Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas: Privacy, Dominance, and Substantive Equality Theory

Shannon Gilreath, Wake Forest University
Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas: Privacy, Dominance, and Substantive Equality Theory

Shannon Gilreath**

Introduction

I think [judges] have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."


Lawrence v. Texas, the decision in which the Court invalidated the states’ remaining sodomy laws, turned five years old on June 26, 2008. Sometimes anniversaries and the reflection they occasion bring us to unhappy realizations. At these unhappy times, we may look at our chosen partners after a period of years and think how differently they turned out to be than we had hoped. So it is in my romance with Lawrence v. Texas. The Lawrence opinion, its obvious equality-promoting attributes notwithstanding, simply isn’t as attractive to me as it was when I first read it. Five years ago, Justice Kennedy’s majority opinion in Lawrence v. Texas1 proceeded through a due process analysis to invalidate a Texas law, unequal on its face, which criminalized same-sex sex. Many Gay2 rights advocates greeted the decision with enthusiastic abandon.3 The Court made a glancing pass at equality jurisprudence,4 but its mere passing reference

** University Fellow in Law and professor for interdisciplinary study, Wake Forest University School of Law, North Carolina. I am grateful for the helpful input of friends and colleagues including: Kenneth Karst, Richard Delgado, Ronald Wright, Sidney Shapiro, Twiss Butler, Michael Perry, Michael Curtis, Kathleen Mahoney, Jose Gabilondo, and Angela Harris. I also acknowledge the work of my stellar research assistant Ben Prevas in the composition of this essay, and the ceaseless energies of Wake Forest’s reference librarians, especially Ellen Makaravage and Jason Sowards. Vulnerabilities in theory and other shortcomings are the sole responsibility of the author.

1 539 U.S. 558 (2003).
2 My convention in this article (although not one I have followed in previous work) is to capitalize the words “Gay” and “Black.” I do this in recognition of the fact that these categorical labels often describe far more than the mere implication of biological essence. By this I mean that “Gay” and “Black” often bespeak a cultural, social, and political identity of shared experience that “white” and “straight” do not. For purposes of this essay, “Gay” encompasses both “gay” and “lesbian.”
3 See, e.g., John Rechy, Finally, Dignity and Respect—But at Such a Cost, L.A. TIMES, June 29, 2003, at 42 (describing Lawrence as an “unqualified victory.”); E.J. Graff, The High Court Finally Gets It Right, BOSTON GLOBE, June 29, 2003, at D11 (referring to Lawrence as “our Brown v. Board of Education, declaring us full citizens, entitled to all the rights and freedoms held by our siblings, colleagues, and friends.”) Legal academics, too, praised the Lawrence decision unreservedly, including William Eskridge, Tobias Wolff, and Richard Lazarus. See Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUMBIA L. REV. 1399 (2004) (collecting citations to such commentary at 1-2, n. 2). In the interest of full disclosure, I should say that even I got in on the act. In the not-so-distant past, my commentary on the Lawrence decision has been decidedly rosier. See, e.g., Shannon Gilreath, Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—with a View toward a Constitutional Moral Imperative, 9 J. L. & SOC. CHANGE 1 (2006) (especially Section III, et. seq.).
4 “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.” Lawrence, 539 U.S. at 575.
was highlighted by the fact that certiorari was granted on the question of whether the Texas law violated equal protection; and equality arguments were made by lawyers for Lawrence and Garner and by advocates for the amici curiae.

This essay will explain why the privacy rationale employed in Lawrence, its obvious equality promotion notwithstanding, served to further entrench heteronormative dominance at the expense of real equality. An applied equality rationale would have avoided this result and would have created access to foreclosed public spaces (e.g., marriage) that currently operate as institutionalized, hetero-dominated hierarchy in contravention of equality. Curiously, an equality analysis also would have avoided Justice Scalia’s feared disruption of other forms of traditional morals legislation (e.g., bigamy, prostitution, etc.), which Scalia believes are left vulnerable by the Lawrence majority’s substantive liberty approach. This essay proceeds through several observations about privacy theory’s failings to an ultimate criticism of the equality analysis (or lack thereof) of the Lawrence opinion itself. Particularly, I am critical of the longstanding notion that “equal protection of the laws” means that persons “similarly situated” must be treated the same under the law. I argue that the “similarly situated” test is especially dangerous for Gay equality interests, and for the rights of other minorities.

Part I examines some of the jurisprudential trade-offs implicit in privacy doctrine rather than equal protection ideas to ground the type of liberty the Court considered in Lawrence. Part II considers the specific risk that privacy doctrine poses for Gays—mainly that their identity rests on being “assimilated” into a heterosexual model from which they are always already excluded. Part III considers an alternative grounding for the legal rights of Gays sought in Lawrence: Substantive Equality looks through mere legal forms because it recognizes the undeniable context of social dominance in which sexual minorities seek limited recognition. Parts IV and V consider two special virtues of

---

5 “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?” Lawrence, 539 U.S. at 564.
6 See Petitioner’s Brief at 32, Lawrence v. Texas, 539 U.S. 558 (No. 02-102); Brief of Amici Curiae Mary Robinson et al. at 22-23, Lawrence v. Texas, 539 U.S. 558 (No. 02-102); Brief of Amici Curiae Human Rights Campaign et al. at 14, Lawrence v. Texas, 539 U.S. 558 (No. 02-102).
7 “Heteronormative” is a term I have employed in other places with varying definitions. For purposes of this paper, “heteronormative” can be defined as the idea (really more of a worldview) that the sexual behavior associated with the heterosexual lifestyle should be promoted, subsidized, or otherwise encouraged in law, and that it should be routinely sheltered from meaningful scrutiny under the law. I thank my friend Jose Gabilondo for conversations that informed this particular formulation.
8 I should note at the outset that Lawrence is not strictly speaking a “privacy” decision. Rather, the Court recognized the right at issue as a “liberty” and employs this language throughout its decision. Nevertheless, the Court’s close association of the right at issue in Lawrence with the contraception and abortion decisions, in my opinion, inextricably links it to the Court’s privacy jurisprudence. Katherine Franke has described the right recognized in Lawrence as a “privatized liberty,” and that is good enough for me. See Franke, supra note 2, at 1401.
9 Lawrence, 539 U.S. at 590 (Scalia, J., dissenting).
10 In Barbier v. Connolly, the Court held that although “class legislation, discriminating against some in favor of others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [fourteenth] amendment.” Barbier v. Connolly, 113. U.S. 27, 32 (1885). As this essay will show, this concept has been the core of the Court’s often stunted equality decisions ever since.
the substantive equality approach: it can override arguments for discrimination based on religion, and it is strong medicine against the stigma imposed on identity groups that are otherwise subordinated, both in law and fact. Part VI concludes with a consideration of the role of prudence in constitutional decision-making, and with a warning that prudence should not be used as an excuse to shirk remedying denials of equality, like those the Gay litigants charged in Lawrence.

I. Lawrence, Roe, and Privacy

Sexism is the foundation on which all tyranny is built. Every social form of hierarchy and abuse is modeled on male-over-female domination.

—Andrea Dworkin, Our Blood: Prophesies and Discourses on Sexual Politics (1976)

Commentary on constitutional law has historically operated as debate about the meaning of seminal cases. My commentary on Lawrence is no exception. It considers in its analysis the meaning of several other so-called seminal cases. In an area like constitutional law with very little settled law but a great deal of theory, commentary can hope to do little more than to figure out how a new case fits into the web of precedent. With this principle in mind, it may be useful to begin any constitutional analysis with Roe v. Wade, unquestionably the most controversial, emotionally-contentious, and feared decision in modern constitutional law. Certainly, any meaningful discussion of Lawrence must begin with Roe. Lawrence is the culmination of a series of departures from essentialist equality analysis that have led to disastrous results: the archetype of which is Roe v. Wade. To understand where Gay people may be going post-Lawrence, we must understand the jurisprudential framework into which the Lawrence decision fits. Justice Kennedy places it squarely in the line of privacy cases that originated with Griswold v. Connecticut, by stating that the liberty compromised by the Texas law was akin to “personal decisions relating to marriage, procreation, contraception, [and] family relationships…”. This effectively took Lawrence and Garner’s essential equality claim, lying at the heart of the Fourteenth Amendment, and moved it to the vulnerable and unstable constitutional periphery where privacy dwells. The location of the constitutional claim here makes sense, if one looks at the evolution of the Court’s sex equality jurisprudence that cabined the abortion right almost as soon as it recognized it. Roe connected a woman’s right to choose an abortion with its contraception jurisprudence, holding that the privacy right recognized in Griswold was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

13 410 U.S. 113 (1973). Roe guaranteed the right to abortion, counterbalanced against other considerations, by denoting it a private choice.
14 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that a right to privacy exists in the Constitution that prevents the states from prohibiting the sale of contraceptives).
15 Lawrence, 539 U.S. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
16 Roe, 410 U.S. at 153.
But the Court could just as easily have applied an equality analysis in *Roe*. In that case, a pregnant woman, “Jane Roe,” and others, challenged the constitutionality of the Texas criminal ban on abortions, which provided no exception for saving the mother’s life. The law made it a crime to procure or to attempt an abortion. Jane Roe was actually a carnival worker named Norma McCorvey. McCorvey, twenty-one years old at the time, claimed to have been gang-raped on her way back to her motel in a small Georgia town. McCorvey was a high school drop-out; she was divorced and had a five-year-old daughter; she earned very little money. Pregnancy meant that she could not continue her work. McCorvey believed that abortion was her only option. Virtually no American, I dare say, is unaware of the outcome of her case: The Supreme Court found that the Texas abortion ban violated McCorvey’s right to “privacy.”

An intellectually honest Court should surely have recognized that abortion is the ultimate sex equality question. Only women are existentially affected by the choice of whether to carry a fetus to term. Certainly, that was true for McCorvey. In the case of anti-abortion restrictions, laws made primarily by men serve to force a woman to endure the burden of pregnancy—a burden only she can endure. What could more obviously implicate equal protection of the laws than that quandary?

But the Court placed the right to choose an abortion on the outer fringes of constitutional thought. The idea of privacy inhabits and delineates this fringe. “Like a Greek chorus, or a bad dream,” the privacy debate haunts modern constitutional commentary. By locating abortion rights on this fringe, the Court ensures that women’s equality quickly becomes subsumed by the needs of male-dominated, heterocentric society. Women’s equality was translated through the rhetoric of individual rights into the realm of descriptive moral counterbalancing—which means that the needs of the heterosexual male most always win. By couching the *Roe* holding in privacy, the Court made possible the future subordination of women’s collective equality needs to the desires of male supremacy.

Privacy’s inadequacy is made plain in the Court’s 1981 decision in *Harris v. McRae*, in which the Court held that the right to privacy did not require that federal Medicaid funds be available to finance abortion needs arising from medical necessity.

