

Gay Rights versus Queer Theory

WHAT IS LEFT OF SODOMY AFTER *LAWRENCE V. TEXAS*?

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In effect, we live in a legal, social, and institutional world where the only relations possible are extremely few, extremely simplified, and extremely poor.

—Michel Foucault, “The Social Triumph of the Sexual Will”

It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals’ lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.

—Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*

In 1986 the United States Supreme Court affirmed the constitutionality of a Georgia statute under which Michael Hardwick had been charged with committing “sodomy” in his home with another adult male. The Court began its analysis by disavowing any concern with “whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable.” Rather, the majority opinion in *Bowers v. Hardwick* formulated its judicial task in the following blunt terms: to determine “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”¹ The answer to that question could of course only be negative. An argument to the contrary was, in the Court’s notorious phrase, “at best, facetious.”²

Less than twenty years later, in June 2003, the Supreme Court reconsidered its earlier holding. In circumstances similar to those in which Michael Hardwick had been charged by the state of Georgia, John Lawrence had been arrested by the state of Texas for engaging in “deviate sexual intercourse with another individual of the same sex” in his own home.³ In an impassioned endorsement of homosexual intimacies, the *Lawrence v. Texas* Court proclaimed breathlessly, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”⁴ And by the instantaneous magic of a judicial pronouncement from the nation’s highest

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court, homosexuals could no longer be treated as presumptive criminals. Although *Bowers v. Hardwick* has not been literally erased—it still remains on the pages of *United States Reports*—its mean-spirited rhetoric has been deprived of constitutional force. It has become a mere historical artifact, a witness to its own powerlessness.

This is an astonishing reversal, and one that took many by surprise.⁵ What made this judicial *volte face* possible? In this essay, I read the Court’s opinion in *Lawrence v. Texas* rhetorically to look for answers to that question.⁶ At the same time, I begin the critical evaluation of a post-*Hardwick* political landscape. With the fall of antisodomy legislation, have we finally been “liberated”? And if so, to what? From the perspective of queer theory, how should we view this victory of gay rights? Indeed, to what extent are commitments to queerness and liberal rights compatible? Or stated even more sharply, is “queer rights” an oxymoron?

The Question of Gay Rights: “Sodomy” or “Intimacy”?

It is a commonplace of legal advocacy that the framing of a legal question always already anticipates its answer. As Janet Halley observes, it has been “the virtually ubiquitous conclusion” in the literature criticizing *Bowers v. Hardwick* that “the *Hardwick* majority vitiated its credibility when it framed the question of the case”⁷—viz., “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”⁸ In his dissent in *Hardwick*, Justice Blackmun was the first to make that claim⁹ and Justice Kennedy, the author of the majority opinion in *Lawrence*, echoes Blackmun and likewise asserts that the *Hardwick* majority’s reductive formulation of the constitutional question manifests their “failure to appreciate the extent of the liberty at stake.”¹⁰ Having established that the issue is emphatically not one of sodomy *simpliciter*, the *Lawrence* Court reframes the issue as follows: “The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”¹¹

That is, the question is not one of “sodomy” but of “intimacy”—of “certain intimate sexual conduct,” the precise nature of which the Court does not even specify for the purposes of stating the constitutional issue.¹² To paraphrase only slightly, by indicting the Texas sodomy law for interfering with same-sex lovers’ “intimacy,” the *Lawrence* Court effectively sets out to decide whether it is a crime to love someone of the same sex—and the answer to *this* question is as much a foregone conclusion as the *Hardwick* Court’s futile search for the word *sodomy* in the Bill of Rights.

Given the unapologetically homophobic rhetoric of the *Hardwick* opin-

ion, it may seem self-evident that the *Lawrence* Court's reframing of the constitutional question as a matter of interpersonal sexual intimacy rather than sodomy puts the nation's constitutional jurisprudence on the proper track. Like every right-thinking person of a progressive political orientation, I too am elated that *Hardwick*, so soon after its ugly appearance, has ended up in the graveyard of discredited constitutional precedents—in the company of cases such as *Dred Scott*, *Plessy v. Ferguson*, *Korematsu*, and others.¹³ How could one *not* be stirred by *Lawrence*'s righteous proclamation, "*Bowers* was not correct when it was decided, and it is not correct today"?

