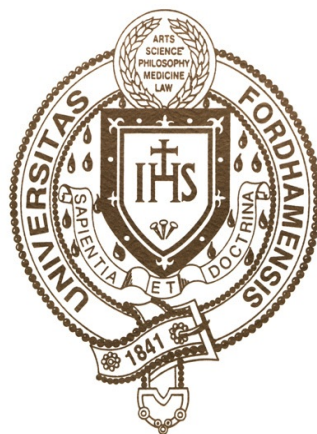


Fordham University School of Law



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*Sexuality and Sovereignty: the Global Limits and
Possibilities of Lawrence*

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SEXUALITY AND SOVEREIGNTY: THE GLOBAL LIMITS AND POSSIBILITIES OF *LAWRENCE*

Sonia K. Katyal*

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INTRODUCTION

In the summer of 2003, the Supreme Court handed gay and lesbian activists a stunning victory in the decision of *Lawrence v. Texas*,¹ which summarily overruled *Bowers v. Hardwick*.² At issue was whether Texas' prohibition of same-sex sexual conduct violated the Due Process Clause of the U.S. Constitution. In a powerful, poetic, and strident opinion, Justice Kennedy, writing for a six-member majority, reversed *Bowers*, observing that individual decisions regarding physical intimacy between consenting adults, either of the same or opposite sex, are constitutionally protected, and thus fall outside of the reach of state intervention.³ Volumes can be written about the decision; it represents a culmination of nearly a century's worth of work in dismantling prejudicial views on gays and lesbians in American law and, indeed, the rest of the world.⁴

* Associate Professor of Law, Fordham University School of Law. The author would like to thank the following colleagues for helpful comments and conversation: Michelle Adams, Carlos Ball, Mary Anne Case, Chai Feldblum, James Fleming, Sheila Foster, Abner Greene, Tracy Higgins, Angela Harris, Nan Hunter, Sital Kalantry, Jane Larson, Robin Lenhardt, Esther Lucero, Catherine Powell, Darren Rosenblum, Holly Tahvonen, and Benjamin Zipursky. Special thanks to Michael Stein for inviting me to this symposium at William & Mary School of Law and to the Center for Gay and Lesbian Studies, where I co-taught a Sexuality, Media Studies, and Performance Series with Carmelyn Malalis. I thank John Alan Farmer, Genevieve Blake, Heather Burke, Jayson Mallie, Ethan Notkin, and Sheila Cockburn for very helpful research assistance on this project.

¹ 539 U.S. 558 (2003).

² 478 U.S. 186 (1986).

³ *Lawrence*, 539 U.S. at 560.

⁴ For some examples of scholarship on the decision, see Paris R. Baldacci, *Lawrence and Ganner: The Love (Or at Least Sexual Attraction) that Finally Dared Speak Its Name*,

10 CARDOZO WOMEN'S L.J. 289 (2004); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004); Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004); Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 SUP. CT. REV. 75; Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23 (2005); Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN'S L.J. 311 (2004); Paisley Currah, *The Other "Sex" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 321 (2004); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004); James E. Fleming, *Lawrence's Republic*, 39 TULSA L. REV. 563 (2004); Edward B. Foley, *Is Lawrence Still Good Law?*, 65 OHIO ST. L.J. 1133 (2004); Katherine M. Franke, *Commentary, The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004); Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004); Bernard E. Harcourt, *"You are entering a gay and lesbian-free zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503 (2004); Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151 (2004); Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65 (2003); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004); Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004); Nancy J. Knauer, *Lawrence v. Texas: When "Profound and Deep Convictions" Collide With Liberty Interests*, 10 CARDOZO WOMEN'S L.J. 325 (2004); Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 65 OHIO ST. L.J. 1265 (2004); Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171 (2004); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004); Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004); Richard D. Mohr, *The Shag-a-delicious Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365 (2004); Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 397 (2004); Louis Michael Seidman, *Out of Bounds*, 65 OHIO ST. L.J. 1329 (2004); Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 411 (2004); Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263 (2004); Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671 (2005); Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What Is Protected and Why?*, 38 NEW ENG. L. REV. 667 (2004); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004); Cass R.

For a moment, civil rights activists took in an unusual turn of events: the Supreme Court, largely regarded as conservative, unwittingly unleashed a firestorm of controversy by refusing to differentiate between the intimacy enjoyed by same-sex and opposite-sex couples, and by attaching a protective cover of liberty to each.⁵ This very act of equivocation was edifying, profoundly courageous, and, for some legal scholars, ultimately reminiscent of the era just after *Brown v. Board of Education*.⁶

At the same time that the decision corrected a grave injustice, it gave rise to a curious host of criticism and discomfort from parts of the American public, the majority of which had previously, and quietly, favored decriminalizing same-sex sexual activity. While supporters of gay and lesbian rights rejoiced in a stunning triumph of corrective justice, antigay advocates seemed to discover a new battle cry, vocally warning the American public that *Lawrence* had suddenly, unwittingly, opened the door to a cavalcade of undesirable outcomes.⁷ In a scathing dissent, Justice Scalia

Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 276; Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004); Jami Weinstein & Tobyn DeMarco, *Challenging Dissent: The Ontology and Logic of Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 423 (2004); David Zucco, *Introduction to Symposium: Gay Rights After Lawrence*, 88 MINN. L. REV. 1017 (2004).

