In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was ‘designed to maintain White Supremacy.’” (citing *Loving*, 388 U.S. at 6)).

³² *Loving*, 388 U.S. at 12 n.11 (“[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”).

³³ This concept was originated by Adrienne Rich in *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980).

³⁴ For further analysis, see MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 128, 136–38 (1983); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 18–19 (1997).

on the basis of sex in violation of the Equal Protection Clause, achieving the result the Court clearly desired to accomplish.

This approach would have resonated with the Court's recent pronouncement that facial sex classifications cannot be sustained if they promote the "denigration of the members of either sex" or "create or perpetuate the legal, social, and economic inferiority of women."³⁵ These substantive sex equality recognitions required no formal declaration that sex is a suspect classification. Such a theory, applied in *Lawrence*, could have joined hands with the *Casey* plurality's invalidation of spousal notification requirements by women needing abortions on grounds of sexual and physical spousal violence against some of them³⁶—a deeply substantive sex equality analysis of the realities of male dominance in substantive due process garb. Substantive sex equality is the natural home for the recognition that harm to some because they are female is harm to the group women as such. This is where the resistance to "stigma" and support for "dignity," so prominent in the *Lawrence* Court's thinking, philosophically belong.

By not asking the substantive sex inequality questions the Texas statute facially invited, *Lawrence*'s clearest victory—situating same-sexuality on a par with heterosexuality—became its deepest limitation. Obscured was the move from homosexuality's closet of imposed unspeakability into heterosexuality's closet, where truly unspeakable acts—sexual abuse—are hidden. With sexual abuse hidden, unequal sex can flourish and masquerade as equal sex, as sex as such, with the result that sex that is forced, coerced, and pervasively unequal can be construed as consensual, wanted, and free. In this sense, the *Lochner*³⁷ approach effectively captures the law of sex: acts in which relations of little social choice are legally fictionalized as free. In using the doctrinal approach it did, *Lawrence* serves further to rationalize sexual relations, now legally encompassing same-sex as well as non-same-sex relations, as presumptively free, as if sex integration eliminates gender hierarchy. While denying privacy to same-sex sexual expression effectively defined same-sex sexuality as a form of abuse when it was not, invalidating the Texas law for privacy reasons further marked sexuality as free and equal virtually by definition, when, unrecognized by law, it is often neither.

The law, norm, and discourse of privacy guards the inviolability of heterosexuality's closet, a closet *Lawrence* not only guarded but strengthened and expanded. *Lawrence* thus became to homosexuality something like what

³⁵ *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

³⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 893 (1992) ("[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.").

³⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

*Stanley v. Georgia*³⁸ was to heterosexuality: an effective shield behind which sexual abuse can be kept invisible, its impunity ever more effectively sealed. That homosexuality and pornography were protected in the home strengthened the cultural and structural public/private line at that threshold, making it ever more canonical. In constitutionalizing possession of obscenity in the privacy of the home, the *Stanley* Court never imagined that anyone could be hurt by it. Although the home is the most violent place for women in society,³⁹ the Court wrote as if Mr. Stanley was all alone in his privacy and never left the house, affected by the pornography he used there. Who was left out of *Lawrence*?

Unlike pornography, homosexuality is not a harm; quite the contrary. Rather, in sex qua sex, due to the social sexualization of dominance paradigmatic in the heterosexuality that tends to define the sexual as such, force is normalized, unwantedness not infrequently obscured. Because heterosexuality's inequalities have so largely defined what sex is, sex is routinely gendered unequal. Male dominant norms can and do sexualize hierarchy in same-sex as well as non-same-sex settings,⁴⁰ if not always in the same ways. In both, consent can be seen as unproblematic rather than as a legal fiction that obscures inequality and force in multiple forms. Thus is actual harm promoted that targets the gendered feminine with the female sex, especially the socially disempowered and vulnerable who are young, poor, and non-white.

By choosing the doctrinal road it did, the Court effectively extended heterosexuality's right to sexual privacy and sexual autonomy to gay men and lesbian women.⁴¹ The question is not whether same-sex sexual expression should be subject to special prohibitions (it should not), but whether heterosexuality's substantively sex-unequal rules should be extended rather than challenged and changed. *Lawrence* extended the tacit norms of male dominance from heterosexual sex to homosexual sex, likely bringing with it the invisibility of its power and the gravitational force of its impunity. If denying constitutional privacy and autonomy rights of gays and lesbians maintained and symbolized powerlessness, a form of group inequality, and it did (and does), the privacy right to liberty as vindicated in *Lawrence* grants an ominous form of assimilation with

³⁸ *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding possession of obscene material in private constitutionally protected).