In these circumstances, it may appear unseemly, not to mention politically unwise, to point to the critical limitations of *Lawrence*'s logic. Accepting that risk, I nevertheless want to suggest that *Hardwick*, after all, got the constitutional *question* right (with some important qualifications I consider below), even though the Court's answer to the question was obviously disastrously wrong. Admittedly, having been labeled as "sodomites" under the constitutional regime crowned by *Hardwick*, it is difficult to resist the *Lawrence* Court's interpellation of homosexuals as law-abiding subjects who are capable of intimacy and "are entitled to respect for their private lives."¹⁴ We are now invited to a new world where homosexuals, too, can embark upon sexual relationships "in the confines of their homes and their own private lives, and still retain their dignity as free persons."¹⁵

But the "respect" and "dignity" offered by the Court will likely not come free. They will have to be earned, by leading respectable sex lives. Below, I first examine the rhetorical and political conditions attached to *Lawrence*'s offer of gay respectability and then turn to *Bowers v. Hardwick* and the possibility of redeeming its focus on "sodomy."

The Limitations of Intimacy

However, before examining critically the rhetoric by which *Lawrence* reaches its result, it is nevertheless appropriate to begin by commenting on some of its achievements. The opinion's revisionist account of *Hardwick*'s simplistic history of sodomy laws and its acknowledgment—however hesitant—of the historicity of sexual identity categories themselves are notable, not at all the kinds of analyses one typically finds in a judicial opinion.¹⁶ Moreover, the *Lawrence* Court acknowledges not only some of the contributions of the academic study of sexuality but also the fact that virulent homophobia is not necessarily a global condition. The majority opinion cites, among other things, the decision by which the European Court of Human Rights struck down national laws similar to

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those upheld in *Hardwick*. (To be sure, the Court gratuitously takes this as an opportunity to highlight the superior achievements of “our Western civilization.”)¹⁷

To turn to *Lawrence*’s limitations, what, then, is the problem with how it frames the constitutional issue—namely, asking whether it should be permissible to make it “a crime for two persons of the same sex to engage in certain intimate sexual conduct”? Of course, it should not be a crime to love another person of the same sex and to express that love sexually. Rather, the problem with the Court’s rhetorical formulation is not what it permits—intimate sexual association—but what it leaves out, beyond the sphere of sexual legitimacy. Being in an intimate personal relationship should not be a *requirement* for having a constitutionally protected sex life.¹⁸ It should not be a crime *just* to have homosexual sex—anal or banal, oral or floral, intimate or not.¹⁹

In terms of its handling of constitutional doctrine, the *Lawrence* majority is careful not to say anything that might be seen as formalizing the legal status of same-sex relationships: “[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”²⁰ Justice Scalia is appropriately unmoved by this disclaimer, to which he responds laconically, “Do not believe it.”²¹ Indeed, in terms of its rhetoric and logic, the Court repeatedly and strenuously analogizes homosexual relationships to marriage. Scalia’s outraged dissent is absolutely correct in evaluating the logical, if not strictly doctrinal, implications of the majority’s reasoning. If homosexual “intimacy” is as deserving of protection as hetero sex, “what justification could there possibly be for denying the benefits of marriage to homosexual couples?”²²

But what exactly is at stake in gay sex, according to the Court? Emphatically not “just” sex. The Court emphasizes that it was precisely in its reduction of same-sex intimacy to sodomy that the *Hardwick* Court “misapprehended” the object of its analysis.²³ Espousing an unabashedly positivist sexual ontology, the *Lawrence* Court is fully confident of its ability to apprehend correctly the nature of homosexual sex. Insofar as *Hardwick* thus failed to understand the true significance of sodomy laws, *Lawrence* proceeds to set the record straight.

Given that “heterosexual identity is the location from which the Justices decide the case without appearing to,”²⁴ it comes as no surprise that the Court’s view of what homosexual sex is about (when properly apprehended) corresponds to normative heterosexual sex: “Intimate conduct with another person [which] can be but one element in a personal bond that is more enduring.”²⁵ With (heterosexual) solicitude for misunderstood homosexuals, the Court announces, “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct *demeans* the claim the

individual put forward, *just as it would demean a married couple* were it to be said that marriage is simply about the right to have sexual intercourse.”²⁶ The wrong of *Hardwick* is ultimately its denial of dignity to homosexual relationships: sodomy laws “seek to control a *personal relationship* that, whether or not entitled to recognition in the law, is within the liberty of persons to choose without being punished as criminals.”²⁷ Indeed, reading the opinion, one would think that homosexuals exist *only* in relationships, and that relationships are the *only* context in which homosexuals might conceivably engage in sex acts.²⁸