---

17 Professor Kenneth Karst pursued an equality rationale for *Roe* in *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). After I finished drafting this article, a colleague introduced me to Jack Balkin’s article, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2007) available at SSRN: http://ssrn.com/abstract=925558, in which Professor Balkin makes some very similar (and, therefore, in my mind, eminently insightful) equality-based observations about the abortion right. I did not have the benefit of Balkin’s article in sketching my own critique, but I recommend it to all interested in an equality defense of the right of women to seek an abortion.

18 McCorvey would later recant much of this story when she became a “born-again” spokesperson for the anti-choice movement.

19 It is too obvious to be said that only women can give birth. But it is also predominately women who provide the majority of childcare after the birth. Women’s careers are compromised. And the majority of single-parent homes are headed by women. See Karst, *supra* note 17 at 53-59 (1977).

20 Madam Justice Bertha Wilson of the Canadian Supreme Court recognized this with great eloquence, writing: “It is probably impossible for a man to respond, even imaginatively, to the [abortion] dilemma not just because it is outside the realm of his personal experience . . . but because he can relate to it only by objectifying it.” Morgenthaler v. The Queen, [1998] 1 S.C.R. 30, 172 (Wilson, J., concurring).


Privacy, the Court held, guaranteed only a woman’s “decision” whether to terminate her pregnancy. Privacy imposed no duty on government to see that women’s abortion choice was in any way meaningful. In less than a decade, Roe’s privacy jurisprudence devolved to this. The interests of (heterosexual) men—primarily manifest in the sectarian perspectives of religion designed by men for men—outweighed the highly circumscribed privacy interest of women. Privacy is, of course, the perfect vehicle for heteronormative dominance. Privacy provides no space or place for a myriad of rights, not the least of which is equality, that are otherwise guaranteed to heterosociety (read: men) for the very reason that such rights are not the prerogative of the private realm when the access point is heterosexual maleness. Nowhere is this more visible than in the abortion cases. Women enjoy a private right, which essentially means that the right’s only guaranteed public dimension is what men are willing to facilitate for women. If the male power structure does not see fit to make even medically necessary abortions affordable, then that is that. The private/public denomination assures that government need not be the catalyst for any change in the status quo. Woman’s “decision” is inviolable; the operation of that decision is left to what she can work out with men on their terms. The very fact that abortion is privacy ensures that government will not intervene in the realm of autonomous, individualistic decision-making. The women in Harris needed something more than mere choice to make their privacy meaningful. They needed equality, substantive equality, but the Court studiously avoided it.

Exactly how this analytic retrospective of the abortion cases applies to Gay rights becomes clear in the great jurisprudential joke of the Lawrence decision—the Court’s implication that Gay people actually have any privacy to be safeguarded. The Court’s precedents make clear that no such privacy exists for Gay people qua Gay people. The sudden equation of homosexual sex with heterosexual sex that Lawrence accomplishes creates a privacy dimension for sure but, despite Kennedy’s assurances, it is not a privacy right that necessarily advances Gay equality interests.

II. Privacy and Assimilation

Whoever fights monsters should see to it that in the process he doesn’t become a monster.

---

23 Id. at 316.
24 My analysis of the abortion right might lead one to ask why, if these suppositions about privacy and male supremacy are accurate, abortion was ever constitutionally legalized at all. One potential answer to this query is found in Catharine A. MacKinnon’s sex equality critique of the abortion question, namely: “In the context of a sexual critique of gender inequality, abortion promises to women sex with men on the same reproductive terms as men have sex with women...abortion facilitates women’s heterosexual availability...The availability of abortion removes the one remaining legitimized reason [the potential of unwanted pregnancy] that women have had for refusing sex besides the headache.” MACKINNON, FEMINISM UNMODIFIED 99 (Harvard University Press, 1987). MacKinnon’s concentration on the “heterosexual availability” of women dovetails with my argument that couching Gay rights equality claims in terms of privacy serves to further insulate the interests of male-dominated heterosociety. One could easily make the same observation about Griswold itself. By making contraceptives readily available, the Court removed another barrier to the pursuit of heterosexual male sexual aggressiveness.
25 It should come as no great surprise, then, that the Court believed that the federal government had no power to intervene in that most private realm where sex abuse takes place. See United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act).
—Friedrich Nietzsche, Beyond Good and Evil (1886)

Lawrence is largely a decision about the protection of sex generally—specifically of “sexual intimacy,” which the Court primarily equates to all sex, presumptively consensual, in the heterosexual image. In this way, the Court avoids the equality concerns at stake in Hardwick,\(^\text{26}\) namely that only homosexual sex is neither presumptively free nor constitutionally protected. The Court’s concern with liberty’s substance meant that the Court extended heterosociety’s presumptive right to sexual privacy to homosexuals, so long as the Gay sex being had resembles heterosexual sex. This assimilation principle undergirds the Lawrence decision and permeates it.\(^\text{27}\)

There are, generally speaking, two primary and alternative paths to equality for Gay people. These are what I have termed the “assimilationist” and “integrationist” approaches.\(^\text{28}\) A substantial politics surrounds this discussion in the Gay community itself.\(^\text{29}\) One need not, however, know much about the movement politics to see—quite clearly—that the Lawrence Court chose the assimilationist path. Quite simply, the assimilationist approach says to Gay people that equality is defined in terms of equivalence to the pre-existing heteronormative standard. “Gay person,” says the hypothetical assimilationist, “if you want equality with straight people, the approach is simple: be the same as straight people.” This is exactly what most Gay rights advocates, and ultimately the Court, said in Lawrence. Gay people deserve equality because they are constitutionally (morally, socially, jurisprudentially) equivalent to straight people.

Much of the Court’s logic, indeed most of the pro-Gay rights briefs submitted on appeal,\(^\text{30}\) argues that Gay people are deserving of equal protection in their sexual activity.


\(^{27}\) “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Lawrence, 539 U.S. at 574. As Angela Harris notes, “Lawrence looks like an attempt to rebrand patriarchy by making it gay-friendly.” See Angela P. Harris, From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality, 14 WM. & MARY BILL RTS. J. 1539, 1577 (2006).


\(^{29}\) Id.

\(^{30}\) See, e.g., Brief of Amici Curiae Constitutional Law Professors, Bruce A. Ackerman, et al., Lawrence v. Texas, 539 U.S. 558 (No. 02-102). In an effort to demonstrate to the Court just how much Gay people are like straight people, the brief highlights “facts” that are so obvious that they sound totally absurd when read aloud: “Gay people…shop, cook, and eat together…celebrate the holidays together…and share one another’s families…rely on each other for companionship and support.” Id. at 12.

The amicus brief filed by the ACLU likewise focuses on the domestic normalcy of Gay people. “As adults, [Gay people] form intimate relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families.” Amicus Curiae Brief of the American Civil Liberties Union and the ACLU of Texas in Support of Petitioner at 8, Lawrence v. Texas, 539 U.S. 558 (No. 02-102).

Similar “like-straight” characterizations of Gay life are to be found in the amici briefs of the Human Rights Campaign and the National Lesbian and Gay Law Association. For an excellent summary of the briefs and discussion, see Marc Spindelman, Surviving Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619-1621 (2004).

The urgency of the pro-Gay groups to connect Gays with the acceptable straight paradigm is overwhelming in these briefs. Their arguments reduce to an essence: Gays are sufficiently like straights to merit constitutional protection for their sexual behavior, because that sexual behavior is sufficiently domesticated to straight acceptability. One notable exception is the brief for the Cato Institute by Professor
premised, precisely because that activity sufficiently mirrors heterosexual sexual activity, which is (of course) the presumptive good.\textsuperscript{31} The Court’s very discussion of the history of sodomy prohibitions connects these demeaning laws by the ways in which they influenced the heterosexual sexual experience (remember, the presumptive good) to show their constitutional deficiencies.\textsuperscript{32} The Court’s treatment of sodomy prohibitions in this way has equal protection ramifications to be sure. Unfortunately, the question of whether the Court’s analysis will morph into a later argument which will claim that anti-sodomy laws (associated as they now are primarily with the heterosexual experience) do not provide evidence of a history of “invidious” discrimination against Gays as is required by generally accepted equal protection analysis is not yet answerable. I hope not.

Situating \textit{Lawrence} as the natural outgrowth of the reproductive privacy cases, the Court is able to declare that, “[p]ersons in a homosexual relationship may seek autonomy for these purposes [defining one’s own concept of existence, of meaning, of the universe, and the mystery of human life], just as heterosexual persons do.”\textsuperscript{33} The court’s assimilation of homosexual sex into the heterosexual norm is thereby complete. Gay people do not deserve protections as Gay people, but rather as the legal equivalent of the heterosexual “Mini-me.” We receive protection because we are sufficiently like straight people to merit protection. Viewing the Court’s decision in this way brings new meaning to the Court’s assertion that a decision grounded in “liberty,” in fact, advances equality. Indeed, the \textit{Lawrence} majority assures, concerned as they were with Justice O’Connor’s envisioned ban on heterosexual sodomy,\textsuperscript{34} that heterosexual men can now get their dicks sucked without fear of prosecution. The equal protection clause means that Gay men get the protection by default.

The Court’s assimilation strategy becomes clear in its near wholesale adoption of Justice Stevens’ \textit{Hardwick} dissent as the controlling analysis in \textit{Lawrence}.\textsuperscript{35} Perhaps Justice Stevens was troubled by something more, but his dissent proceeds on the logic that Georgia’s law at issue in \textit{Hardwick} was constitutionally faulty because it treaded on heterosexual autonomy.

[1]ndividual 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. Moreover, this protection extends to intimate choices by unmarried as well as married persons.\(^{36}\)

Paradoxical as it may seem, our prior case thus establish that a State may not prohibit sodomy with ‘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…\(^{37}\)

Justice Stevens is preoccupied with the notion that to “totally prohibit” sodomy would collide with the privacy rights of heterosexuals—as established, both married and single, by the very line of privacy cases the Court relies upon in its articulation of the liberty of sexual intimacy. Stevens believed that such a prohibition “clear[ly]” violated these heterosexual rights. This starting move by Stevens reflects his inability to abstract himself from the dictates of his own identity position, from which he can only analogize or generalize. He then, by an equal application theory, extended heterosexual privilege to the homosexual, made as he is in the heterosexual’s image.

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 contact of either is equally burdensome.\(^{38}\)

The Court’s transmutation of Stevens’ *Hardwick* dissent into Kennedy’s *Lawrence* majority opinion gives life to its dubious prophecy:

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. 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.\(^{39}\)

This is a curious formula. As Marc Spindelman observed, “the Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and advances ‘equality of treatment’ by extending liberty to Gays. Rights that are made to the king’s measure are fit for a

\(^{36}\) *Hardwick*, 478 U.S. at 216 (quoted in Lawrence at 578.)

\(^{37}\) *Id.* at 218 (Stevens, J., dissenting)(internal citations omitted).

\(^{38}\) *Id.* at 218-219 (Stevens, J., dissenting).