³⁹ See MACKINNON, *SEX EQUALITY*, *supra* note 24, at 715–24, 888–91 (collecting data and analyzing what might be termed intimate violence or original violence a/k/a domestic violence).

⁴⁰ Francisco Valdes crisply converges the two: “[G]ender is the central device for the simultaneous oppression both of women and of sexual minorities under heteropatriarchy. . . . [S]exual orientation actually and ultimately *is* sex-based.” Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 3, 324, 336 (1995).

⁴¹ See discussion of *Lawrence*, *supra* note 4.

dominance. And heterosexual dominance is male dominance, a truth deeply buried in the facial sex discrimination the Texas statute used to accomplish its discrimination on the basis of sexual orientation. To the extent the right to sexual autonomy translates into a right to sexually abuse with impunity, to impose sex on the less powerful and get away with it, gay men and lesbians can now join heterosexuals in the sexual closet of abuse on legally equal terms, a closet within which equality rules are effectively suspended. Haven't both been closeted long enough?

The undeniably positive development of *Lawrence* thus has negative dimensions that a substantive equality approach would have avoided. Privacy works to protect systematic inequality, whether structurally in reinforcing the public/private line⁴² or in express doctrine in substantive due process liberty.⁴³ After *Lawrence*, an abused partner in a gay or lesbian relationship is no longer in the legal position of a prostitute who claims he or she was raped or a person who complains that his marijuana was stolen, i.e., someone subject to prosecution for engaging in the conduct that gave rise to the victimization. This is a major change for the better. Yet the same legal system that did not care about inequalities in sexual relationships still does not. Substantive equality, by contrast, could produce the same decriminalization by taking an "out" approach and also expose abuse wherever it occurs, facing the publicly shared and sanctioned oppression of the assertedly private, clearing an equal public place in the world for historically unequal groups.⁴⁴

⁴² What is meant by "structural privacy" can be seen in *Harris v. McRae*, 448 U.S. 297 (1980), in which congressional refusal to fund Medicaid abortions was found not to violate the equal protection of the laws of poor women because the private right to decide inside one's mind whether to continue a pregnancy was seen as not unduly burdened by public funding of one option, childbirth, but not another, abortion; in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989), in which the Court found that a little boy beaten into a vegetative state by his father while state authorities kept track of his decline was not deprived of his substantive due process liberty because young Joshua was not assaulted by state actors but in the privacy of his home, termed "the free world," *id.* at 201, by the majority; and in *United States v. Morrison*, 529 U.S. 598 (2000), in which the U.S. Supreme Court invalidated the Violence Against Women Act in part because of its view that federalism required that sexual violence of so-called private actors understood as sex discrimination be addressed by states, even if they are not adequately doing so. See MacKinnon, *Disputing Male Sovereignty*, *supra* note 25, at 152–72, for further discussion of *Morrison*.

⁴³ My original articulation of this view can be found in CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93–102 (1987).

⁴⁴ For further analysis of many of the points in the preceding paragraphs, see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004) [hereinafter Spindelman, *Surviving*]. For an interpretation that is also critical of privacy (though not for its relation to abuse), see Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004). Lawrence H. Tribe, in *The*

The *Lawrence* Court noted that sodomy prosecutions and convictions historically “were for predatory acts against those who could not or did not consent,”⁴⁵ for acts that were not rape under the criminal law, “typically involv[ing] relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.”⁴⁶ Sodomy law is a remarkably inapt vehicle for addressing these harms. But who in *Lawrence* was thinking, really, about the adult sexual predators of children, the same-sex rapists of adults, the sexual violators of animals? Who was thinking about that cardinal concern of equality “*disparity in status*”? So far from such awareness, the *Lawrence* Court even implies that the same-sex setting of the case per se guarantees that it “does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”⁴⁷ How could they possibly know? Nothing in the case turned on, or required inquiry into, the lived realities and relative status (say age, race, or class) of the people involved.

Chances for equality between same-sex partners may be heightened over heterosexuality’s usual and socially entrenched sex-based hierarchy, which pervasively undermines men and women in diadic intimacy (register here the true meaning of “anti-social”), such that a same-sex context seems to make consent more presumptively real. But it is not the case that injury or coercion or forced consent disappears when sex partners are of the same sex, or that gender and other hierarchies do not exist in gay and lesbian communities.⁴⁸ In prominent challenges to sodomy laws, from *Onofre*, involving a young man subjected to

“*Fundamental Right*” That Dare Not Speak Its Name, 117 HARV. L. REV. 1893 (2004), misses the opportunity of the analysis whose name is substantive sex equality.

⁴⁵ *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

⁴⁶ *Id.*

⁴⁷ *Id.* at 578.

