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### Foreword

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For Jerome Culp, in memory

The Supreme Court's decision in *Lawrence v. Texas*<sup>1</sup> is nominally the text that precipitates this Symposium and coheres the essays in it, written by a number of our country's leading experts in the theory and law of the Constitution, equality, and lesbian and gay rights.<sup>2</sup> The various representations of *Lawrence* they offer—of its holding, of its reasoning, and of its, and our, future—span the political and ideological spectrum. But to a number, they treat the Court's decision in the case with the seriousness and respect it desires and deserves. This is itself a singularly remarkable development in an era in which the sex acts underlying the case still trigger giggles and stir disgust, and in which the identarian terms used to describe persons who engage in those acts remain legally actionable as slur.<sup>3</sup> Praise or decry it, *Lawrence* is no joke. It crystallizes and portends significant shifts in the horizons of the social order.

What follows in these pages is part of the first wave of analysis and criticism of *Lawrence* that inaugurates the process of shaping what *Lawrence* does—and

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<sup>1</sup> 539 U.S. 558 (2003).

<sup>2</sup> See Symposium, *Equality, Privacy, and Lesbian and Gay Rights After Lawrence v. Texas*, 65 OHIO ST. L.J. 1057 (2004), which includes the following: Cass Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004); Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004); Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004); Edward Foley, *Is Lawrence Still Good Law?*, 65 OHIO ST. L.J. 1133 (2004); Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004); Berta E. Hernandez-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151 (2004); Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 65 OHIO ST. L.J. 1265 (2004); Joan L. Larsen, *Importing Constitutional Norms for a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Louis Michael Seidman, *Out of Bounds*, 65 OHIO ST. L.J. 1329 (2004); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004).

<sup>3</sup> At least for now. See, e.g., *Nacinovich v. Tullet & Tokyo Forex, Inc.*, 685 N.Y.S.2d 17 (App. Div. 1999); *Dally v. Orange County Publications*, 497 N.Y.S.2d 947 (App. Div. 1986); *Matherson v. Marchello*, 473 N.Y.S.2d 998 (App. Div. 1984); *Thomas v. Bynum*, No. 04-02-00036-CV, 2003 WL 553277 (Tex. App. Feb. 28, 2003); *Head v. Newton*, 596 S.W.2d 209 (Tex. Civ. App. 1980).

will come to—mean: the opinion’s history-in-the-making. In this sense, the essays presented here are of a piece, and should be read together with the remainder of the early published commentary on *Lawrence*, cited throughout, but most notably including essays collected in special volumes of the *Michigan Law Review*, the *Minnesota Law Review*, and the *Cardozo Women’s Law Journal*, which, like this one is, are significantly dedicated to it.<sup>4</sup>

Symposia, including published collections like this one, do not just happen. More people than can possibly be thanked for bringing this one into being ought to be. Just so, those who were absolutely vital to it, hence cannot not be mentioned by name, include: Dean Nancy Rogers, who generously supported the idea of a Symposium on *Lawrence* even before its formal inception; *Ohio State Law Journal* Editor-in-Chief Erik Clark and Symposium Editor Patrick Brodhead, whose willingness to lead, and to lend a volume of the journal they shepherded, led them to promise it a home; *Ohio State Law Journal* Editor-in-Chief Chris Geidner and Executive Editor Kelly Curtis, along with the entire Managing Board and staff of this issue of the *Ohio State Law Journal*, who undertook the hard, and often thankless, work of making the promise real; and, of course, to the contributors to the Symposium—Professors Cass Sunstein, Catharine MacKinnon, Steven Calabresi, Edward Foley, Lino Graglia, Berta Hernandez-Truyol, Andrew Koppelman, Joan Larsen, Louis Michael Seidman, and Francisco Valdes—who, individually and collectively, make this volume the passage-point to *Lawrence* it very soon will be.<sup>5</sup>

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<sup>4</sup> Colloquium, *The Boundaries of Liberty After Lawrence v. Texas*, 102 MICH. L. REV. 1447 (2004); Symposium, *Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1021 (2004); Symposium, *Privacy Rights in a Post Lawrence World: Responses to Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 263 (2004). My own initial thoughts on *Lawrence*, hardly uncritical of the Court’s decision in the case, are being published in the Michigan Law Review Colloquium on *Lawrence* as Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004). Other significant commentary on *Lawrence*, not included in any of the three collections just mentioned, include Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27; Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75; Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); 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 (2004); Teemu Ruskola, *Gay Rights vs. Queer Theory: What Is Left After Lawrence v. Texas?*, 23 SOC. TEXT (forthcoming 2005).

<sup>5</sup> The live event, held at the Moritz College of Law, on November 7, 2003, was enriched, in addition, by the presentations given by Mary Becker and Martha Fineman.