\(^{39}\) *Lawrence*, 539 at 575.
queen.”

This is distributive justice at its acme. So, the more the Court critically evaluates the rights of Gays the more it concentrates on the presumptive rights of heterosexuals.

Would not the Court have taken a more honest jurisprudential look at the plight of Gay Americans had it engaged in a substantive equality analysis? That is to say had it seen the hierarchical and, therefore, anti-equality dimensions of a law that criminalizes homosexual expressions of intimacy (or even non-intimate sex)—the very conduct by which Gays as totally sexualized beings are defined—even if such laws facially applied to heterosexuals, too.

One needs no analogies to marriage or paradigmatic (one might say fantastic in the fairy tale sense of the word) heterosexual intimacy to see this. Justice O’Connor’s nominally equal protection-based concurrence hints at this problem, but her analysis of the issues stops far short of substantive equality (although it may constitute a classic formal equality analysis). By refusing to acknowledge hierarchy in this way, the Court scaffolds it. The superior constitutional status of heterosexuals (men, at least) is both the doorway and the ceiling of homosexual rights.

And what’s wrong with that? Lawrence’s celebrants will ask.

Well, nothing if you believe, as the Court apparently did, that equality is a numbers game, counting rights, quantities and uniformities: likes alike and unalikes unalike. But if you believe that true equality cannot be found in acquiescence in a system where the oppressed must assume the appearance of the oppressor in order to enjoy freedom, then the Court’s analysis presents serious moral and philosophical dilemmas. If freedom for Gays is to be had only in the legal institutionalization of compulsory heterosexuality, in the mere mimicry of the privileged, is it really freedom at all? Does real equality lie in the exchange of Gay identity for the implicit safety of heteronormative assimilation?

My point of departure with Justice Kennedy is not on the question of whether same-sex sex ought to be the object of special and especially oppressive regulatory intrusion. Certainly, I believe that it should not be. On this, the ultimate outcome, the Lawrence majority and I are in total agreement. No, the point of departure is whether in reaching this conclusion the Court should have examined the substantively unequal

---

40 Spindelman, Surviving Lawrence v. Texas, supra note 30, at 1630.
41 “Sodomy…is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym.” Janet Halley, Reasoning About Sodomy, 1737.
42 “Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.” Lawrence, 539 U.S. at 579 (O’Connor, J., concurring).
43 Justice O’Connor, of course, begins with the faulty premise that Equal Protection “is essentially a direction that all persons similarly situated should be treated alike.” Id. She goes on to recognize that the effects of the existence of the Texas statute go far beyond the potential for criminal prosecution. Id. at 581-582. But the “similarly situated” principle blinds Justice O’Connor to the caste-creating effects of the statute, were its facial discrimination removed. (“The Equal Protection Clause ‘neither knows nor tolerates classes among citizens.’” Lawrence, 539 U.S. at 584 (citing Romer v. Evans, 517 U.S. 620, 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). “Whether a sodomy law that is neutral both in effect and application … is an issue that need not be decided today.” Id. What Justice O’Connor fails to realize is that a sodomy law can never be neutral in “effect,” even if it were to be neutral in application. Even in such an imaginary regime, heterosexuals would always be being punished for engaging in acts common to homosexuals, not for any quality of their superior heterosexual orientation.
trappings of the heterosexual hierarchy. By ignoring its existence, the Court legitimates it. In operation, it does this by taking the due process privacy route instead of the substantive equality route. Perhaps, the majority truly believed (or at least it did not consider the alternative) that its privacy-based decision was the best possible outcome for Gay people. Whatever the answer to that query, surely the Court believed—it must have understood—that a privacy analysis was the least bumpy route to the desired outcome. Rights are delivered, no doubt, but it should be clear that equality is not part of the delivery.

Lawrence, its equality outcome notwithstanding, further isolates Gays rather than providing them equal citizenship. From the very outset of its opinion, the Lawrence majority, in the parlance of privacy, makes clear that what they are articulating is an individuated and individuating right. “Liberty,” Kennedy posits, “protects the person (read: individual) from unwarranted governmental intrusions into . . . private places.” This pronouncement, coupled with the historiography the Court embraces—a history that disconnects anti-sodomy persecutions from the Gay and lesbian experience—avoids the class-based analysis that a substantive equality approach would have required and, thereby, overlooks (or at least looks through) the Gay community. As the Lawrence decision sees Gay people, we have no identity or worth of our own, nothing that is separate from the heteronormative definition. As long as that definition is intact—Gay people can continue with the “lifestyle” choices that Justice Kennedy concedes by analogy from straight identity. In the Court’s analysis, heterosexuals are again the heroes of the constitutional drama, and Gay people are the mendicants. The use of privacy, not equality, reifies the bitter heteronormative prerequisite Gay people face daily: to be free we must be like, we must be palatable to, heterosociety.

Justice Kennedy’s explication of liberty seems to presuppose that Gay people have the same inner-self recognized for straight people and denied to Gay people in Hardwick. What Kennedy drastically misapprehends, however, is whether this inner-self can be free in the isolation to which Kennedy’s majority opinion assigns it. Lawrence announced a curious rule: Gay people have a right to define their own destinies, which includes, the Court says, their intimacies. But that destiny seems to extend only as far as the door of the new Closet the Court creates. Gay people will not be sent to jail for consensual sex in private. But any illumination of these “bonds that may be more enduring” to an unwilling heterosexual establishment is subject to the hammer of heteronormative conformity. Aside from marriage, which Kennedy so obviously elides, lower courts have held Lawrence to cover only the most closeted of sex—the most private—so that oral sex, for example, can still be punished more harshly than

---

44 Lawrence, 539 U.S. at 562.
45 The imperative of an equality norm that recognizes group realities has been understood from perspectives other than Gay liberation as well. “With the inability to assert a group reality—an ability that only the subordinated need—comes the shift away from realities of power in the world and the search for ‘identity’ . . . It changes the subject, as it were, or tries to.” Critical Race Theory Histories, Crossroads, Directions 71 (Francisco Valdez, et al, eds., 2002).
46 Lawrence, 539 U.S. at 567.
47 Id. at 578. (“[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”)
paradigmatic heterosexual sex (vaginal) if it occurs in public, or for hire, or even when state legislatures have gone to great pains to decriminalize the conduct, as have many states with oral sex between minors close in age. Even rapists may have their sentences enhanced if they violate their victims orally or anally. This is not to suggest—in any way—that the rapist is sympathetic; rather I am suggesting that rape is made no worse simply because the form it takes is a violent mirror of traditionally homosexual sex acts. All of these painful associations make it difficult for Gays to have the free inner-self Kennedy’s opinion imagines for us. Lawrence, with all its privacy faults, allows bigoted judges, reminiscent of Chief Justice Burger in Hardwick, to continue to enact homophobia into law.

Of course a necessary precursor to this approach is the a priori assertion, taken as gospel, that heterosexuality is the measure of “the good.” Heterosexuality is citizenship, presumptively and really. The assimilationist standard says Gays are to be judged equivalent to the “good” when we are sufficiently proximate to the heterosexual paradigm. In the case of Lawrence and Garner, a Gay couple happened to be engaging in a sex act that a substantial number of straight couples engage in; therefore, those acts and the participants deserve protection based upon the heterosexual paradigm. As I will explain, a substantive equality analysis of the situation in Lawrence would not have required assimilation, but a privacy analysis is perfectly comfortable with that outcome: Privacy protects Gay sexual conduct because it (as suggested by current data) is

48 See, e.g., In re R.L.C., 635 S.E.2d 1, 5 (N.C. Ct. App. 2006) (“It was undisputed that the conduct occurred in a car parked in a bowling alley parking lot. The crimes against nature statute remains applicable where public conduct is involved.”).
49 See, e.g., State v. Thomas, 891 So.2d 1233 (La. 2005).
50 See generally, 635 S.E.2d 1.
51 See e.g., Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006) (“[I]f a seventeen-year-old male who engages in an act of sodomy with a female under the age of sixteen years is convicted of aggravated child molestation, he is subject to a mandatory sentence of ten years imprisonment without possibility of parole. If, however, that same teenage male engages in an act of sexual intercourse with the same female child and is convicted of statutory rape, he is guilty of only a misdemeanor.”).
52 As to Catharine MacKinnon’s assertion that “A forced sodomy statute enforced equally without regard to sex or sexual orientation would [survive substantive sex equality scrutiny],” I vigorously disagree. (See Catharine A. MacKinnon, The Road Not Taken: Sex Equality in Lawrence v. Texas, 65 OHIO ST. L. J. 1081, 1093 (2004). Taken at face value, this statement means that forcible oral sex might still be the object of more onerous criminal punishment than, say, forced vaginal intercourse. My conceptualization of substantive equality would find this statute to be a violation simpliciter. To punish forced oral or anal sex more harshly than forced vaginal sex, respecting the reality that the acts of oral and anal sex are so central to the iconography of Gay identity, perpetuates the existence of the very kind of caste—in this case a highly sexualized version—which is inimical to substantive equality. Rather, a permissible law aimed at the evil of forced sex would be a law against rape—unwanted sex of any kind. But a criminal system that allows an escalation of punishment for rape because the act of rape itself was the violent mirror of the acts by which Gay people interact sexually is, in a phrase, substantively unequal.
54 See William D. Mosher et al., U.S. Dep’t of Health & Human Servs., Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002 3 fig. 4 (2005) (reporting that 90% of males and 88% of females between 25 and 44 years of age had engaged in oral sex with a member of the opposite sex). The figures for anal sex were 40% for males and 35% for females. Among males 22-24 years of age, 7.4% reported engaging in sex with another male. 12.4% of females between 15 and 24 years of age reported engaging in sex with another female.
substantially equivalent to heterosexual sexual conduct. The conduct at issue (oral and anal sex) must be, presumptively should be, protected for heterosexuals. Gay people get the benefit of this protection, too. But make no mistake: heterosexuality is the referent for the decision. The individuated right of sexual autonomy elucidated in *Lawrence* has no room for the group realities that define the place of the Gay individual in American society, law, and politics. These issues of dominance and hierarchy are both the symptom and the root cause of sodomy prohibitions aimed at same-sex sexual expression, but they are not discussed. Why?

Here is why. The canonical development of the “right to privacy” has never really been about what is “private” in the most common sense of the word. It has not been about what should be secreted by necessity, locked away because it is shameful or perverse (although the privacy cases could understandably be interpreted in this way as well: sex practices, condom use, unwanted pregnancy, abortion as the destruction of “life,” the possession of obscene materials, oral sex, etc.); rather “privacy” as it has emerged jurisprudentially is much more about the power (and that word power is important) to define one’s own sense of self, one’s own personhood, and one’s own moral register. At issue in the privacy cases has been the right and ability to define the “good” life for one’s own self. Viewed in this light, the essential equality problem in *Lawrence* becomes clearer.