⁵ Note, however, that Justice Powell had long publicly regarded his tie-breaking vote in *Bowers* as one of his most regrettable decisions. See Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, 53 U. KAN. L. REV. 1, 53 n.341 (2004) (citing Powell's statement at a law school appearance that his vote in *Bowers* was "probably . . . a mistake" and another statement to a reporter that *Bowers* was probably inconsistent with *Roe v. Wade*); see also Robson, *supra* note 4, at 407 & n.52 (2004) (noting that Powell's concurrence in *Bowers* was — according to some casebook authors — "a decision later regretted by Justice Powell who had thought that *Bowers v. Hardwick* was not really an important decision").

⁶ 347 U.S. 483 (1954). David Garrow noted in *Newsweek* that the *Lawrence* case "'may be one of the two most important opinions of the last 100 years.'" Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38. See also Nancy Gibbs, *A Yea for Gays*, TIME, July 7, 2003, at 38. In another publication, Garrow claimed that "[a]ntigay evangelists Jerry Falwell, Pat Robertson, and James Dobson are now in the same league as [segregationists] Lester Maddox and Strom Thurmond" after *Brown*. Chris Bull, *Justice Served*, ADVOC., Aug. 19, 2003, at 35, 36 (alteration in original).

⁷ The Reverend Lou Sheldon, president of the Traditional Values Coalition, declared, "People of faith are not going to lie down and allow their faith to be trampled because a politically correct court has run amok . . ." Thomas, *supra* note 6, at 38. One of the leading conservative strategists, Paul Weyrich, observed that he has "'never seen people so energized and activated, even more so than at the time of *Roe v. Wade*.'" Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, § 6, at 48. In one much-publicized poll, two months before the decision, 60 percent of respondents favored decriminalizing gay sex; yet, days after *Lawrence*, that number had shrunk to 48 percent. Richard Goldstein, *Get Back!*, VILLAGE VOICE, Aug. 12, 2003, at 32. Polls also showed that, after *Lawrence*, there was a "sudden drop in the number of Americans who said that they would support civil unions for gays and lesbians, from 49 percent in May to 37 percent in August." Rosen, *supra*. For more discussion, see Susan Page, *Gay Rights Tough to Sharpen into Political "Wedge Issues"*, USA TODAY, July 28, 2003, at A10, and Susan Page, *Americans Less Tolerant on*

vociferously complained that the majority “ha[d] largely signed on to the so-called homosexual agenda,”⁸ and observed:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.⁹

Republican Senator Rick Santorum further predicted that if sodomy was legalized, “then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the [right to anything].”¹⁰

Elsewhere over the globe, *Lawrence* was met with a comparable mixture of trepidation and satisfaction.¹¹ While some gay rights advocates rejoiced in the United States’ decision to join a growing cadre of nations that had decriminalized laws against sodomy (and in particular, cited the Court’s willingness to draw on international human rights jurisprudence to that effect), other governments took a different route and used the opinion to signify a growing distaste with Western decadence. One of Egypt’s religious leaders proclaimed a newfound commitment to fighting the “plague” of gay visibility, declaring his opposition to the appointment of gay clergy and same-sex marriage.¹² The Vatican, just weeks after *Lawrence*, issued a sweeping declaration repudiating same-sex unions as “gravely immoral,” urging Catholics to join in combating them.¹³ And, in perhaps the most powerful example of this trend, the Indian government offered a resounding defense of its own sodomy laws, claiming in a recent brief that despite recent signs of tolerance in the West, “Indian society is intolerant to the practice of homosexuality/ lesbianism,” pointing out that such “disapproval of homosexuality was ‘strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private.’”¹⁴ The government,

Gay Issues, USA TODAY, July 29, 2003, at A1. For a longer historical treatment on the rise of the gay civil rights movement, see Laura Secor, *Rainbow Warriors*, BOSTON GLOBE, Aug. 3, 2003, at E1.

⁸ *Lawrence*, 539 U.S. at 602.

⁹ *Id.*

¹⁰ David Teather, *U.S. Supreme Court Lifts Ban on Gay Sex in Texas*, GUARDIAN (London), June 27, 2003, at 13.

¹¹ See Ahmar Mustikhan, *A Ruling Heard Around the World*, PAC. NEWS SERVICE, June 30, 2003, <http://www.alternet.org/story/16301>.

¹² *Egypt Religious Leader Fights Gay ‘Plague’*, Gay.com U.K., Sept. 9, 2003, <http://www.gay.com/news/article.html?2003/09/09/4>.

¹³ *Vatican Fights Gay Marriages*, CNN.com, July 31, 2003, <http://www.cnn.com/2003/WORLD/Europe/07/31/vatican.gay.marriages/index.html>.