It is certainly rhetorically satisfying when the Court grounds its holding not only in homosexuals’ “spatial” liberty interest in being left alone in their homes but also in the “more transcendent dimensions” of liberty, which the Court associates with sexual expression. Yet this rhetoric leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship. In the end, the crucial rhetorical limitation of *Lawrence* is precisely its inability, or refusal, to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy. The implicit bargain the Court proposes is plain. The Court, and the Constitution, will respect our sex lives, but on condition that our sex lives be respectable.

This, one fears, is the new jurisprudential project inaugurated by *Lawrence v. Texas*: the normalization of gay sex, or as Katherine Franke puts it, the “domestication” of sexual liberty.²⁹

The Possibilities of Sodomy

Liberal rhetoric aside, rights do not connote unqualified “freedom.” Like everything else, they come at a price. That price is the disciplinary regime of political modernity. But so long as we recognize this, can we afford to turn down “dignity” and “respect” when they are being offered to us by the U.S. Supreme Court? After all, lacking those qualities can be positively hazardous to one’s health.

Obviously I am in no way endorsing the *Hardwick* Court’s answer to the question it posed. Sodomy laws *should* be unconstitutional, if for no other reason that—far beyond their symbolic effects—they have been used to deprive people with nonnormative sexual lives from their jobs and their children, for example, to mention only some of the more severe material consequences.³⁰ Rather, what I hope to recover from *Hardwick*, selectively, is a relative emphasis on sexual *acts*. I do so although I am not at all sanguine about the analytic distinction between acts and identities. Notoriously, the *Hardwick* opinion itself exploited the unstable relationship

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between the two, as it opportunistically at various times both conflated and disaggregated “sodomy” and “sodomites.”³¹ Acts are always performed by actors who have identities, and identities are always consolidated in and through acts.³² Yet it is a peculiar achievement of the liberal legal imagination to separate categorically things that are in fact indissolubly connected. (Notoriously, “if you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind.”³³) Nevertheless, a return to a relative emphasis on acts rather than identities need not imply a metaphysical distinction between the two. Rather, an emphasis on acts can be a political tactic aimed at making certain acts available to the largest number of actors possible, rather than merely the respectable few.

Although it is useful to reevaluate the possibilities implicit in the way in which *Hardwick* framed the constitutionality of sodomy legislation, the Court’s formulation has some crucial limitations as well. The most obvious, and most criticized, aspect of that formulation was its refusal to consider sodomy in its heterosexual aspect. The Georgia sodomy law under which Michael Hardwick was prosecuted defined sodomy capaciously as anal or oral sex between members of the same *or* opposite sex,³⁴ yet the Court gratuitously limited its analysis to “homosexual sodomy.” The appropriate way to rephrase *Hardwick*’s question would be, then, to ask whether there is a constitutional right to engage in sodomy *tout court*—and a positive answer to that question would in turn afford the right to such sodomitical acts to men and women of any, all, or no sexual orientation.

Beyond questioning how *Hardwick* excluded heterosexuals from sodomy’s embrace, one might also question the term *sodomy* itself. As Kendall Thomas observes, “The fact that the [*Hardwick*] Court did not choose an alternative characterization of the statutorily proscribed conduct is a textual register of how deeply the social voice of homophobia is inscribed in the institutional voice of the Constitution.”³⁵ Insofar as “sodomy” is “an anachronistic, ideologically loaded appellation” burdened with overlapping sexual, political, and religious overtones,³⁶ one might reformulate the *Hardwick* Court’s question more neutrally, as whether there is, or ought to be, a constitutional right to engage in, say, anal and oral sex.