⁴⁸ See, e.g., SHEILA JEFFREYS, *THE LESBIAN HERESY: A FEMINIST PERSPECTIVE ON THE LESBIAN SEXUAL REVOLUTION* (1993) (critically analyzing gendered sexuality in the lesbian community); SHEILA JEFFREYS, *UNPACKING QUEER POLITICS* (2003) (taking a similar critical look at gendered sexuality in the queer community); Sheila Jeffreys, *The Essential Lesbian*, in ALL THE RAGE: REASSERTING RADICAL LESBIAN FEMINISM 90–113 (Lynne Hame & Elaine Miller, eds., 1996) (criticizing role-playing in lesbian sexual relationships); CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992); CLAIRE M. RENZETTI & CHARLES HARVEY MILEY, *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS* (1996); NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel, Nat’l Coalition Against Domestic Violence Lesbian Task Force, ed., 1986); see also JUDITH HALBERSTAM, *FEMALE MASCULINITY* (1998); DEL LAGRACE VOLCANO & JUDITH HALBERSTAM, *THE DRAG KING BOOK* (1999). Of course, these analyses by no means describe, or purport to describe, all relationships or all sexual relationships in the communities considered.

violent if desired sex,⁴⁹ to *Banana*, involving allegations of unwanted sex acts imposed by a head of state upon an aide,⁵⁰ force in same-sex settings has often been as central to the facts as it has been invisible to the law.⁵¹ Surely this obscuring of force and unwelcomeness is not a coincidence in privacy litigation over sodomy laws. True to form, the opinions in *Lawrence* did not raise the questions of sexualized inequality that would have made visible whether consent “might not easily be refused”—questions a substantive sex equality approach would highlight.⁵²

The difference between a substantive due process approach founded on traditional heterosexual morality and a substantive equality approach addressing real injuries of inequality can be measured by assessing in substantive equality terms the provisions Justice Scalia contended will be invalidated by the *Lawrence* majority’s analysis.⁵³ He claimed that criminal laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity⁵⁴ can only be upheld on moral grounds;⁵⁵ as they cannot survive rational basis review (interesting admission), *Lawrence* sounds their death knell. A substantive equality approach, sensitized to real injury, would draw a line across his list. Traditionally disadvantaged groups could be protected from the actual harms of socially organized domination on the basis of sex and gender that are inflicted through some of these sexual practices. Laws that prohibit practices that, in reality, harm no one and merely enforce some peoples’ moral values and preferences on other people, in the process often contributing to actual harms, could not be defended or would be invalidated.

Prostitution and pornography exploit and violate women and children on the basis of sex. Prostitution laws traditionally target the adult victim, usually a woman, for criminal penalty; U.S. obscenity laws are indifferent to pornography’s real harms. Laws against prostitution, seen substantively, thus discriminate on the basis of sex. Obscenity laws could not be sustained under a substantive equality approach either, because they do nothing to promote sex

⁴⁹ *People v. Onofre*, 415 N.E.2d 936, 938 (N.Y. 1980).

⁵⁰ *Banana v. State*, 8 B.H.R.C. 345, 366–69 (Zimb. 2000).

⁵¹ This analysis is developed brilliantly in Spindelman, *Surviving*, *supra* note 44; see also MACKINNON, *SEX EQUALITY*, *supra* note 28, at 1090 (discussing *Onofre*); *id.* at 1093 (discussing *Hardwick*, in which the statute was eventually invalidated in a case involving alleged rape of a 16-year-old girl by her uncle, re-raising the facts of heterosexual dominance made invisible in invalidating a same-sex law; *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998)); *Banana*, 8 B.H.R.C. at 366–69 (setting forth the facts of the case).

⁵² For a superb discussion of this problem in full, see Spindelman, *Surviving*, *supra* note 42.

⁵³ *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.* at 589.

equality and, were they effectively enforceable, may tend to undermine it; laws addressing pornography's harms would be sustainable.⁵⁶ Bestiality laws, for reasons unrelated to the welfare of the exploited creature, try to prevent humans from having sex with nonhuman animals, who in human society are relegated to a lower plane of existence.⁵⁷ If the Texas sodomy statute had been invalidated on substantive sex equality grounds, it would not have called these laws into question in the blanket way Justice Scalia claimed. Whether bigamy laws would violate a substantive sex inequality rule would depend on the gendered realities of the practice. Most instances of bigamy may be polygamy, which the Human Rights Committee has termed "incompatible" with the sex-equal right to marry, a violation of the dignity of women, and "an inadmissible discrimination against women."⁵⁸ By contrast, laws against masturbation (should they still exist), fornication, and probably adultery lack a substantive sex inequality rationale. They simply restrict sexual freedom on a moralistic basis. They would go, unmourned by most.