¹⁴ *Life Sentences Necessary “To Control Homosexuality” India Says*, 365gay.com, Sept. 9, 2003, <http://www.365gay.com/NewsContent/090903indiaSex.htm>. See also *All that Gays Want Is Equality*, TIMES INDIA, Sept. 21, 2003; *Allowing Homosexuality Will Lead to Delinquent Behavior: Indian Govt*, Rediff.com, Sept. 8, 2003, <http://www.rediff.com/news/2003/>

notably, reached this conclusion even in light of the ironic fact that India's sodomy laws were enacted by British colonial regimes in the 1800s, not by Indians themselves.¹⁵

These examples carry with them hidden and unstated implications for the recent globalization of gay civil rights, forcing us to actively contemplate whether *Lawrence* is yet another symbol of a global wave of change, or whether it represents an ultimately unfulfillable goal worldwide, particularly in places where gay civil rights movements have been met with considerable backlash.¹⁶ For, as Professors Arnaldo Cruz-Malavé and Martin Manalansan have observed, “[q]ueerness is now global. Whether in advertising, film, performance art, the Internet, or the political discourses of human rights in emerging democracies, images of queer sexualities and cultures now circulate around the globe.”¹⁷ They continue:

In a world where what used to be considered the “private” is ever more commodified and marketed, queerness has become both an object of consumption, an object in which nonqueers invest their passions and purchasing power, and an object through which queers constitute their identities in our contemporary consumer-oriented globalized world.¹⁸

Interestingly, as the “private” becomes more and more commodified, the role of law has become much more central in defining the rights of particular sexual minorities, particularly in times of tremendous cultural transition. The recent emergence of gay- or lesbian-identified individuals in postcolonial contexts has created complex ruptures in existing social fabrics, calling into question the universality of legal constructs governing sexuality and culture. Throughout the globe, various social norms, histories, symbols, and meanings create complex intersections with legal categories of sexual identity. Three perspectives dominate. On one side, some governments view the advent of gay rights movements as purely “Western” phenomena, devoid of local expression. On the other side, some global gay rights activists favor

sep/08sex.htm (last visited Sept. 9, 2003); Kavita Chowdhury, *Centre Says Being Gay Will Remain a Crime, Its Reason: Our Society Doesn't Tolerate It*, INDIAN EXPRESS, Sept. 9, 2003; Swagato Ganguly, *India's Sexual Minorities*, STATESMAN (Calcutta), July 27, 2003; *India Court Petitioned on Sodomy Law*, Datalounge, Sept. 10, 2003, available at <http://www.sodomylaws.org/world/india/innews33.htm>; *No 'Unnatural' Sex Please, We Are Indians!*, HINDUSTAN TIMES, Sept. 11, 2003, available at <http://www.sodomylaws.org/world/india/innews2.htm>; Jyoti Sharma, *Why Should Homosexuality Be a Crime?*, TIMES INDIA, Sept. 19, 2003; *Still Unnatural*, TELEGRAPH (Calcutta), Sept. 12, 2003.

¹⁵ *All that Gays Want is Equality*, *supra* note 14.

¹⁶ In other work, I have raised significant concerns about this global movement. See Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98 (2002) (noting that many foreign governments see the formation of gay communities as a foreign threat and have mounted vocal and often violent attacks against gay and lesbian movements within their borders).

¹⁷ See QUEER GLOBALIZATIONS: CITIZENSHIP AND THE AFTERLIFE OF COLONIALISM 1 (Arnaldo Cruz-Malavé & Martin F. Manalansan, eds., 2002) [hereinafter QUEER GLOBALIZATIONS].

¹⁸ *Id.*

a universalized understanding of sexual identity that risks erasing the diversity of localized sexualities in favor of encouraging individuals to identify under the homogenizing categories of “gay,” “lesbian,” or “bisexual” identity. A third group, largely composed of social constructionists, favor particularized meanings of sexual identity and meaning that can often fail to reference their larger political significance as part of a global phenomenon.

As I will show, the pronounced risk of backlash against gay rights necessarily forces us to contemplate the limits and possibilities of each of these prisms, particularly in terms of the boundaries between public and private space and the need for cultural translation. I will argue in this paper that *Lawrence* offers us another way that surpasses, and yet challenges, the perspectives offered by these different groups. A close reading of *Lawrence* represents a culmination of a historic, and increasingly global, convergence between liberty, privacy, and anti-essentialist theories of sexual identity. Indeed, the ultimate significance of *Lawrence* lies not in its overt shielding of sexual minorities from criminalization, but rather in its willingness to offer to the American (indeed global) public, a version of sexual autonomy that is filled with both promise and danger, fragility and universality. For, quite unlike *Bowers*, which largely directed its judicial gaze towards gays and lesbians in particular, the court in *Lawrence* carried a message of sexual self-determination for everyone, irrespective of sexual orientation. At the same time, however, by examining the case law that has flourished in its wake, we see that it has often been correlated with an implicit logic of containment that has relegated the exercise of sexual autonomy to private, rather than public, spaces.¹⁹

In the past, equality-based movements on the basis of sexual orientation have historically focused on the trope of expressive identity, drawing upon comparisons with race and sex for their persuasion.²⁰ Within this paradigm, gay and lesbian advocates often claimed that sexual orientation is like race, or that gay men and lesbians are similar to racial groups, defined by an essence that is inalterable, fixed, immutable, and, ultimately, fundamental to one’s identity.²¹ Largely since *Bowers*, scholars and courts have embraced this conception by defining the class of gays and lesbians by a shared, public personality, rather than a particular sexual activity.²² Indeed, the most successful cases for gay rights have unerringly utilized this public notion of gay personhood, framed by reference to sexual orientation, as a central animating figure

¹⁹ Cf. Case, *supra* note 4; Franke, *supra* note 4; Hunter, *supra* note 4.

²⁰ Cf. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

²¹ See Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW 115, 121 (David Kairys ed., 1988); see also Sharon Elizabeth Rush, *Equal Protection Analogies — Identity and “Passing”: Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997).