Admittedly, an exclusive focus on sex acts can be rhetorically dehumanizing. Precisely for that reason, it is difficult to conceive the Supreme Court’s asking the *Hardwick* question about heterosexual sex acts at all. Although the *Hardwick* Court was perfectly happy to analyze homosexuals’ right to indulge in what it at one point called “acts of *consensual sodomy*” (as opposed to a constitutional right to male-on-male rape?),³⁷ it seems unlikely that the Court would ever frame questions of opposite-sex sexual acts in such a clinical manner—as, for example, “whether there is a fun-

damental constitutional right to insert a condom-covered (or even just a plain old) penis into a consenting vagina.” Instead, constitutionally such questions are framed in terms of personal decisions about “procreation” and “family,” not “vaginal intercourse.”³⁸

In the pre-*Lawrence* world, it made sense to respond to the dehumanizing language of *Hardwick* with a certain emphasis on the humanity of queers. Insofar as the *Hardwick* justices asserted patently counterfactually that there is “no connection between family, marriage, or procreation on the one hand and homosexual activity on the other,”³⁹ it was certainly important to remind the world that gay people, too, have families. (*Quelle surprise.*) Now, however, the Supreme Court has caught on to the fact that homosexuals too can, and do, exist in relationships with others. That, in itself, is a perfectly welcome observation. However, what should give us pause is the notion that the justices now purport to know the *truth* of homosexual intimacy: *it is just like heterosexual intimacy*, except between persons of the same sex. This is “compulsory heterosexuality” in its new, second-generation form, Adrienne Rich updated for the millennium.⁴⁰ Homosexuals are no longer faced with the impossible demand to literally *become* heterosexuals but merely to become *just like* heterosexuals. Imitation, after all, is the sincerest form of flattery.

Mere Rhetoric?

In Nan Hunter’s apt observation, “The Supreme Court’s decision in *Lawrence v. Texas* is easy to read, but difficult to pin down.”⁴¹ By no means does the opinion *require* that noncoupled homosexuals ultimately be treated legally as second-class citizens. As far as constitutional doctrine as such is concerned, *Lawrence* can indeed be read as removing “the last obstacle to the paradigm of consent, rather than the institution of matrimony, controlling the definition of when sex is presumptively legal.”⁴²

Yet, read more rhetorically, the ultimate jurisprudential project may turn out to be not that of destigmatizing *all* private consensual sex, but only certain kinds of intimacies, as I have suggested. Limiting legitimate sex to “intimate” relationships is admittedly not the same thing as state-sanctioned marriage, but it is its sociological analogue: although actual emotional intimacy is not a legal prerequisite for getting married, a “real” marriage is one where law reigns over a couple joined in sexually expressed love. Hence, even as the Court doctrinally delinks marriage and sex, rhetorically it recouples them, so that not all sexual subjects seem to be created equal, after all.

Nevertheless, and perhaps most strikingly, the couple whose dignity

and respect the *Lawrence* Court works so hard to restore rhetorically is not a “couple” at all, but apparently just a one-night stand that got interrupted (as it were) by the state of Texas. How do we make sense of this dramatic disjunction between the Court’s rhetoric and the legal effect of its holding? Why does the Court so willfully ignore the parties before it and insist on constructing an image of transcendental gay intimacy?

At the same time, if by virtue of the Court’s fantastic rereading of the facts all sodomites—both the respectable and the not-so-respectable ones—are allowed to get on with their (sex) lives, why should we worry by what rhetoric the Court accomplishes that goal? As Franke emphasizes, in the end “the Texas sodomy statute was not found to violate a constitutional right to dignity, but rather a right to liberty,”⁷⁴³ for the simple reason that in the United States “dignity” is not a constitutional right, only a social privilege, and terms such as “respect” and “dignity” have no precise legal meaning.⁴⁴ On the language of respect in *Lawrence*, James Whitman similarly insists that for better or worse “little of it can be said to count in any certain way as *law*.”⁴⁵ Gay people’s respectability or lack thereof is thus not a legally enforceable matter anyway.

Yet there are at least two reasons for concern. First, whether applicable to same- or opposite-sex conduct, *Lawrence*’s holding is nevertheless ultimately grounded in the principle of privacy. Insofar as we regard sex as an ultimately political and public issue, rather than a private one, *Lawrence* forecloses important avenues for political engagement. It permits the exclusion of nonnormative sexualities from the “world of public intimacy,”⁴⁶ which may remain reserved for manifestations of normative heterosexuality.⁴⁷

Second, although the Court’s singular insistence on making gay sex respectable does mean that one can in fact no longer be thrown in jail *just* for engaging in same-sex sexual conduct, that rhetoric may well come back to haunt us as homosexual sex, inevitably, becomes increasingly regulated by the state. So long as the Constitution permitted viewing *all* homosexual sex as presumptively criminal, there was little need to draw distinctions between kinds of homosexual sex—it was all bad (or at least not good and deserving of protection). But as Franke observes, after *Lawrence* gay sex takes place “in the underregulated space that lies between criminalization and legitimization through marriage.”⁴⁸ New distinctions are likely to emerge to clarify the status of different sexual subjects in this ambiguous space. Those distinctions may not affect the interpretation of sodomy laws per se—under *Lawrence*, any unreconstructed sodomy statute *will* be unconstitutional—but *Lawrence*’s rhetoric may be a harbinger of the jurisprudence yet to come on the civil regulation of homosexual sex, with different treatment of “good” and “bad” homosexual sex.