The problem, obviously, is not *Lawrence*’s outcome—the decriminalization of oral and anal sex. There is an equality there. The Court’s privacy perspective, however, is fraught with equality challenges. Who is the definitional measure in *Lawrence*? Is it *Lawrence* and Garner? Or is it heterosociety’s evolved definition of what is morally problematic (or no longer morally problematic)? Heterosociety’s definition of what is properly protected sexual conduct is at issue; their history defines sodomy prohibitions; and ultimately their acquiescence in the practices (equivalency) drives *Lawrence*’s decriminalization of sodomy, just as their obsessions with Gay sex previously animated sodomy’s criminalization. Equality as equivalency (sexual being to sexual being, couple to couple) emerges from the *Lawrence* decision’s privacy guarantee. Substantive equality, that which considers questions of hierarchy and dominance, does not.

---

55 Even in its secular manifestations, sodomy is deemed abominable and detestable, as in an 1837 North Carolina statute which read “the abominable and detestable crime against nature, not to be named among Christians.” N.C. Gen. Stat. § 34-6 (1837). Sodomy, this thing that Gay people do, treads in privacy so deep that the acts dare not even be said aloud. It is private because it is “abominable,” “detestable,” “horrible,” “against nature.” It is all these things exponentially because it is private—because it cannot be examined or questioned in the light of day.

56 This has been an inherent flaw in the metaphysics of equality from its early American development. Consider this revelation from the congressional debates on the Fourteenth Amendment.

> Congressman Thaddeus Stevens: When a distinction is made between two married people or two femmes sole, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality. Cong. Globe, 39th Cong., 1st Sess. 1064 (1866).

Michael Kent Curtis has observed:

> The principle against class or caste legislation was accepted by people like … Congressman Stevens. But [he] thought it did not apply [to women generally] because of then widely held assumptions about the nature of gender differences. In another context (that of suffrage and section 2 of the Fourteenth Amendment) Senator Howard explained that by “the law of nature…women and children were not
only real importance of constitutionally protected privacy—the ability to define one’s own destiny—collapses under the crushing weight of heterosexual hierarchical domination. Even on this question of sexual privacy, heterosexuals are the measure of worth. Gays are delivered from non-person status because of their equivalency with straights, not because of any inherent equal worth. The destined good has been defined for Gay people, but not by Gay people.57

The Lawrence majority essentially says: Look at what anti-sodomy laws prohibit (oral and anal sex). These are expressions of sexual intimacy common to straight and Gay alike (just as the expression of sexual intimacy at all is common to Gay and straight alike). If it must, as Justice Stevens proclaims in Hardwick, be protected for straight people, then Gay people should get the benefit of that protection, too. Any difference between Gay sexual intimacy and straight sexual intimacy—at least any difference to the point of constitutional significance—is, in the Court’s view—a fantasy of the Texas legislature. In this very basic observation, surely the Court is right. But what the Court’s approach misses and, I argue, thereby validates is the fact that the heterosexual hierarchy of power at work when the Texas legislature imagined a legally significant difference in Gay and straight intimacy produces real as well as imaginary differences—differences that become inequalities. Real difference emerges, often in the form of psychic or cognitive differences. The 800 pound gorilla in the Lawrence opinion is this question: Why should Gay people have to be perceived as like straight people (indeed, with such myopic obsession that even Gay rights groups believe heterosexuality to be the

regarded as the equal of men.” The congressional debates and social practices of 1866-1868 suggest that for most the class or caste principle was not expected to change the inferior role the law typically assigned to married women. See Michael Kent Curtis, The Fourteenth Amendment: Recalling What the Court Forgot, 56 DRAKE L. REV. (forthcoming July 2008) (internal citations omitted).

Despite this obvious shortcoming, Professor Curtis believes strongly in the redemptive power of the “similarly situated” conception of equality when in the hands of courts willing to apply the premise to evolved social facts. My problem is that this conception is, itself, a caste. Substantive equality theory of the type I propose in this paper would not depend needlessly on rationality inquiries—that is, whether the government can rationalize a reason for the discrimination (e.g., “nature,” “morality,” etc.) Instead, the courts would ask whether the law in operation (as distinct from motivation) has the effect of instituting or perpetuating a caste. By this definition, women deserved equality as much in 1866 as they do in 2008. And this entitlement does not depend on the willingness of male-dominated society to determine that women are really not much different from men. But because courts operated—and continue to operate—under the flawed “similarly situated” standard, women still do not have equality.

Another meritorious criticism of the Lawrence majority opinion, although one tangential to this discussion, is the criticism that Lawrence is a substantial departure from the privacy canon altogether. This is so because the majority requires privacy in the traditional sense (read: secrecy (to a degree)) in order for the liberty it announces to be exercised in any meaningful way. The Lawrence majority speaks in the sweeping language of destiny but then requires that those engaging in “sodomy” do so closed-off, behind closed doors. Justice Kennedy underscores this when he says, “Liberty protects the person from unwanted government intrusion into a dwelling or other private place.” Lawrence at 562. Or “[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” Id. at 567. Kennedy’s analogy between the activity at issue in Lawrence and the obscenity cases, like Stanley v. Georgia, (privacy protects the right to possess obscene (otherwise illegal) material in the home) helps make it plain. This type of privacy is as much cage as sanctuary. It is exactly the same conception of privacy manifest in the military’s “Don’t Ask, Don’t Tell” policy allowing Gay servicemembers to serve as long as they keep their sexual proclivities entirely secret. See generally Shannon Gilreath, Sexually Speaking: “Don’t Ask, Don’t Tell” and the First Amendment after Lawrence v. Texas, 14 DUKE J. GENDER L. & POL’Y 953 (2007).
presumptive measure of goodness) in order to receive protection as equal citizens? Why is heterosexuality the access point to citizenship, so that Gay people—Gay people who want to make a claim for equal citizenship in a legal order (a world order) made by straight people—have to show that they are the same as heterosexuals in all the ways that really matter, and that they are only accidentally homosexual as a consequence of birth.

This is the ultimate failing of the Court’s decision to go the privacy route. Whatever lurks beneath the rock of formal equality (like alike, unalikes unalike)—whatever must be squashed so that substantive equality can thrive—goes undiscovered. Of course, anytime one criticizes the establishment with the ground of Gay liberation as his base, he must immediately answer calls that he is advocating for special rights. At least with relation to my criticism of the Lawrence decision in this essay, I should answer this anticipated criticism now. I can understand intellectually this criticism. “Isn’t Gilreath asking to be regarded as both the same and different? Isn’t he asking to have it both ways?” My answer is: So what? This is exactly what straight people have: equality under the law and preservation of their identities as straight people. Lawrence illustrates this perfectly. Straight people are like Gay people when they want to be (when they want to engage in sodomy) and they are different from Gay people when they want to be, too (when they want to get married, for example). So for Gay people to be equal and different at the same time is, in a word, fair.

III. Loving and the Road to Substantive Equality

If you are trying to transform a brutalized society into one where people can live in dignity and hope, you begin with the empowering of the most powerless. You build from the ground up.


A. Substantive Equality

A different approach was open to the Court, however, one that threads its way through our constitutionalism from its earliest theoretical formulation—from Jefferson’s Declaration to the Fourteenth Amendment. Equality was the approach not taken, the question not answered, in Lawrence v. Texas. This approach is one not concerned with similarities and differences, but with the distribution of power. Sexual orientation is a

58 Feminist advocates have understood the necessity of eschewing a similarities test in favor of a power differential approach for some time. For an excellent exposition for the woman-centric argument that “sameness” and “difference” in equality theory should be replaced by “a deeper understanding of gender as a system of power relations,” see Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 836 (1989). Catharine MacKinnon elucidates a version of this dominance-over-difference approach to equality analysis as far back as 1979. See Catharine A. MacKinnon, Sexual Harassment of Working Women (1979). She continues to refine the theory in subsequent work, see, e.g., Catharine A. MacKinnon, Feminism Unmodified (1988) (examining the sameness/difference approach as derivative of Aristotelian theory).

I remain convinced that the inequality of Gays to straights, with its particularized prejudices, now almost uniquely rationalized as acceptable religious expression, normatively moral when actually only descriptively so, deserves a theory of its own. Nevertheless, earlier feminist theorizing on the failings of “similarly situated” analysis and the possibilities of a realistic judicial look at majoritarian dominance is of merit to Gay liberation. The link between women and Gays and their social, religious, and legal inequality is impossible to deny. For an excellent exposition of the connection, see David A.J. Richards, Women, Gays, and the Constitution (1998).
question of power, of hetero-domination and of Gay subordination. Substantive equality recognizes that inequality is not inherent, but constructed. From this perspective, sexual orientation may not qualify as a difference at all, except that it has been constructed into one by the heterosexual hierarchy that has used it as a tool for dominance. From the assumptions of heterosexual male supremacy come categorical distinctions that matter, which have been gender and sexual orientation. In this invented reality, difference is only consequential as a tool for social power. Justice Kennedy’s privacy rationale recognized that a constructed difference existed and should be unconstitutional because, as the majority understood it, the difference (the sex of sexual partners) was an artificial one. The individuated nature of the privacy right, however, ensured that the Court stopped here, without exposing and considering the root cause of the epistemological distinctions drawn by the Texas law. The kind of substantive equality approach I envision would have gone further. It would have given Gays access to the standard by which differences are measured and power meted out, rather than, as the Lawrence Court did, rest on the determination (albeit right) that resulted when it measured one group’s (Gays) differences against the standard set by the group (straights) that constructed the differences.  

Now, if the Court is to cease asking questions of categorized difference, what questions should the Court ask? In the sort of substantive equality approach I suggest, the Court, instead of asking whether Gays and straights were sufficiently alike or sufficiently different or were in the appropriate box for purposes of criminalization, would have asked whether the law promoted the dominance of one group with the consequence of the subordination of the target group, in a socio-political reality in which the groups are, in fact, unequal in power, and where the socio-political (and legal) hierarchy excludes the target group from power. In short, this approach is the revivification of Justice Harlan’s much-lauded Plessy dissent: There is no caste here. This approach, of course, requires the Court to realize things it may not wish to realize. It requires the Court to depart from a historical jurisprudence of formal equality only, and to begin to ask questions that are so hard because they are so simple. It requires the Court to distinguish the oppressed from the oppressor, victim from victimizer—powerful from powerless. It requires that the Court examine equality (or more often inequality) as it really exists—in reality—not merely in the abstract world of judges and law professors.

Some constitutional scholars are disquieted by my shift from a “difference” to a “dominance” theory of equal protection. For example, in conversations about this essay, Professor Michael Kent Curtis raised the following hypothetical:

Suppose a young man in a small Southern town wants to enter nursing school. The nursing program in closest proximity to the young man is part of a woman-only college. He is denied admission based on his sex. The young man brings an equal protection challenge seeking access to the

59 I continue to believe that “Equality … is the combination of personal and civic freedom; it is a combination of the private and the public. While it is fair to say that one cannot enjoy civic freedom without first possessing personal liberty, one is not free until one has a role in shaping the public mechanisms that govern one’s destiny.” Gilreath, SEXUAL POLITICS, supra note 28, at 129-130.