²² Rush, *supra* note 21, at 91; see also Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1744 (1993); Katyal, *supra* note 16, at 111.

in exploring other fundamental rights affecting speech, assembly, association, or the right to participate in the political process.²³

Yet *Lawrence*, by focusing on privacy and liberty, instead, has quietly and subtly reoriented this project along a different and more convergent continuum that emphasizes the need for protection through the lens of autonomy, privacy, and liberty, rather than the trope of expressive identity. Emerging from this decision is a vision of sexual self-determination, what I call “sexual sovereignty,” that represents the intersectional convergence of three separate prisms: spatial privacy, expressive liberty, and deliberative autonomy.²⁴ In creating a space for the convergence of all three facets, I would argue that *Lawrence* is a triumph — and a product — of anti-essentialism, but its implicit logic of containment limits its potential to traverse both theoretical and global divisions regarding culture and sexuality.²⁵ Consequently, ultimately, despite the power of its universalist vision, this Article argues that *Lawrence* is circumscribed by potential limitations wrought by culture, property, nationality, and citizenship. Indeed, the example of India offers gay activists in the West a particularly rich and cogent lesson regarding the limits of globalization of gay civil rights, one that reflects a deeper ambivalence and complexity regarding the convergence of law, culture, and sexuality.

As Robert Post forcefully recognized, culture and law are locked in a complicated, ongoing dialogue, one that inevitably produces a constitutional law that reflects the contested and dynamic values that constitute culture itself.²⁶ As Post observes, law both arises from, and in turn regulates, culture as a result.²⁷ But if the outcome in *Lawrence* captures a key moment in the culture wars surrounding sexuality in America, then we should also confront its meaning and legal significance on a broader, global scale. *Lawrence*’s limitations and possibilities have been covered at great length by other scholars; my objective aims to capture some of these ideas in order to explore how *Lawrence* generates a global politics of tolerance, rather than a global politics of equality.²⁸ Yet, despite these limitations, I argue that *Lawrence* serves as a starting point with which to build a theoretical model for global sexual autonomy that encompasses many of the anti-essentialist critiques offered by human rights discourse, critical race theory, and queer theory.

²³ See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 49 (1995); see also Nan D. Hunter, Commentary, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993) (observing that “the First Amendment has provided the most reliable path to success of any of the doctrinal claims utilized by lesbian and gay rights lawyers.”); Katyal, *supra* note 16, at 111.

²⁴ See, e.g., Valdes, *supra* note 4.

²⁵ Cf. Case, *supra* note 4; Franke, *supra* note 4; Hunter, *supra* note 4.

²⁶ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

²⁷ *Id.*

²⁸ See generally Eskridge, *supra* note 4.

This Article, written for a symposium on the development of social movements, first attempts to use *Lawrence* as a recent example of an emergent theory of “sexual sovereignty,” and second, attempts to predict what using this type of theory might yield for similar battles that are being fought elsewhere throughout the globe, particularly those which intersect with questions of culture, identity, and sexuality.²⁹ Part I of this Article turns to exploring the common problems of global gay civil rights discourse, with special reference to India and its own debates regarding sodomy laws. Part II discusses the tri-partite prism of *Lawrence*, arguing that *Lawrence* and its progeny offer the public a vision of sexual self-determination that is deeply bordered between public and private expressions of sexuality and desire. As I argue, India’s own treatment of sexuality and sexual orientation provides us with a fascinating application of the limits and possibilities behind each facet of *Lawrence* — spatial privacy, expressive liberty, and deliberative autonomy — in a post-colonial context. I argue here that although *Lawrence* may be culturally circumscribed by Western notions of sex and sexual identity, its theory of sexual autonomy offers a vital shift — from expressive identity to privacy and autonomy — that may be more easily translatable to contexts that lack corresponding entrenchments of publicly heterosexual, homosexual, and bisexual identities. While the legacy of *Bowers* forced individuals to reclaim public spaces for gay and lesbian visibility, *Lawrence*, by creating a space for the protection of private space, allows for a kind of sexual sovereignty that comprises the intersectional prism of privacy, autonomy, and liberty. However, as I show, the limitations of this theory call for a much more dynamic interaction between the sovereignties of the private and the public — in short, we must use the public to enhance the private, and vice versa if *Lawrence* is to be at all effective in a global context.

I. THE PARADOX OF GLOBAL GAY LIBERATION

As a preliminary matter, it is important to observe that there is no single “lesbian and gay movement” in the United States; instead, there is a proliferation of different and competing groups with widely different self-understandings, representations, and political aims.³⁰ Nevertheless, it can be said that the most prominent strand which often presents itself as “the movement” involves organizations and individuals that promote an agenda of equal rights and inclusion that is largely “premised on a conception of gay men and lesbians as a clearly demarcated social group with a fixed,

²⁹ Mustikhan, *supra* note 11.