At the very latest, if and when same-sex marriage arrives, we will know whose sex is good and whose is bad.

Tactical Acts

Given the prospect, embedded in *Lawrence v. Texas*, of the Supreme Court's defining the meaning of (normal) homosexual sex, it seems tactically wise to focus on liberating acts themselves, separating them away from their contexts and from the actors performing them. Sodomy, defined in the most expansive way, should be available to whoever desires to engage in it, for whatever reasons. Single people, especially single women, have as great a stake as queers in insisting on the legitimacy of engaging in sex outside of intimate relationships. As Halley insisted long before *Lawrence* overruled *Hardwick*, "We can form new alliances along the register of acts."⁴⁹

It bears repeating, however, that whether we choose to focus on acts or identities, that choice is always only tactical, in the sense in which Michel de Certeau uses the term. Distinguishing tactics from strategies, de Certeau defines a strategy as a "calculus of force-relationships" that is performed by a "proper" subject that occupies a definite discursive location; it is in relation to his or her own relatively fixed location that a "proper" subject assesses others in the social field. A tactic, in contrast, is a calculus of those without such a location:

It has at its disposal no base where it can capitalize on its advantages, prepare its extensions, and secure independence with respect to its circumstances. The "proper" is a victory of space over time—it always depends on the watch for opportunities that must be seized "on the wing." Whatever it wins, it does not keep. It must constantly manipulate events in order to turn them into opportunities. The weak must continually turn to their own ends forces alien to them.⁵⁰

Queer sexual subjects are obviously not "proper" subjects speaking from a position of relative power and fixity. Indeed, it is the peculiar discursive privilege of heterosexuality that it can opportunistically define and redefine homosexuality from moment to moment as either merely a set of acts or an identity possessed by certain people. Therefore, as Halley's reading of *Hardwick* shows, those labeled "homosexuals" continually face a discursive double bind that offers no simple exit: "You cannot win because your victorious opponent is willing to be a hypocrite and to 'damn if you do and damn if you don't.'"⁵¹ Applying the act/identity framework to *Law-*

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rence, it is evident that both decisions exploit this discursive ambivalence, strategically treating “homosexuality” as a practice and as an identity.

However, in *Hardwick* homosexuality as identity is a minor rhetorical key and homosexuality as acts a major one, as the opinion relentlessly seeks to reduce homosexuals to sodomy (never mind that, tautologically, the stigma of sodomy ultimately derives from the identity of the actors).⁵² In *Lawrence*, in contrast, identity is the major rhetorical mode, as the Court seeks to justify sexual conduct by the actors’ identities: capable of intimacy and hence deserving of respect, homosexuals should be permitted to engage in the acts that define them in the first place. Tactically, then, there were certain opportunities in resisting *Hardwick*’s reduction of homosexuals to their acts and insisting on queers’ humanity, as I have suggested. However, with the discursive 180-degree turn of the *Lawrence* Court and its celebration of homosexual intimacy, we are clearly far beyond a “love that dare not speak its name,” and a rhetoric describing simply the humanity of that love no longer has the traction it once did. The circumstances have shifted, and so has our discursive location. We ought therefore to reconsider our tactics as well, as we confront a new judicial landscape. It is time to focus not on the love but on the acts that dare not speak their names.

There is no doubt that, in the political order of the United States, being a respectable subject of rights is preferable to being a sexual object. Even if rights do not signify pure, unadulterated “freedom,”⁵³ and even if they impose their own normalizing discipline on their subjects,⁵⁴ in the contemporary political world they are surely preferable to a regime of homophobic violence sanctioned by sodomy laws. As Gayatri Spivak observes with artful ambivalence, liberal rights are something that “we cannot not want”:⁵⁵ without them one has no legal and political existence.