If a substantive sex equality approach opposes enforcement of gender hierarchy through sexual regulation, how would it treat a law that prohibits certain sex acts as such for everyone, regardless of sex? Directly to the concern of the *Lawrence* Court: is there a sodomy statute that could survive substantive sex equality scrutiny? A forced sodomy statute enforced equally without regard to sex or sexual orientation would. Better, a law that criminalized unwanted sex, sex forced by inequality, sexual invasions under coercive circumstances, including rape, without regard to sex or sexual preference, would: a real sexual

⁵⁶ It is worth recalling that *Stanley v. Georgia*, discussed *supra* at notes 36–37 and accompanying text, was used as the platform from which to attack obscenity and child pornography laws for decades, if ultimately with little success. See, e.g., *United States v. Reidel*, 402 U.S. 351, 356 (1971) (rejecting the argument that a conviction for mailing obscene books, apparently for profit, was unconstitutional under *Stanley*); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (declining to extend *Stanley* to protecting viewing of obscenity in public commercial theaters); *Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (distinguishing *Stanley* on ground that child pornography is regulated to protect children by destroying the market for their exploitation through penalizing those who possess and view the materials). For a stunning analysis showing how a substantive sex equality approach, by contrast, addresses the sex-based harm of gay male pornography, see CHRISTOPHER N. KENDALL, *GAY MALE PORNOGRAPHY: AN ISSUE OF SEX DISCRIMINATION* (2004).

⁵⁷ See *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). My essay in this volume focuses on the status of nonhuman animals relative to human animals in sex equality terms. See Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 263–76 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁵⁸ U.N. GAOR, Hum. Rts. Comm., 68th Sess., 1834th mtg. ¶24, U.N. DOC. CCPR/C/21/Rev.1/Add.10 (2000). The United States has ratified the International Covenant on Civil and Political Rights, of which a General Comment is an authoritative interpretation.

assault law.⁵⁹ The European Court of Human Rights, favorably considering an equality approach to rape, recently held that member states have a “positive obligation . . . to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”⁶⁰ By extension, just as the Texas statute invalidated in *Lawrence* discriminated against gay men and lesbian women on the basis of sex, so would a rape law that failed to respond equally to same-sex sexual assault.

The gay rights movement, not without internal dissent, has sought freedom of access to many central institutions of gender inequality: that men should be able to have sex without restraint; that women should be able to be mothers; that both should be able to marry. The point is not that sex, motherhood, and marriage should be restricted on the basis of sex. Indeed, gay men and lesbian women have contributed profoundly to breaking the sex-based roles and stereotypes of sexuality, parenthood, and intimate partnership that have long subjugated women. The point is that the gender inequality of these institutions and practices is not necessarily transformed through sex integration.⁶¹ In this view, *Lawrence*'s road of libertarian autonomy undermined sex equality in legal analysis and in reality, securing for homosexuals heterosexuality's substantive privileges, including its male gendered dominance, by extending rather than dismantling them. Similarly, if *Lawrence* becomes the route through which gay marriage is pursued, as some fear and others hope, that right could extend gender inequality yet further into the so-called private family, further insulating its gender-stratified economic, reproductive, social, cultural, sexual, and aggressive organization from public scrutiny and state rectification. More people will have the protection of privacy, but until the private is equal, it will not be free.

Privacy's freedom does not make you equal, but freedom and equality can be harmonized if equality is not compromised. *Loving* created intimate associational freedom in a highly “private” realm by recognizing, not denying, the role of the public order in constructing it—with no help from the Due Process Clause. Passing a conceptual olive branch across the liberty-equality tension, the Human Rights Committee of the United Nations invalidated a sodomy prohibition in Tasmania on a joint privacy-equality rationale, in essence finding it to constitute

⁵⁹ For further discussion, see Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, 989 ANNALS N.Y. ACAD. SCI. 265 (2003). For a congenial international definition of rape see *Prosecutor v. Akayesu*, I.C.T.R. 96-4-T, at 75–76 (1998).

⁶⁰ *Case of M.C. v. Bulgaria*, App. No. 39272/98, at para. 162 (Eur. Ct. H.R. Dec. 4, 2003), available at <http://www.echr.coe.int/>.

⁶¹ See generally CHESHIRE CALHOUN, *FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT* (2000); Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993).

a sex discriminatory interference with sexual autonomy.⁶² The sex discrimination there was doubtless easier to see because one part of the prohibition was facially confined to sexual intimacy between men, but the Committee noted on principle that “sex” under the Covenant includes “sexual orientation.”⁶³ This approach evocatively surfaces a dynamic the *Lawrence* Court did not consider: equality can make you free.

⁶² See *Toonen v. Australia*, Communication No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, at 226, U.N. Doc. A/49/40 (1994).

⁶³ *Id.* ¶ 8.7.