³⁰ Steven Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 30–31 (Barry D. Adam et al. eds., 1999) (observing that multiple movements over time with “widely different self-understandings and political strategies” have included “homophile,” “gay liberationist,” “lesbian feminist,” “gay rights,” and “queer”).

ethnic-like identity.”³¹ It is this “movement,” circumscribed by the twin aims of cultural equality and law reform, that I focus on particularly in this Article.³²

Prior to *Lawrence*, legal treatments of sexuality in the United States tended to actively ossify divisions between identities by focusing on the presence or absence of fixed, declarative statements of sexual orientation.³³ Its governing theory, according to Nan Hunter, drew upon a powerful and pragmatic notion of “expressive identity,” the idea that one’s sexual identity is both performative and representational, a politics of presence.³⁴ In these respects, the law governing sexuality has often presumed — and thus imposed — a clear delineation of boundaries between homosexual, heterosexual, and bisexual identities. As a result, laws which govern sexuality implicitly presume that everyone is classifiable along some continuum of sexual identity; it serves as a priceless index of human self-actualization. In the United States, as I and others have argued in prior work, the emergence of this seemingly fixed and stable homosexual identity became increasingly necessary as a means to successfully decenter the import of *Bowers v. Hardwick*.³⁵ In order to distinguish *Hardwick*’s impact in the equal protection context, scholars and courts began to embrace an alternate conception of homosexuality in which the class of homosexuals became defined by a public, shared personality, rather than a sexual activity.³⁶ Since then, the “class” of homosexuals has become defined through the lens of gay personhood, which is deemed a “central and defining aspect of the personality of every individual.”³⁷ This index of sexual identity — gay personhood — remains at the heart of the successes and failures of the gay civil rights movement, generating as many definitional conundrums as it has brought forth uncertain victories.³⁸

³¹ *Id.* at 32. See generally URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (2d ed. 1996) (arguing, among other things, that a gay and lesbian movement pursuing social, legal, cultural and political legitimation emphasizes the discrimination that gay and lesbian people face as a minority).

³² NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 65 (1997).

³³ See Hunter, *supra* note 20, at 10 (noting the military’s “don’t ask, don’t tell” policy as a prime example of how statements of sexual orientation become speech acts through which one’s legal status or material condition may be altered). For an extremely thoughtful treatment of the benefits and disadvantages of using expressive identity in litigation, see Goldberg, *supra* note 22. See also Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 116–23 (1998) (describing the divisions in communities and the costs inflicted upon the gay and lesbian community by staying in “the closet,” and by not openly declaring one’s sexual orientation); Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81 (2001).

³⁴ Hunter, *supra* note 20.

³⁵ Janet Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET* 91 (Michael Warner ed., 1994).

³⁶ See *id.*

³⁷ *Id.* at 92.

³⁸ See Katyal, *supra* note 16.

Part of this focus is historically attributable to the changing role of sodomy laws in the nineteenth century, which slowly began to focus more on homosexual “persons” rather than “activities.”³⁹ Whereas early classifications of homosexuality, for the most part, concerned themselves with sexual acts, rather than sexual identities, later disciplinary processes began to focus more on the homosexual as a distinct type of person, a “species,” rather than a type of behavior.⁴⁰ Early court opinions, for example, carved from the law a vision of a homosexual species, thereby willingly embracing the notion that American society could be neatly classified into homosexual and non-homosexual persons.⁴¹ In *Bowers v. Hardwick*, for example, the Court observed that its opinion did not require it to judge sodomy (in general) or homosexuality (in particular); instead, it circumscribed its query to ask only whether the Constitution conferred the “fundamental right upon homosexuals to engage in sodomy.”⁴² By carving out a particularized inquiry — focusing its gaze on homosexuals, as opposed to society generally — the Court reified the notion that sexual identity, rather than activity, marked citizens for both liberation and moral opprobrium, depending upon which side of the line they fell.⁴³

In turn, the language of gay and lesbian liberation unwittingly assumed this unstated platform. Ever since *Bowers*, which foreclosed privacy protections for same-sex sexual activity, strategies for lesbian and gay equality have tended to focus on

³⁹ Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 537 (1992) (noting that in “ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage” (quoting MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 42–43 (Robert Hurley trans., 1978))). Hunter also explains that anti-sodomy “statutes that prohibited the ‘crime against nature’ without defining it were challenged on grounds of vagueness, although most were upheld with limiting constructions.” *Id.* at 538.

⁴⁰ 1 FOUCAULT, *supra* note 39, at 43. According to Michel Foucault, whereas ancient civil or canonical codes forbid sodomy as a category of forbidden acts,

[t]he nineteenth century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away.

Id. See also Anne B. Goldstein, Commentary, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988).

⁴¹ See *Boutilier v. INS*, 387 U.S. 118 (1967) (characterizing a Canadian man as a “homosexual” under section 1182(a)(4) of the 1952 Immigration Act and Nationality Act, 8 U.S.C.A. § 1101 et seq., which excludes “[a]liens afflicted with psychopathic personality or mental defect”).

⁴² *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

⁴³ *Bowers* brought forth a multitude of insightful critiques from both criminal and constitutional perspectives. See, e.g., Halley, *supra* note 22; Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000); Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

equality within public spaces — freedom of speech and expression, for example, is often used as a principle to justify inclusion and protection in public events.⁴⁴ As a result, gay civil rights, both inside and outside of the law, have become inextricably permeated with an expressive, identity-based rhetoric. Group rights have become the main platform to imagine gay equality after *Bowers*; the unavailability of privacy-based strategies of liberation forced individuals out of the closet, into the streets, and ultimately forged a visible, unitary view of the gay community. Under this visage, public, expressive identity becomes everything — part and parcel of the language of both discrimination and liberation.⁴⁵