But as we emerge from the closet and our sex lives begin to turn into entitlements recoded as part of universal human intimacy, we need to consider the ways in which such new sexual rights institute their own regime of normalcy, their own code of sexual behavior. Given homosexual subjects’—and objects’—still uncertain claims to humanity, we ought to be alert to the continuing exclusions of this humanist logic even as we (or at least those in qualifying “intimate relationships”) are embraced by it. It is in this context that it seems politically useful to insist on liberating sexual *acts* for use by any individual—without regard to his or her relationship status.

As always, there are costs to this tactic as well. Insofar as we insist that the right to “sodomy,” in any one of its multiple definitions, pertains to individuals *qua* individuals, rather than partners in an intimate relationship with another individual, we are implicitly supporting the legal

fiction of a transparent, freestanding subjectivity—the legal subject of liberal individualism that the law so presumptuously calls the “natural person.” Ironically, in *Lawrence* the Supreme Court promises to rehabilitate homosexuals as sovereign subjects of law precisely because it seems to have finally gained faith in our ability to *surrender* our individuality in intimate relationships with other homosexuals, to become one in love.

Indeed, a liberal legal order treats its subjects as atomistic individuals insofar as it regulates their political and economic lives: the abstract bearer of political rights and the abstract *homo economicus*, respectively. The intimate sphere of the family, in contrast, is the one place where a liberal society not only permits but expects its citizens to shed their individuality and connect with others. And the privileged intimate bond in this most private of spheres is the sexual one between a man and a woman—a feature of the liberal organization of society that Martha Fineman aptly criticizes as the “sexual family.”⁵⁶ *Lawrence v. Texas* is thus an instance of the conceptually indissoluble and politically indispensable liberal contradiction between individuality and connectedness. It is only when the state is able to imagine legitimate homosexual intimacies entitled to “privacy” that homosexuals become deserving of “dignity” and “respect” in the public spheres of the liberal polity as well. Ultimately, it is this dichotomized public/private schema that *Lawrence* invites queers to join—with the noteworthy, though increasingly contested, restriction that two men or two women cannot be legally married.

Although this humanizing gesture is hard to resist, we nevertheless ought to insist on separating sexual acts from identities as much as we can, at least for the purposes of legal categorization.⁵⁷ *Lawrence v. Texas* is a rhetorical symptom of the risk that the invitation to join the “intimate public sphere,” to use Lauren Berlant’s term, is being ultimately offered “only for members of families,”⁵⁸ whether gay or straight.

Yet a family need not be built around a relationship that is defined by a sexual bond, and a sexual connection need not constitute an embryonic family. After all, sex need not be about connection at all; sex can signify intense alienation and separation as much as connection.

Notes

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1. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).
2. 478 U.S. 194.
3. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2003).
4. 123 S. Ct. at 2484.

5. That is, while many observers did expect the ultimate outcome—the Court’s striking the Texas statute—few expected the sweeping rhetorical and doctrinal reversal by which the Court achieved the result. As Nan Hunter observes, in reversing itself the Court ordinarily prefers to rely on bland and technical rhetoric, so as to minimize the disruption of constitutional continuity. *Lawrence*, in contrast, is “a reversal of more than law,” as the majority sets out passionately to reconfigure not only the relevant constitutional doctrine but also “the social meaning of homosexuality” (Nan D. Hunter, “Living with *Lawrence*,” *Minnesota Law Review* 88 [2004]: 1125).

6. In what follows, I draw methodologically as well as substantively from the classic rhetorical readings of *Bowers v. Hardwick* by Janet Halley, “Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*,” *Virginia Law Review* 79 (1993): 1721–73; and Kendall Thomas, “Beyond the Privacy Principle,” *Columbia Law Review* 92 (1992): 1431–516.

7. Halley, “Reasoning about Sodomy,” 1747.

8. 478 U.S. at 190.

9. The very first sentence of Blackmun’s dissent is “This case is no more about a ‘fundamental right to engage in homosexual sodomy,’ as the Court purports to declare, than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies, or *Katz v. United States* . . . was about a fundamental right to place interstate bets from a telephone booth” (ibid., 199).

10. 123 S. Ct. at 2478.

11. Ibid., 2575.

12. The opinion does eventually specify the criminal act in question—“deviate sexual intercourse, namely anal sex, with a member of the same sex (man)” —but the very first substantive section of the majority opinion that sets out the constitutional question refers only to “certain intimate sexual conduct.” In terms of its relative emphasis on sodomy, rather than intimacy, the majority opinion in *Hardwick* finds occasion to use the term *sodomy* a total of thirty-three times, whereas it resorts to the word *intimate* only once. In contrast, the *Lawrence* majority opinion uses the words *intimate* or *intimacy* a total of twelve times.