60 Plessy v. Ferguson, 163 U.S. 537, 539 (Harlan, J., dissenting) (1896).
woman-only program. Shouldn’t the young man receive equal opportunity?

The young man is a sympathetic plaintiff. He is not wealthy; he is caring for a sick mother; and he wants to enter a noble profession. He cannot do so in the manner most convenient for him solely because of an accident of birth—his sex. In *Mississippi University for Women v. Hogan*, the case from which Professor Curtis’ hypothetical is drawn, the Supreme Court ruled—applying the formal, “likes alike; unalikes, unalike” equality theory—that refusal to admit the young man based solely on his sex was a violation of equal protection.61

Professor Curtis believes that *Hogan* was rightly decided and that my shift to a “dominance-over-difference” equality analysis like the one I posit for *Lawrence* would require contrary results. The sex-based classification in question doesn’t, at first blush, appear to be constructed to promote the dominance of women over men, and men as a target group likely aren’t subordinated by it (given what we know about the employment realities of men and women); hierarchy is not constructed to subordinate men—on the contrary, the hierarchy cuts the other way; and the power differential is, in reality (if reality is composed of something more than isolated counterfactuals), weighted heavily in favor of men. Therefore, wouldn’t my equality theory mean that the sympathetic male plaintiff loses?

Maybe. But this result does not necessarily follow from my theory. My substantive equality approach looks at inequality as it really exists, which requires that the court examine the power structure at play and its attendant moral register in its entirety as a complement to individuated decision-making. In this type of analysis, the male plaintiff may still win if he can show that the segregation of the nursing profession has the net effect of relegating women to a subordinate status. An economy that attempts to define certain professions as “for women only” may indeed have such an effect.

Reasoning like this, albeit a bit more patronizing, seems to be the basis for Justice O’Connor’s majority opinion in *Hogan*. Sex stereotyping notwithstanding, in other circumstances in which a male plaintiff seeks access into the relatively few enclaves enjoyed and controlled by women, my theory may well order his loss in the courts. Equality should not be used as a battering ram by which a majority member can shatter the few enclaves carved out by the minority for themselves. This would defy the “dominance-over-difference” approach and return us to mere formal equality. Such a result ignores the reality by which majority and minority—in the hypothetical example: men (heterosexual men, at least) and women—live their lives. In that reality, “differences” constructed by the majority into legal significances have already given the heterosexual male a myriad of advantages, which may explain why certain woman-only enclaves may be a necessary evolution in the first place. In these instances, the use of “likeness” theory to open new inroads for the majority simply serves to magnify the advantages already enjoyed by the majority. Such an approach turns equality theory into an affirmative action program for the already-powerful.

Exceptional cases and counterfactuals, like *Hogan*, are convenient weapons for attacks on substantive equality theory. Unfortunately, they usually ignore the group

---

realities that define minority existences. Only in a legal order grounded in heterosexual male supremacy would “driving further,” as the plaintiff in Hogan would have had to do in order to enter a co-ed school, be judged an imposition equal to the destruction of a learning model formulated to specifically address the needs of a less powerful minority. Haven’t the women of Mississippi University for Women lost exponentially more than the individual male plaintiff has gained? Shouldn’t this, at least in an equality analysis—perhaps especially in an equality analysis—matter? Perhaps the Hogan majority’s decision costs the women more as a group than the individual male plaintiff gains. The focus on the needs of the individual plaintiff, divorced from group realities, is natural in a legal order that systematically, pathologically advantages the already-advantaged. In reality, however, while heterosexual men may be able to live their lives primarily as individuals, many minorities, especially women and Gays, live realities defined almost entirely by their group status. In such a world order no caste is created by single-sex or single-sexuality learning environments (like the Harvey Milk School for Gay students in New York City). Such educational environments merely take into account group realities that define existence.

I would defend educational experiments, like the Harvey Milk School, by suggesting that such environments may be necessary to account for—in a more than merely ameliorative way—the realities faced by Gay youth. I could defend all-women or “historically Black” institutions on similar bases. Such environments created by the powerless as a powerbase illumine the sharp distinction between separation and segregation. The former is an instrument of survival; the latter is an implementation of caste. Viewed in this way, it makes no sense to destroy these ecologies of survival because one member of the majority must suffer the burden of “driving further.” Indeed, such a result is the opposite of equality—it is a net loss for equality.

**B. Loving v. Virginia**

The paradigm case for a substantive equality analysis of the questions presented by Lawrence is not found in the contraception cases and their endangered privacy, but rather the paradigm is Loving v. Virginia, in which the Court struck down antimiscegenation laws as discriminatory tools to maintain white supremacy. In

---

62 Loving v. Virginia, 388 U.S. 1, 11 (1967). I have not chosen Brown v. Board as my paradigm (though it is the most commonly touted equality case), because I do not believe Brown, in fact, to be a substantive equality case. By my reading of it, Brown, unlike Loving, announces no new equality theory. The Brown Court simply applied the Plessy Court’s formal equality analysis (the likeness/difference approach) to evolved social facts. In other words, the court decided that Black people were sufficiently like white people to merit integration. Viewed in this way, Brown is the mirror of Lawrence: the minority “wins” because it has sufficiently—in the eyes of a court constituted primarily by the majority—come to resemble the majority (or has the potential to). There is an equality there, for sure, but one without substance.

63 It is interesting that the justices dissenter in Hardwick apparently thought Loving to be the most analogous precedent, too. Justices Stevens and Blackmun, both joined by Justices Brennan and Marshall, wrote dissents that relied on Loving. Justice Blackmun noted that “[t]he parallel between Loving and this case is almost uncanny.” Hardwick, 478 U.S. at 210 n.5 (Blackmun J., dissenting). Likewise, in a footnote, Justice Stevens notes the parallels between the crimes of miscegenation and sodomy. 478 U.S. at 216 n.9 (Stevens J., dissenting).

The Loving analogy has been made by academics. For a brilliant analysis, see Andrew Koppelman, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L. JOURNAL 145
Loving, the Court did not feel constrained in its equality analysis because the Virginia law prohibited Black people from marrying white people as well as white people from marrying Black people (mirroring the sort of equal application sodomy law the Court envisioned would be problematic for equality analysis in Lawrence). Instead, the Court looked at the overarching problems of power and hierarchy. The Court invalidated the Virginia law at issue in Loving because it was “designed to maintain White Supremacy.” 64 This focus is also a departure from the “trait-based’ jurisprudence that has come to define equality doctrine. The Court spent no time expostulating on the evils of classifications drawn on the paradigmatic trait—race. Rather the Court focused on the power relationships at play in a system of supremacy—power hierarchy which “violates the central meaning of the Equal Protection Clause.” 65 The one exception was Justice Stewart, who argued that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.” 66 Race was determinative for him. No other justice joined his opinion, and Chief Justice Warren’s majority opinion is indubitably concerned with the consequences of power and caste.

Sodomy laws, no less than antimiscegenation laws, are designed to maintain supremacy—this time Heterosexual Supremacy—what Adrienne Rich coined as Compulsory Heterosexuality. 67 Moreover, the Loving Court was not deterred by the possibility of a racially neutral restriction on marriage. Instead, the Court recognized and focused on the substantive inequalities of power that motivated the law in the first place, writing “[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.” The law operated to institutionalize a caste, and that was enough to constitutionally condemn it.

A similar observation by an intellectually honest Court regarding Justice O’Connor’s hypothetical facially neutral sodomy law would be this: The mere existence of sodomy laws, whether they target only Gays or all people equally, given the real inequalities between Gay and straight, discriminate on the basis of sexual orientation in a way that entrenches heterosexual dominance in violation of the Equal Protection Clause 68 (1989). Professor Koppelman and I cover some of the same ground, albeit from distinctly different starting points—he from the already well-framed law of sex discrimination and I from the far less well-framed law and theory of Gay liberation.

It is no surprise that Loving should figure so prominently in the thinking and rethinking of Gay equality claims. The relationship between Loving and Lawrence provides an historical analogy, but it, in multiple ways, provides a converged reality as well. Gay people have never have been owned as chattel property (at least not as Gay people—surely there were slaves who happened to be both Black and Gay); otherwise, their treatment has been similarly tragic. Like Blacks, Gay people have been subject to systemic abuses, sexual and other physical violence, condoned and, indeed, often encouraged by the American legal order from the top down. Blacks, Gays, and women have all been systematically sexualized by their governments. But these realities of the lives lived by the powerless or less powerful are seldom the stuff of which decisions are made in formal equality adjudication.

64 Loving, 388 U.S. at 11.
65 Id. at 12.
66 Id. at 13 (Stewart, J., concurring).
67 ADRIENNE RICH, BLOOD, BREAD, AND POETRY 23 (1986).
of the Fourteenth Amendment. This is so because, while straight people apparently engage in acts of oral and anal sex with great frequency, the conduct is inextricably associated with Gay people. The unavoidable association of Gay people with sodomy has been the means by which heterosociety fictionalized the caste. An honest recognition of this reality would have accomplished the result the majority wanted without resort to the spuriousness of privacy.

By failing to follow the substantive equality approach, Lawrence’s victory became a limitation almost the moment it arrived. Perhaps this was intended. After all, if marriage laws based on racial classifications are unconstitutional because of their caste-maintaining consequences—if hierarchies of supremacy and dominance are bad in this realm—why are marriage statutes based on sexual orientation not so? Perhaps this was the unarticulated worry that motivated the Court’s choice of approaches. The privacy

---

68 For example, in striking an anti-Gay Act in South Africa, Justice Ackermann of the South African Constitutional Court focused on the ways in which the mere “existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.” Nat’l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC) ¶¶ 14-26, 27-39. This is somewhat different from Justice Kennedy’s focus on the stigma attached to convictions under such laws.

69 Moreover, even in the current equal protection framework, a facially neutral sodomy statute need not be a major hurdle for a Gay plaintiff bringing a discrimination action. Facial neutrality is not proof—not at all—that the law does not target Gays. A plaintiff need not “prove that the challenged action rested solely on racially discriminatory purposes….When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.” Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Homophobia may or may not have been the original motivator of antisodomy legislation, but it certainly has been a prime motivator in the statutes’ retention. This is rarely disputed. Consider the 1981 decision of the House of Representatives to overrule a decision of the D.C. City Council to repeal the District’s sodomy law. The House debate focused on homosexual sodomy, not heterosexual activity. “A vote to table or postpone is a vote to legalize sodomous [sic] homosexual liaisons,” declared Rep. Philip Crane, resolution sponsor. 127 Cong. Rec. 27,749 (1981). See also remarks of Rep. Parren Mitchell noting and criticizing the debates’ nearly exclusive focus on homosexual sex. Id. For a discussion, see Koppelman, The Miscegenation Analogy, supra note 63.