Yet this overreliance on identity-based paradigms of equality all too often illuminates a troubling paradox.⁴⁶ The seductive power of categorization — the notion of gay personhood — tethers the very premise of liberation to the same categories as those that originated in order to oppress. These categories — quite strategically — either erase or overlook the rich and complicated tapestry of human sexuality and identity, potentially excluding vast numbers of individuals whose self-perception may fall outside of the interstices of gay, lesbian, bisexual, or heterosexual identity categories.⁴⁷ Often, categories of sexual identity assume a particular fixedness that may often diverge from social norms, and may fail to play out in terms of one's behaviors, tastes, and social roles. As Hunter explains:

The civil rights claim remains the most powerful device for securing equality in American society, yet is premised on recognition of a coherent group identity. What often goes unspoken in the assertion of such a claim is the tension between the desire to deconstruct the imprisoning category itself and the need to defend those persons who are disadvantaged because they bear the group label.⁴⁸

Hunter's eloquent observation, I suggest, represents a critical crossroads for gay and lesbian rights, particularly globally, where the language of gay liberation has often faced audiences in other cultures whose social norms might actively challenge the universality of such categories. In short, exceptions to the general categories of gay, lesbian, or bisexual identity are everywhere, even despite their seeming clarity.⁴⁹

⁴⁴ See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); see also Hunter, *supra* note 20; Knauer, *supra* note 4, at 332 (noting that “[b]y the time John Geddes Lawrence and Tyson Garner were before the Court, the homosexual had already emerged . . . as a politicized, organized, expressive, and sexual individual.”).

⁴⁵ See Hunter, *supra* note 39, at 1553–54.

⁴⁶ See Katyal, *supra* note 16, at 128–29.

⁴⁷ This is particularly true for the vast numbers of sexual minorities that adopt or express gender variance, as I argued in *Exporting Identity*. See *id.* at 133, 154–55; see also Currah, *supra* note 4.

⁴⁸ Hunter, *supra* note 39, at 546–47.

⁴⁹ See generally Katyal, *supra* note 16.

According to Eve Sedgwick, “modern Western culture has placed what it calls sexuality in a more and more distinctively privileged relation to our most prized constructs of individual identity, truth, and knowledge.”⁵⁰ Consequently, she adds, “it becomes truer and truer that the language of sexuality not only intersects with but transforms the other languages and relations by which we know.”⁵¹ The growing tendency among some global gay rights activists to traverse the globe and history, labeling everything with hints of same-sex eroticism as evidence of “gay” or “lesbian” identity, reveals troubling unstated premises about the presumed centrality of sexual identity over sexual activity.⁵² At times, the language of identity, as applied to sexual relationships between individuals, both in public and private spaces, can lead to global difficulties in translation, particularly where the presentation of sexual identity is concerned.⁵³ Given that other cultures may have different social meanings for homosexuality — or may lack reference points for such identities altogether — raising discussions of gay rights in other contexts challenges and exposes many fundamental premises upon which “the movement” is based. Consider, for example, the interesting taxonomy of the term “homosexual,” by one anthropologist studying parts of West Africa:

“Homosexual” is mainly used in describing a rather queer, feminine man who likes to play the passive sexual role. Homosexuality itself connotes transvestism and transsexuality. Although there are many same-sex partners in West Africa, only a small portion of them will identify themselves as homosexual. Sex between men is not automatically labeled as homosexual behavior.⁵⁴

⁵⁰ EVE ROSFOSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 3 (1990).

⁵¹ *Id.* In fact, some scholars argue that the fact that sexual identity has become a “permanent identity marker” separating the individual from the group is perhaps responsible for intolerance of variations in the terrains of sexuality and gender in some western countries. GILBERT HERDT, *SAME SEX, DIFFERENT CULTURES: EXPLORING GAY AND LESBIAN LIVES* 22 (1997).

⁵² LENORE MANDERSON & MARGARET JOLLY, *SITES OF DESIRE, ECONOMIES OF PLEASURE: SEXUALITIES IN ASIA AND THE PACIFIC* 25 (Lenore Manderson & Margaret Jolly eds., 1997).

⁵³ For my definition of “homosexual identity,” I rely on Richard R. Troiden:

The homosexual identity is a *self-identity* when people see themselves as homosexual in relation to romantic and sexual settings. It is a *perceived identity* in situations where people think or know that others view them as homosexual. It is a *presented identity* when people present or announce themselves as homosexual in concrete social settings. Homosexual identities are most fully realized, that is, brought into concrete existence, in situations where self-identity, perceived identity, and presented identity coincide — where an agreement exists between who people think they are, who they claim they are, and how others view them.

Matthew W. Roberts, *Emergence of Gay Identity and Gay Social Movements in Developing Countries: The AIDS Crisis as Catalyst*, 20 *ALTERNATIVES* 243, 249 (1995).

⁵⁴ *Id.* at 247.