13. *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Plessy v. Ferguson*, 163 U.S. (1896); *Korematsu v. United States*, 323 U.S. 214 (1944).

14. 123 S. Ct. at 2484; emphasis added.

15. Ibid., emphasis added.

16. Ibid., 2478–80. From the amicus briefs of scholars from various disciplines, the Court culls references to Katz’s *Invention of Heterosexuality* as well as d’Emilio and Freedman’s *Intimate Matters: A History of Sexuality in America*—hardly conventional legal authorities (ibid., 2479). Yet even as we welcome this attention to scholarship, its blessings may be mixed. The law can undoubtedly benefit from academic insights, yet there is also something disturbing in seeing scholarly positions translated into judicial pronouncements. Once embedded in a chain of judicial citations, they may be used to justify the exercise of state authority in unanticipated and wholly unqueer ways.

17. Ibid., 2481, citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), paragraph 52; emphasis added. To be sure, as constitutional law scholars have

observed, the reference to the European Court of Human Rights is primarily a rhetorical embellishment, not an acknowledgment of the binding nature of human rights law on the constitutional question at issue. As Gerald Neuman puts it, “The Supreme Court’s invocation of human rights law in *Lawrence v. Texas* represents a rather modest use of international law in aid of constitutional interpretation” (Gerald Neuman, “The Uses of International Law in Constitutional Interpretation,” *American Journal of International Law* 98 [2004]: 89).

18. Needless to say, the words *relationship* and *intimacy* have multiple meanings. For example, there are surely kinds of intimacies that are possible even in a one-night stand, and even the briefest sexual encounter takes place in the context of some kind of relationship—it is, after all, exceedingly difficult to commit sodomy alone. However, rather than resignifying the key terms, for the purposes of this essay I take them in the mutually constitutive senses in which the Court uses them, with “relationship” connoting intimacy of long duration and “intimacy” connoting sexual activity occurring in the context of an ongoing relationship.

19. I borrow my formulation from Gore Vidal’s irresistible reference to “anal and banal sex as well as oral and floral sex,” in “Pink Triangle and the Yellow Star,” in *United States: Essays 1952–1992* (New York: Random House, 1993), 595.

20. 123 S. Ct. at 2484.

21. *Ibid.*, 2497 (Scalia, J., dissenting).

22. *Ibid.* As Scalia correctly points out, “‘Preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples” (*ibid.*, 2496; Scalia, J., dissenting).

23. *Ibid.*, 2478.

24. This is Halley’s description of the *Bowers* majority, but it is an apt description of the *Lawrence* justices as well—indeed, of all constitutional jurisprudence (“Reasoning about Sodomy,” 1767).

25. 123 S. Ct. at 2478.

26. *Ibid.*; emphasis added.

27. *Ibid.*; emphasis added.

28. Tellingly, in describing the history of sodomy legislation, the Court observes that “American laws targeting same-sex *couples* did not develop until the last third of the 20th century” (*ibid.*, 2479; emphasis added).

29. Katherine M. Franke, “The Domesticated Liberty of *Lawrence v. Texas*,” *Columbia Law Review* 104 (2004): 1399–426. Franke’s comment on *Lawrence* makes an argument parallel to that of this essay. We both analyze the ways in which the Court rhetorically narrows the constitutionally protected liberty that it doctrinally upholds; Franke emphasizes the Court’s rhetoric of “privatizing” and “domesticating” that liberty, while I focus on the Court’s demand for “respectability” as the price at which the liberty has to be earned.

30. See, for example, Ryan Goodman, “Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics,” *California Law Review* 89 (2001): 643–740; and Christopher R. Leslie, “Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws,” *Harvard Civil-Rights—Civil-Liberties Law Review* 35 (2000): 103–81. On the denial of custody to gay parents, see also Teemu Ruskola, “Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist,” *Yale Journal of Law and Feminism* 8 (1996): 291–96. On the wider implications of sodomy laws, such as the construction of sodomy as a tax crime, see, for example, Anthony C. Infanti, “The

Internal Revenue Code as Sodomy Statute,” *Santa Clara Law Review* 44 (2004): 763–804.