Of course, Hardwick itself ought to close the debate on the meaning of facially neutral sodomy laws. The Georgia law at issue applied equally to Gays and straights, but Georgia defended it almost exclusively in light of the evils of homosexuality; and Justice White, writing for the Court, followed the House of Representatives in his opinion’s exclusive focus on homosexuality. The result of these observations, even if we accept the work of historians who want to delink Gays and sodomy prohibitions (see the brief of the historians in Lawrence), ought to be this: The antisodomy law is facially neutral. So what? Homophobia need not be the sole reason for the statute, it need only be a “motivating factor.” See Arlington Heights, 429 U.S. 252, 265-66 (1977); accord Personnel Administrator v. Feeney, 442 U.S. 265, 276-77 (1979).

Moreover, the substantive equality theory I postulate, one that sees dominance before difference, would scrap this requirement altogether. Substantive equality theory would require no proof of a legislative mens rea of “reckless” or “knowing” disadvantage to the target group before a law should fall as an unconstitutional breach of equality. Instead the Court would inquire as to whether the law at issue has the effect of instituting or perpetuating a caste. If it does, then the government would have the duty of proving that the classification did not legalize identity prejudice.

70 Loving, after all, came 13 years after Brown. The Court denied certiorari in miscegenation cases twice before the Loving decision, once in 1954, just months after Brown was handed down (Jackson v. Alabama, 348 U.S. 888) and again in 1956 (Naim v. Naim, 350 U.S. 985). After the 1967 Loving decision, the Court declared—seventeen years later—that the interracial nature of a parent’s subsequent relationship could not be a basis for a custody decision regarding children of a prior relationship. (Palmore v. Sidoti, 466 U.S. 429 (1984)). This slow progress might be seen as a shirking of constitutional duty by the Court, or it might be
approach by contrast allows the Court to stop short of this outcome. Marriage involves more than the nonintervention privacy requires. Marriage requires legal recognition by the state. So, marriage—the current holy grail of the Gay movement—is beyond Lawrence’s scope. Essentially, Lawrence holds that Gay “dignity” is inviolable only when the law recognizes it as unregulable. When it is not so recognized, it is neither inviolable nor free. It is in private, where the Court locates it, that equality is most vulnerable. The Lawrence decision reinforced the private/public demarcation that has been the inevitable result of the Court’s privacy jurisprudence.

A substantive equality analysis would have avoided these problems. It would also have avoided the “problems” that give Justice Scalia most pause about the Lawrence decision (at least, that is, if you take Scalia’s dissent at face value rather than viewing it simply as rationalized bigotry). Scalia believed that the majority’s privacy rationale and its resulting decriminalization of sodomy necessarily mean the decriminalization of bigamous marriage, same-sex marriage, incest, prostitution, adultery, fornication, bestiality, and obscenity. Scalia interestingly concedes that since majoritarian morality cannot trump individual privacy, laws criminally prohibiting these practices must fall. Substantive equality analysis would find Scalia only partially right. As I explained, substantive equality would result in the fulfillment of Scalia’s prophesy about same-sex marriage. But substantive equality’s insistence that the Court make realistic distinctions between the powerful and powerless would ensure that the other freaks in Scalia’s parade of horribles would find no refuge in equality—because they entail real power inequities and real harms.

Polygamous marriage could continue to be criminalized based on the gender inequities usually entailed in the reality of these relationships. Thus, the laws would stand as shields against an institution (the polygamous marriage) that usually compounds existing sex inequalities between men and women, thereby serving to entrench male supremacy. Laws prohibiting bestiality would stand, if for no other reason than the obvious power inequality between animals and humans. Prostitution and pornography entail obvious harms to women—obvious to all but those who do not want to see them. Their prohibitions would likely remain undisturbed. Laws prohibiting rape, incest and other crimes of forced sex would remain intact because of the obvious harms and power inequities of forced sex crimes.

IV. Substantive Equality—Not a Moral Issue: A Note

The degree and kind of a man’s sexuality reach up into the ultimate pinnacle of his spirit.

seen as “prudence.” (See Koppelman, The Miscegenation Analogy, supra note 63, at162 (“The prospect of the Court attempting to impose such results on a resistant society is, and should be, a daunting one.”).) Whatever the proper description, the Court’s “one bombshell at a time” approach to earlier social issues may portend a long road to a Gay rights vindication of marriage equality. Gay marriage is certainly no less explosive than was interracial marriage.


72 Lawrence, 539 U.S. at 578.

73 See Angela P. Harris, From Stonewall to the Suburbs?, supra note 27, at 1539 (“Embracing Lawrence, even with the hope of somehow turning it against itself, is a strategy that risks us getting lost, once again, in the mazes of the public/private distinction.”).

74 Lawrence, 539 U.S. at 590. (Scalia, J., dissenting).
An analogy between *Loving* and *Lawrence* is also important because it illumines the faultiness, constitutionally speaking at least, of transmuting the old talisman “love the sinner, hate the sin,” into jurisprudential theory. The “possibility that one can ‘hate’ an individual’s behavior without hating the individual” has been a stumbling block even to those who are largely sensitive to claims for equal citizenship made by Gay people. Michael Perry, for instance wonders whether an “irrational fear and loathing” of homosexuals really motivates many of the laws that deny Gays equal citizenship, for example opposition to opening civil marriage to Gay couples. Perry wonders whether such resistance is rather a genuine expression of religiously-based moral disapproval (presumptively more benign?) for homosexual activity, and thus a reluctance to “incentivize” it. Andrew Koppelman, a consistent proponent of marriage equality, also argues, “[n]ot all antigay views…deny the personhood and equal citizenship of Gay people….There is a serious discussion to be had here about sexuality and morality.”

Now, opposition to Gay “conduct” (or conduct most commonly presumed “Gay”) may be, as Perry sees it, a genuine expression of religious morality. Or it may be, as I see it, a convenient rationalization for bigotry. Or it may be both. What *Loving*’s equality analysis makes quite plain, however, is that the answer to this conundrum makes absolutely no difference in the way the Court should adjudicate an equality-based claim under the Fourteenth Amendment. Religious justifications supporting anti-equality legal regimes have served as no magic shield from constitutional scrutiny. Indeed, the Virginia trial judge who sentenced Richard and Mildred Loving to banishment for the *conduct* of engaging in interracial marriage buttressed his decision by concluding that interracial marriage violated the laws of “the Creator.”

Almighty God created the races white, black, yellow, malay [sic] and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Was this religious pronouncement a reflection of the deeply-held moral conviction of the Virginia electorate, or was it a rationalization and tool (a very effective one) for the maintenance of White Supremacy? The Court made no effort to solve the dilemma because it was constitutionally irrelevant. Regardless of whether the impetus for the miscegenation statute was one of moral force, the sentiments in legal operation denied equality to Blacks.

---


78 *Loving*, 388 U.S. at 3.
Indisputably, a religious teaching about the natural separation of the races was part and parcel of the Southern establishment that kept Blacks powerless. Pro-segregation Southern ministers frequently argued that Blacks were God’s creation too and should be treated compassionately, but that

the destiny to which the Almighty has assigned [the races] on this continent . . . require[s] that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.  

It’s really for their own good, see?

Anti-Gay laws rest on powerful religious convictions, too. Some such expressions mirror those of pro-segregation preachers in that they affirm that Gays should be treated with “respect, compassion, and sensitivity.” Only their “conduct” (having sex with same-sex partners, or marrying someone of the same sex) is morally dubious and objectionable.

...}

79 Kinney v. Commonwealth, 71 Va. 858, 869 (1878). Arguably, this kind of legal imposition of sectarian definitions of “destiny” would even violate the right to privacy, in so far as that right has been construed to protect an individual’s ability to control his own destiny and to define his own relationship with the Universe.

80 USCCB Administrative Committee, Promote, Protect, Preserve Marriage: Statement on Marriage and Homosexual Unions, 33 Origins 257, 259 (2003). This concededly pretty language rings rather hollow to many Gay people, especially considering that the Vatican has also labeled us “inherently disordered” and equates our mere contact with children with child abuse.

81 Similar arguments, resting on moral grounds, were used to deny women equal citizenship. Consider Justice Bradley’s explanation of his decision in Bradwell v. Illinois in which the Court upheld laws prohibiting the “conduct” of a woman’s practice of law: “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” 83 U.S. 130 (1873).

Or this attack on women abolitionists:

We invite your attention to the dangers which at present seem to threaten the female character with widespread and permanent injury. The appropriate duties and influence of women are clearly stated in the New Testament. Those duties, and that influence are unobtrusive and private, but the sources of mighty power. When the mild, dependent, softening influence upon the sternness of man’s opinions is fully exercised, society feels the effect of it in a thousand forms. The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for protection. See ELEANOR FLENNER, CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES (rev. ed. 1975) (1959) (quoting a pastoral letter).

Or: “The Creator has endowed the bodies of women with the noble mission of motherhood…Any woman who violates this great trust by participating in homosexuality not only degrades herself socially but also destroys the purpose for which God created her.” Allan Bérubé and John D’Emilio, The Military and Lesbians During the McCarthy Years, 9 SIGNS 759, 769 (1984) (emphasis added).

Condemnation of the “conduct” at issue in these statements was done to protect and further “respect, compassion and sensitivity” toward women, not to deny a woman’s personhood. Indeed, the hate the sin, love the sinner camp would argue that the condemnation is there solely so that personhood may be fully recognized. Likewise for homosexuals. The abiding insult of such pronouncements is that the pontificators purport to know what is good for Gays better than Gays know it for our selves. Enforcing this descriptive “good” by the power of the state is exactly what makes such laws violate the substantive
None of this posturing mattered to the *Loving* Court. All that mattered was that Virginia’s antimiscegenation law, whatever its religious justification, served to entrench the power of the white hierarchy—a consequence that struck at “the central meaning of the Equal Protection Clause.”

V. Privacy, Equality, Stigma, and Power: Some Final Thoughts on *Loving*’s Lesson

The genius of any slave system is found in the dynamics which isolate slaves from each other, obscure the reality of a common condition, and make united rebellion against the oppressor inconceivable.


I find it curious that the Court would find the answers to its concerns over “stigma” in due process as opposed to the substantive dimensions of equality. How heteronormativity and homophobia define the “Gay” person was the proper departure point for the *Lawrence* decision; yet, it is given only passing reference. Kenneth Plummer has observed:

> The single most important factor about homosexuality as it exists in this culture is the perceived hostility of the societal reactions that surround it. [...] [This hostility] renders the business of becoming a homosexual a process that is characterized by problems of access, problems of guilt and problems of identity. It leads to the emergence of a subculture of homosexuality. It leads to a series of interaction problems involved with concealing the discredbtable stigma. And it inhibits the development of stable relationships among homosexuals to a considerable degree. Homosexuality as a social experience simply cannot be understood without an analysis of the societal reactions to it.