As the foregoing quotation illustrates, the constant interaction of a multiplicity of different fragments complicates identity in various ways, a person's outward sexual identity, their sexual orientation, their *subjectivity*, or sense of self, and the social meanings that attach to each category.⁵⁵ Contrary to the prevailing assumption that individuals who have sex with members of the same gender are identified as "homosexuals" or "bisexuals," there are numerous individuals who would never conceive of identifying as such and yet routinely engage in same-sex sexual activity.⁵⁶ As Gilbert Herdt explains: "They may regard themselves as 'heterosexuals,' 'straights,' or just 'human beings' who on occasion participate in homoerotic encounters for various reasons, including pleasure, money, social expectations, and the absence of other sexual opportunities."⁵⁷

A. Revisiting the Closet

Consider the closet, the iconic symbol of the imprisoning potential of the absence of gay self-identification among individuals who are attracted to members of the same sex.⁵⁸ The closet, according to Eve Kosofsky Sedgwick, is "the defining structure for gay oppression in this century."⁵⁹ It comprises an intersection of both property and privacy; its interior and exterior boundaries produce a type of protective enclosure through confining and silencing, rather than creating the foundation for a more declarative foundation of sexual identity. Sedgwick has deemed the closet to be "'a structured silence,'" pointing out that the silence becomes ruptured by the enactment of the birth of the gay subject by "'coming out.'"⁶⁰ The narrative from a closeted to a fully self-actualized person carries with it a symbolic power that is almost magnetic; Sedgwick calls the act of "coming out" a "salvational epistemologic certainty";⁶¹ that is, the act of leaving the closet is dynamically poised to affect a person's transition towards personhood by adopting an expressively gay, lesbian, bisexual, or transgendered identity.

The closet thus represents a convergence between two themes, both of which suggest a crossing of borders; the first theme suggests a crossing from private to public, and the second, less obviously, from absence to presence. Through coming out, the spatial privacy of the closet, of interior, unnamed space, is also rejected in favor

⁵⁵ Peter A. Jackson & Gerald Sullivan, *Introduction* to *LADY BOYS, TOM BOYS, RENT BOYS: MALE AND FEMALE HOMOSEXUALITIES IN CONTEMPORARY THAILAND* 1, 19 (Peter A. Jackson & Gerard Sullivan eds., 1999) [hereinafter *LADY BOYS*].

⁵⁶ HERDT, *supra* note 51, at 4.

⁵⁷ *Id.*

⁵⁸ See SEDGWICK, *supra* note 50, at 71.

⁵⁹ *Id.*

⁶⁰ Roberto Strongman, *Syncretic Religion and Dissident Sexualities*, in *QUEER GLOBALIZATIONS*, *supra* note 17, at 180 (quoting SEDGWICK, *supra* note 50).

⁶¹ SEDGWICK, *supra* note 50, at 71.

of an expressive and declarative space; the private is rejected in favor of the public.⁶² By “coming out,” one crosses the border from a “love that dare not speak its name”⁶³ to gay self-actualization, gay personhood. What is invisible and therefore nonexistent becomes visible, expressive and present: as a result, the personal declaration of “coming out” becomes instead a politicized statement of personhood. ““If every gay person came out to his or her family,”” an article breathlessly entreated after *Bowers*, “a hundred million Americans could be brought to our side. Employers and straight friends could mean a hundred million more.”⁶⁴

The dominant form of identity in lesbian and gay legal discourse has actively embraced the need for this crossing from private to public, and thus involves, and is often limited to, situations in which both partners define themselves as gay or lesbian.⁶⁵ However, as many social constructionist scholars have persuasively shown, the development of gay personhood is relatively recent and figures far more prominently in Western legal discourse than anywhere else in the world.⁶⁶ For in other contexts, as one activist pointed out, the claim to gay sexual *identity, i.e., status* is severely punished, whereas same-sex sexual behavior, *i.e., conduct*, is largely tolerated, as long as it takes place in private, and often without attachment to a particular identity.⁶⁷

Thus, at the same time that the image of the closet remains a powerful cornerstone of gay rights, over time and across boundaries, it might also be viewed as deeply and inherently context-specific. Indeed, one might ask whether the architecture of the “structured silence” of the closet varies according to cultural and social norms. For at the heart of the fabled closet lies a predominantly Western assumption that a gay, lesbian, or bisexual identity is a major determinant in the lives of *all* individuals. According to theorist Tom Boellstorff, a “coming out” narrative is premised on a Foucaultian concept of power and confession, in which an identity can only become authentic when it has been transferred to an external entity “who interprets and acknowledges [the] confession.”⁶⁸ In other words, as I have suggested, liberation from “the closet” suggests that a crossing from private to public is necessary for self-actualized personhood and a fuller experience of the various dimensions of life, both personally

⁶² *Id.*

⁶³ “I am the love that dare not speak its name” is the last line of a poem by Oscar Wilde’s lover, Lord Alfred Douglas, and is widely thought to refer to his homosexual relations with Mr. Wilde. Lord Alfred Douglas, *Two Loves*, in *THE CHAMELEON* 28 (photo. reprint 1894). Mr. Wilde was asked to explain the phrase during his 1895 criminal trial for “gross indecencies.” See Douglas O. Linder, *The Trials of Oscar Wilde: An Account*, available at <http://www.law.umkc.edu/faculty/projects/ftrials/wilde/wildeaccount.html> (last visited Jan. 24, 2006).

⁶⁴ SEDGWICK, *supra* note 50, at 71.

⁶⁵ See STEPHEN O. MURRAY & WILL ROSCOE, *ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY, AND LITERATURE* 4 (1997).

⁶⁶ *Id.* at 4–5.

⁶⁷ Interview with Surina Khan, Executive Director, IGLHRC (Dec. 14, 2000) (on file with author).