31. See Halley, “Reasoning about Sodomy.” As Halley demonstrates elsewhere, the military’s “don’t ask, don’t tell” policy similarly exploits the instability and incoherence of the homosexual status/conduct distinction. See Janet Halley, *Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy* (Durham, NC: Duke University Press, 1999).

32. See, for example, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); and Butler, *Bodies That Matter: On the Discursive Limits of “Sex”* (New York: Routledge, 1993).

33. Thomas Reed Powell, quoted in Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969), 4.

34. 478 U.S. at 188.

35. Thomas, “Beyond the Privacy Principle,” 1434 n. 4.

36. *Ibid.*, 1433 n. 4. For a problematization of “sodomy,” see also Katherine M. Franke, “Putting Sex to Work,” in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham, NC: Duke University Press, 2002), 290–336.

37. 478 U.S. at 192; emphasis added.

38. See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

39. 478 U.S. 191.

40. See Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence,” *Signs* 5 (1980): 631–60.

41. Hunter, “Living with *Lawrence*,” 1103.

42. *Ibid.*, 1112.

43. Franke, “Domesticated Liberty of *Lawrence v. Texas*,” 1401.

44. On the role of “dignity” in the South African Constitution, see Franke, “Domesticated Liberty of *Lawrence v. Texas*,” 1404–5; and Hunter, “Living with *Lawrence*,” 1136.

45. James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty,” *Yale Law Journal* 113 (2004): 1214. Robert Post also notes that while “themes of respect and stigma are at the moral center of the *Lawrence* opinion,” they are “entirely new to substantive due process doctrine” in which the Court grounds its opinion doctrinally. Robert C. Post, “Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” *Harvard Law Review* 117 (2003): 97.

46. The phrase is from Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997), 5.

47. Kendall Thomas makes an expanded version of this argument in his remarks at the Association of American Law Schools Panel on *Lawrence v. Texas* (San Francisco, CA, 4 January 2004).

48. Franke, “Domesticated Liberty of *Lawrence v. Texas*,” 1426.

49. Halley, “Reasoning about Sodomy,” 1722.

50. Michel de Certeau, *The Practice of Everyday Life*, trans. Steven Rendall (Berkeley: University of California Press, 1984), xix.

51. See Halley, “Reasoning about Sodomy,” 1748.

52. As Halley observes, in most of the opinion (the fundamental rights holding) the Court defines homosexuality primarily as a set of acts and secondarily as an identity. In its briefer discussion (the rational basis holding), the Court switches these primary and secondary rhetorics (“Reasoning about Sodomy,” 1748). Yet

within the overall structure of the opinion, the rhetoric of acts predominates over the rhetoric of identity.

53. This does not reflect a failure of rights as a technology of freedom, but rather the nature of freedom itself. As Iris Murdoch observes, “Freedom is not an isolated ability, like the ability to swim, which we can ‘exercise’ in a pure form. . . . Freedom is a matter of degree and a mode of being” (Iris Murdoch, *Metaphysics as a Guide to Morals* [London: Penguin Books, 1992], 326).

54. I analyze law’s role as a ritual of “subjection,” in the Althusserian sense, in Teemu Ruskola, “Legal Orientalism,” *Michigan Law Review* 101 (2002): 179–234. On discipline and governmentality as hallmarks of political modernity, see Michel Foucault, *Discipline and Punish*, trans. Ian Sheridan (New York: Vintage Books, 1977); and Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).

55. Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993), 45. For an extended discussion of the dilemma of liberal rights, inspired in part by Spivak’s aphorism, see Wendy Brown, “Suffering the Paradoxes of Rights,” in Brown, *Left Legalism/Left Critique*, 420.

56. Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth-Century Tragedies* (New York: Routledge, 1995).

57. Much of the commentary on *Lawrence* has responded enthusiastically to its promise to rehabilitate homosexuality as an identity. Laurence Tribe, for example, applauds the decision for emphasizing “not the *set of specific acts* that have been found to merit constitutional protection, but rather the *relationships* and *self-governing commitments* out of which those acts arise—the network of human connection over time that makes genuine freedom possible” (Laurence Tribe, “*Lawrence v. Texas*: The ‘Fundamental Right’ That Dare Not Speak Its Name,” *Harvard Law Review* 117 [2004]: 1955 [emphasis in original]).

58. Berlant, *Queen of America Goes to Washington City*, 3.