The analysis Plummer suggests is exactly the analysis the Court’s privacy decision avoids. Privacy analysis asks where power may be exercised. What are its spatial limits?


82 *See generally Lawrence*, 539 U.S. at 575.

83 JÉAN PAUL SARTRE, ANTI-SEmitE AND JEW 143 (1948). Sartre’s observation was certainly true in Nazi-era Germany. In the 1920s, Joseph Goebbels, later Hitler’s official propaganda minister, organized an anti-Jew campaign in the very effective form of cartoons. The cartoons focused on one character, a Jewish police officer. The man, derisively nicknamed “Isidor,” was caricatured, in among other atrocious ways, with his neck in a crude noose. The caption read: “For him too, Ash Wednesday will come.” The cartoons became the vehicle by which the Nazis imparted all manner of nefarious characteristics to Germany’s Jewish citizens. The police official on whom “Isidor” was based sued Goebbels to stop the publication of the libelous cartoons. Goebbels, his lawyers making full use of all the available “democratic” protections of free speech—after all, such “democratic” protections are always available to the powerful—got Goebbels acquitted. The appellate court upheld the acquittal reasoning that the word Jew was equivalent to the word Protestant or Catholic. Surely one could not be sued for libeling another by calling him a Protestant or a Catholic. How could there be injury from calling a Jew a Jew? See Shannon Gilreath, *Tell Your Faggot Friend He Owes Me $500 for My Broken Hand: Some Realism About First Amendment Fundamentalism* 44 WAKE FOREST L. REV. (forthcoming May, 2009).

84 KENNETH PLUMMER, SEXUAL STIGMA: AN INTERACTIONIST ACCOUNT 102 (1975).
Substantive equality analysis, by contrast, asks: What is power? What does a group deprived of power look like? And what would redistribution of power take?

Professor Kenneth Karst has offered the following analysis of power as it relates to stigmatization and inequality:

The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who “belongs.” Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma. The inverse relationship between stigma and recognition as a person is evident. “By definition, …we believe that the person with the stigma is not quite human.” The relationship between stigma and inequality is also clear: while not all inequalities stigmatize, the essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect. A society devoted to the idea of equal citizenship, then, will repudiate those inequalities that impose the stigma of caste and thus “believe the principle that people are of equal ultimate worth.”

The privacy-based decision in *Lawrence* merely removed one possible place in which the stigma that is “homosexuality” may legally operate. It does little—if anything—to investigate the “how” and “why” of the stigma the majority presumed in the wider world—indeed, it purposefully stops short of such an analysis. If, as Professor Karst has suggested, equality is ultimately reducible “to a claim to be free from stigma,” has the *Lawrence* Court really done anything at all to address substantively the equality question before it? *Lawrence* tells us that the government may not force its institutionalized stigma in the form of the criminal law into the private confines of the bedroom. Despite the poetry of language Justice Kennedy employs, the *Lawrence* decision practicably goes no further—and cannot. Essentially, the decision reinforces the need for the Closet. The most wounding aspect of *Lawrence* is perhaps the fact that its gesture toward “equality of treatment” operates as the latch dropped on the Closet door.

By limiting recognition of Gay rights to the decriminalization of consensual sex in private, *Lawrence* thus draws a line across which the liberty it supposes does not operate, or at least across which liberty’s operability remains questionable. The majority then undertheorizes to the point of nonexistence the way the line demarcating the private from the public is constantly susceptible to repressive heterocentric definition. The stark

---


87 Indeed, Professor Harris points out that with the ascendancy of “neoliberal” politics, especially consolidated under the Reagan presidency, the public sphere is shrinking (as are the legal remedies that
contrast between private and public assumes for Gays a dual reality with which no other category of citizen is asked to contend. The liberty presupposed by the Lawrence majority ought to mean more than the availability of a defined space in which one may live freely as long as one lives detached from the rest of society.

The Fourteenth Amendment forbids the arbitrary isolation of groups of people into untouchable categories exempt from basic moral freedoms of self-determination and liberty of conscience that subject caste members to burdens not borne by citizens outside the caste.° One lesson we should take from Lawrence is that equality should not depend

usually operate in it) as rights and citizenship are increasingly defined into the private realm. She quotes Laruen Berlant for the proposition that “since ’68, the sphere of discipline and definition for proper citizenship in the United States has become progressively more private, more sexual and more familial, and more concerned with personal morality.” Angela P. Harris, From Stonewall to Suburbs?, supra note 27, at 1560 (quoting LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 86 (1997)). As Harris notes, this family-centered view of citizenship is trended heteronormative and as politicized generally involves the drama of the straight family norm in constant conflict with “evil queers and selfish feminists bent on destroying the ‘family.’”°° I fully articulate this theory of equal protection in Shannon Gilreath, Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—with a View toward a Constitutional Moral Imperative, 9 J. LAW & SOC. CHANGE 1 (2006). For a similar but narrower caste-based theory, see Cass Sunstein, The Anticaste Principle, 92 MICH. L. REV. 2410 (1994).

Critics have observed that my conceptualization of the equality norm leaves the question of the poor unanswered. Surely poverty is a caste that ought to be incorporated into any meaningful antisubordination theory of the kind that my “dominance-over-difference” theory purports to be. I share Professor Mari Matsuda’s belief that, in any jurisprudential theory that matters, the theorist must maintain a “multiple consciousness” that allows him to “operate both within the abstractions of standard jurisprudential discourse, and within the details of [his] own special knowledge.” See Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7, 9 (1989). See also Darren Leonard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358 (2000) (arguing that failure to analyze Gay rights claims in terms of race and class results in the faulty essentialism of using white, economically privileged Gays as a proxy for all Gays). Nevertheless, even a theory attuned to multiple consciousnesses must categorize to avoid the inevitably unworkable nature of a theory that is too narrow because it is too individuated or too broad because it approaches sweeping meta-theory.

The Gay struggle is a particularized struggle. The power differential that results from the heterosexual hierarchy against Gay people’s interests is often unique. For Gay liberation theory to matter, and for any conceptualization of an equality norm that is informed by it to matter, some identifiable expression of the “Gay experience” must be distilled; not to the isolationist extreme of essentialism, but in order to define a theme, which for Gay liberation is necessarily the theme of straight against Gay. The search for this kind of definition may mean that in certain situations the experiences of those in parallel castes are suppressed to a degree. This may be a necessary (but concededly disappointing) side-effect of constructing a theory with coherence and that will possess any authority.

Fully understanding, as Barbara Smith observed, that the effect of multiple oppression is “not merely arithmetic,” 8 See Barbara Smith, Notes for Yet Another Paper on Black Feminism, or Will the Real Enemy Please Stand Up?, 5 CONDITIONS 123 (1979)), my solution is to treat poverty as an intensifier of the underlying prejudice discussed by the theory (be that, for example, anti-Gay, anti-Black, or anti-woman prejudice). In this way, my theory operates on the assumption that there are particularized inequities of the experience that is straight against Gay, or white against Black, or men against women, which are the primary inequities that I envisioned when constructing the dominance-over-difference approach. Certainly, these inequities may be intensified when their victims also have the misfortune of being poor: so that a poor Gay person will feel more acutely the weight of straight oppression (usually) than will a Gay person who is better off financially. Economic privilege is often ameliorative of identity prejudice.

It is, however, important to note (and I make no representations to the contrary) that my dominance theory is aimed at a particular kind of subordination—that which may be denominated “identity
upon uniformity. As Judge Albie Sachs of the South African Constitutional Court so elegantly put it: Equality means equal concern and respect across difference.\textsuperscript{89} The assimilation demand inherent in Justice Kennedy’s reasoning does not even imagine that any constitutionally significant difference exists between Gay and straight—or that such difference could exist in other situations. The decriminalization of sodomy accomplished little more than the signal of an emerging tolerance, or perhaps acquiescence in, behavior, once descriptively deviant, by dominant straight society. The behavior is, nevertheless, still deviant enough to warrant its relegation to the privacy of the Closet. This stigma is even preserved for straight “sodomites.”\textsuperscript{90}

The Court’s hypothetical facially neutral sodomy law (most fully explored in O’Connor’s concurrence) begs the question of why such a facially neutral statute was enacted in the first place. Does the law’s theoretical applicability to straights make it any less stigmatic? Consider, again, the Court’s treatment of the interracial marriage ban at issue in \textit{Loving}. Virginia argued that the ban treated Blacks and whites equally. The only discrimination, argued Virginia, was against people who sought to participate in interracial marriages, and that categorization crossed racial lines.\textsuperscript{91} Black people could not marry white people and white people could not marry Black people. In this way, Blacks and whites were truly equal and no “racial” discrimination existed at all. This factual scenario led to the Court’s emphasis on “White Supremacy.”\textsuperscript{92} Virginia’s appeal to formalism in equality was rejected by the Court. Instead, the Court understood that Virginia’s aim with its antimiscegenation law was to preserve the race hierarchy. The significant source of power in any hierarchal caste system is the ability to determine the “inferior” from the “superior.” Indeed, a significant source of power in Virginia’s racial hierarchy was the ability to tell Black from white. In a Virginia with legalized racial mixing, the ability to tell the “superior” from the “inferior” would erode. Understood in this way—as the Court understood it—Virginia’s miscegenation ban violated the very core of Equal Protection.

subordination.” This type of subordination often (usually) transcends social class to be operative at any and every level of economic strata. For example, less-well-off straights may coalesce politically to visit anti-Gay prejudice on Gays in a higher economic stratum. Or take, for example, James Baldwin’s observation that neither the wealth nor fame he had achieved as a Black man entitled him to the use of a whites-only phone booth in Jim Crow Alabama—a privilege even the poorest white was accorded. Baldwin’s success may have been ameliorative of anti-Black prejudice because he could board a train and leave Alabama, but it did not destroy the subordination.

Or take as an example the observation of Critical Race Theory that a poor white man, when asked whether he would trade places with a more affluent Black man—if he could—would refuse to do so. It is with this type of identity subordination—which generally transcends economic class—that my theory is most concerned. I remain convinced that a poor straight man is inherently better off than is a poor Gay man. Despite what is lost for want of it, the theory I articulate here does not purport to be a general theory addressing all social inequality. I hereby invite the critique and subversion of my own theory for the good of the creation of one that does.

\textsuperscript{89} National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6, 57, ¶¶ 110-135 (CC) (Sachs, J., concurring).
\textsuperscript{90} This was the case in North Carolina in 2003, and in other states as well. For a thorough discussion, see generally Michael Kent Curtis & Shannon Gilbreath, \textit{Transforming Teenagers into Sex Felons: The Persistence of “Crime Against Nature” Prosecutions after Lawrence v. Texas}, 43 \textit{Wake Forest L. Rev.} (2008).
\textsuperscript{91} \textit{Loving}, 388 U.S. at 8.
\textsuperscript{92} \textit{Id.} at 10.
Consider now the analogous argument for purposes of sexual orientation. A substantive equality analysis, like that at work in Lov ing, would ask more than simply whether a sodomy ban applies to straight and Gay alike (where O’Connor’s analysis stops) but rather, in the event such a facially neutral statute existed, a substantive equality analysis would ask why the prohibition was likewise applied to straights and what are the effects of its operation. The answer, of course, is the same answer as that buttressing the miscegenation ban at issue in Loving: Prohibiting straight actors from engaging in sexual activity usually (historically) associated with homosexuals (oral and anal sex) keeps the sexual caste distinction pure—it makes it easier to define the sexually “superior” from the stigmatized sexually “inferior.” Under a conceptualization of equal protection which prohibits the marginalization of a citizen or group of citizens based on a merely descriptive moral disapproval of a trait, or display of a trait, immutable or otherwise, the antisodomy law at issue in Lawrence is as constitutionally infirm as the antimiscegenation law in Loving.

VI. Prudence and Jurisprudence: A Note

Judges must be politicians for the sake of the things that should be beyond politics.

As mentioned, constitutional commentary is largely a theoretical exercise, although one that can have compelling applications and effects. At any given moment, the Court faces practical limitations which the law professor does not. In fact, any agent of change that is judicial, legislative, or executive faces the very real and profound problem of the popular will. Abraham Lincoln, for example, consistently maintained that slavery was wrong. But as to the best means of eradicating slavery, Lincoln was open to equivocation—even doubt. Lincoln believed that as a practical matter “the great mass of white people” would not permit immediate unqualified change in the status of Blacks. “A universal feeling, whether well or ill-founded can not be safely disregarded.”

Justice Ruth Bader Ginsburg has expressed similar feeling in relation to Roe v. Wade. Roe, doubtlessly, had some extraordinarily disastrous results from the perspective of liberal politics. Roe galvanized the evangelical electorate and has been a consistently reliable clarion call to get these myopic, single-issue voters to the polls. The polarization Roe caused was central to the ascendancy of Ronald Reagan. And the tendency to see the women’s movement as co-terminus with the pro-choice movement has been, over all, detrimental to women’s equality interests.

---

93 The is the conceptualization of equal protection that I explore in previous works. See Gilreath, Of Fruit Flies and Men, supra note 88.

94 For a fascinating discussion of Lincoln and the slavery question see PAUL ESCOTT, "WHAT SHALL WE DO WITH THE NEGRO?": WHITE RACISM, ABRAHAM LINCOLN, AND CIVIL WAR AMERICANS (forthcoming, U. Virginia Press, 2009).

Sincerely, Paul Escott


96 Id.

My disagreement with Roe has been jurisprudential: it has been a disagreement with the Court’s philosophy and judicial methodology. I have not disagreed with Roe’s outcome: that McCorvey could procure an abortion. But the aforementioned societal backlash is serious reason to be skeptical of Roe’s wisdom. I think Gay rights advocates—even those of us who would consider ourselves more radical, as Gay liberationists—should resist allowing our needs—the adjudication of our rights—to become the next Roe v. Wade.

When one has nothing, and consequently has everything to gain, a little pragmatism goes a long way. Of course, the “Gay rights” movement, hijacked as it now is by “liberals” who are disconnected from the way most Gay people live their lives, has not been long on pragmatism. One need look no further than the disastrous way much of the Gay establishment handled a shot at federal employment anti-discrimination laws to see that. Hundreds of Gay rights organizations (one must read their dedication loosely) actively opposed the Employment Non-Discrimination Act in 2007, which would have secured much-needed protection for millions of Gay people, because the legislation, as revised in Congress, did not reach the aspiration of protecting transgender people, too. The approach of these anti-employment rights groups within the Gay movement is emblematic of a movement intuition that mistakes pragmatism for lack of principle.98

I have some sympathy with the un-pragmatic. As Professor Marc Spindelman has observed, “Pragmatic or prudential considerations always modulate a principle’s sweep.”99 No one wants a revolution more than I, but I am skeptical that the courts are always the wisest battlefields.

In my courses dealing with law and sexuality, I want students to think about not only what the law is, but what it should be as well. As I cover the marriage materials, I invariably ask students which court—the Vermont Supreme Court in Baker v. State100 or the Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health,101 had the better approach to bringing marriage equality to Gay people.102 Many students believe that the Goodridge Court got it right in ordering that only “marriage,” and no analogous construct of the legislature, like the civil union scheme which emerged from Baker, would do.103 These same students often overlook the important concerns the

99 Marc S. Spindelman, Reorienting Bowers v. Hardwick, 79 N.C. L. REV. 359 (2001). I might tweak this explanation a bit to say that prudential considerations modulate a principle’s application, not “sweep” as Professor Spindelman suggests. Principles are sweeping precisely because they are principles. It is the application of the principle that, sometimes for prudential reasons, (and sometimes sadly because of cowardice or careerism) does not always live up to its sweep.
100 744 A.2d 864 (Vt. 1994).
102 For further discussion see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 141-154 (2002).
103 See Goodridge, 798 N.E.2d at 969 (holding that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution); Baker, 744 A.2d at 886 (holding that plaintiffs were entitled to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples, but leaving it to the legislature to establish same-sex marriage or an alternative statutory scheme like “domestic partnerships” or “registered partnerships”).
Baker majority had in mind when it left it to the Vermont legislature to craft the legal vehicle by which the equality the Court mandated would be delivered.\(^{104}\)

In dissent, Justice Denise Johnson argued that the Court should have issued civil marriage licenses immediately.\(^{105}\) In a display of bare political calculation, majority and dissent trade accusations: Justice Johnson holding that the majority had “abdicate[d] [its] constitutional duty…”\(^{106}\) and the majority charging that Johnson’s claims were “insulated from reality.”\(^{107}\)

This rather acid disagreement between Chief Justice Amestoy for the majority and Justice Johnson exposes the argument over pragmatism that I have been talking about. Amestoy is unwilling to order the remedy of marriage, the only remedy Johnson believes plausible, because of the “disruptive and unforeseen consequences” such action may introduce.\(^{108}\) Clearly, he fears the possibility of a constitutional amendment overturning such a wide-sweeping remedy as Justice Johnson posits. In fact, Amestoy makes note of just those sorts of amendments reversing prior marriage equality rulings in Hawaii and Alaska.\(^{109}\) Amestoy is prescient here, for in the wake of Goodridge, the ensuing popular backlash spawned many state constitutional amendments precluding Gay couples from marriage and a similar, failed attempt at the federal level.\(^{110}\)

Justice Johnson’s reply to these concerns is ambivalence: “If the people of Vermont wish to overturn a constitutionally based decision, as happened in Alaska and Hawaii, they may do so.”\(^{111}\) Johnson is concerned with what the law is and with the most “straightforward and effective” way of effectuating it.\(^{112}\) Amestoy is concerned with what the law should be. He knows that marriage equality for Gays will not have a long shelf-life if it is achieved through a decision that makes sweeping alterations to the marriage norm. Amestoy hopes to ensure equality by making his decision as politically palatable as possible. He understood that sometimes, as Andrew Koppelman put it: “judges must be politicians for the sake of the things that should be beyond politics.”\(^{113}\)

All of this is not to suggest that prudence dictates that the Court could not have applied a substantive equality analysis of the sort I envision in Lawrence. On the contrary, prudence only requires that the Court modulate the immediate reach of the theory’s application. Again, Loving is instructive. We see this sort of modulated approach at work in the progression from Brown to Loving. The Court, of course, has nearly unfettered discretion in deciding which cases it will consider on certiorari. The Court used that discretion prudentially in refusing to hear two equality challenges to antimiscegenation legislation prior to the Loving decision.\(^{114}\) The Court apparently

---

\(^{104}\) Baker, 744 A.2d at 887.

\(^{105}\) Id. at 898. (Johnson, J., concurring in part and dissenting in part).

\(^{106}\) Id.

\(^{107}\) Id. at 888.

\(^{108}\) Id. at 902 (Johnson, J., concurring in part and dissenting in part).

\(^{109}\) Id. at 888.

\(^{110}\) See Shannon Gilreath, Sexual Identity Law in Context: Cases and Materials 726-728 (collecting citations).

\(^{111}\) Baker, 744, A.2d at 904, n.7 (Johnson, J., concurring in part and dissenting in part).

\(^{112}\) Id. at 901 (Johnson, J., concurring in part and dissenting in part).

\(^{113}\) Koppelman, The Gay Rights Question, supra note 102, at 143.

\(^{114}\) See supra note 69 and discussion.
believed that the risk of deciding the interracial marriage question so soon after *Brown* was too great.

The Court could have reacted with a substantive equality analysis in *Lawrence* in the same way. It could have analyzed the *Lawrence* claim as one of substantive equality dimension, thereby addressing the damaging role of hierarchy and anti-equality effects of institutionalized caste. The Court could then have modulated the holding’s reach by using its discretion to avoid addressing the marriage question until such time as it becomes politically feasible.

**Conclusion**

It’s not what I feared, but what I had not thought to fear.

—Edgar Allan Poe

*Lawrence v. Texas* is an important decision. Gay people as human beings are present in the Supreme Court’s jurisprudence for the first time. If the decision had accomplished nothing else, this sharp contrast to *Bowers v. Hardwick*, in which Michael Hardwick, the plaintiff, was totally invisible, is a momentous thing. Of course, the decision brought other important achievements. The sex acts of consenting Gay adults in private can no longer be criminal, and criminal Gay sex regulations can no longer be the basis for invidious civic burdens.

But in celebrating *Lawrence* as an accomplishment, we should not be blind to the underlying heteronormative dogma that motivated its structure as much as its outcome. In constitutional law, structure is important. My major gripe with *Lawrence* is that it was a missed (or perhaps avoided) opportunity for a real structural analysis of the heterosexual hierarchy at work in the creation of antiGay laws and the antiGay caste in general. By employing the “similarly situated” methodology it does, the *Lawrence* majority leaves largely intact the system of hetero-dominance under which Gay Americans labor daily, and for which the State is either an accomplice or a direct sponsor.

What I have dubbed the “substantive equality” approach is a departure from the “similarly situated” brand of formal equality that has been, with rare exception, the ceiling of the Court’s equality jurisprudence for nearly one hundred fifty years. It is both a marked departure from this formalism and an invitation to begin thinking about equality as the highest constitutional good. Equality thus conceptualized is substantive in and of itself. Equality and the due process framework of the *Lawrence* decision are at tension. Substantive equality cannot exist—will not exist—until equality is examined substantively. To borrow from Thoreau,115 castles built in the air are not necessarily futile labors; after all, that is where castles belong. But these castles need firm foundations if they are to last. The liberty and freedom of conscience presupposed by the *Lawrence* majority are beautiful things; they deserve a place in gossamer realms. Now, I say, put the foundations under them. Equality is the foundation. Equality will make us free.

---

115 Henry David Thoreau, *Walden* 362 (A.L. Burt 1902) (1854) (“If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them.”).