⁶⁸ Tom Boellstorff, *The Perfect Path: Gay Men, Marriage, Indonesia*, 5 *GAY & LESBIAN Q.* 475, 496 (1999).

and politically.⁶⁹ There is a caveat, however, because “coming out” is only valuable if someone else acknowledges this crucial shift from private to public. Indeed, within Western treatments of sexuality, Foucault has explained the imperative of the confessional in this way: “[w]hether in the form of a subtle confession in confidence or an authoritarian interrogation, sex — be it refined or rustic — had to be put into words.”⁷⁰ Sex, then, becomes a central object of surveillance, of examination, of discipline.⁷¹ The confession, for all its power, can only be effective if it takes place within the context of a power relationship; one could only confess with the presence of an authoritative figure who required and prescribed the confession.⁷² The authority figure then “intervenes in order to judge, punish, forgive, console and reconcile”;⁷³ and then, in accordance with the prescription, the act of confession produces a desired modification of behavior.⁷⁴ Foucault further observes:

It is no longer a question simply of saying what was done — the sexual act — and how it was done; but of reconstructing, in and around the act, the thoughts that recapitulated it, the obsessions that accompanied it, the images, desires, modulations, and quality of the pleasure that animated it. For the first time no doubt, a society has taken upon itself to solicit and hear the imparting of individual pleasures.⁷⁵

In other words, expression is everything; it encapsulates the language of punishment, domination, and liberation.⁷⁶

⁶⁹ See M.V. Lee Badgett & Lynn Comella, COMING OUT IN THE UNITED STATES: A SUMMARY OF RESEARCH FINDINGS 1, available at http://hrc.org/Template.cfm?Section=Get_Involved&Template=/ContentManagement/ContentDisplay.cfm&ContentID=23970 (last visited Jan. 24, 2006) (finding that “[p]eople who are out in the workplace have higher levels of job satisfaction, better relationships with coworkers, and lower levels of stress.”); see also Interview by Candace Gingrich with Tony Varona, former legal director, Human Rights Campaign, available at http://www.hrc.org/Template.cfm?Section=Latinas_Latinos&Template=/ContentManagement/ContentDisplay.cfm&ContentID=12759 (last visited Jan. 24, 2006) (describing how coming out enabled Mr. Varona to establish happier and more complete relationships with his family and lead a more productive life at his law firm).

⁷⁰ See 1 FOUCAULT, *supra* note 39, at 32.

⁷¹ MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984, at 111 (Lawrence D. Krizman ed., Alan Sheridan et al. trans., 1988) [hereinafter FOUCAULT, POLITICS, PHILOSOPHY, CULTURE].

⁷² 1 FOUCAULT, *supra* note 39, at 61.

⁷³ *Id.* at 61–62.

⁷⁴ *Id.* at 62.

⁷⁵ *Id.* at 63.

⁷⁶ Foucault continued in one interview:

It is often said that sexuality is something people in our societies dare not talk about. It is true that people dare not say certain things. Nevertheless, I was struck by the following: when one thinks that, since the twelfth century, all Western Catholics have been obliged to admit their

As Charles Taylor has observed, our identities are shaped by both recognition, the absence of recognition, and by misrecognition, all of which can result in “real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”⁷⁷ At the same time, Anthony Appiah has observed the seminal importance of ensuring that both the individual and collective identity be viewed, not as limiting principles, but rather as emblems that function in order to rework and recode negative stereotypes or culturally insensitive expectations.⁷⁸ Consider Appiah further:

Demanding respect for people as blacks and as gays requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black and gay, there will be expectations to be met, demands will be made. It is at this point that someone who takes autonomy seriously will ask whether we have not replaced one kind of tyranny with another. If I had to choose between the world of the closet and the world of gay liberation, or between the world of *Uncle Tom’s Cabin* and Black Power, I would, of course, choose in each case the latter. But I would like not to have to choose. I would like other options.⁷⁹

Taking both authors’ observations, while the dynamics of confession might be readily applicable to those familiar with its disciplinary imperatives, we do see some difficulties in translating them to cultures which lack corresponding social norms, due to differing conceptions of space, identity, and privacy. For example, some public health activists have called the notion of a gay or lesbian identity “incomprehensible” among some citizens in non-Western countries who fail to attach the same sort of

sexuality, their sins against the flesh and all their sins in this area, committed in thought or deed, one can hardly say that the discourse on sexuality has been simply prohibited or repressed. The discourse on sexuality was organized in a particular way, in terms of a number of codes, and I would even go so far as to say that, in the West, there has been a very strong incitement to speak of sexuality.

FOUCAULT, POLITICS, PHILOSOPHY, CULTURE, *supra* note 71, at 102. Obviously, confession also played a key role. Foucault explained:

Confession, the examination of conscience, all the insistence on the important secrets of the flesh, has not been simply a means of prohibiting sex or of repressing it as far as possible from consciousness, but was a means of placing sexuality at the heart of existence and of connecting salvation with the mastery of these obscure movements.

Id. at 111.

⁷⁷ Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994) [hereinafter MULTICULTURALISM].

⁷⁸ K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM, *supra* note 77, at 159–61.

⁷⁹ *Id.* at 162–63.

identificative significance to same-sex sexual behavior.⁸⁰ At least one public health activist has suggested that South Asian families control one's behavior through honor and shame, rather than Western cultures that focus more on guilt.⁸¹ Avoidance of shame, meaning a loss of one's honor, may therefore be a governing factor in the lives and choices of many individuals and families.⁸² Here, the main emphasis may be placed on *public* "visibility of behavior, . . . not the behaviour itself."⁸³ An example of this is the emphasis placed on fulfillment of the institution of marriage, which is often seen "as an essential requirement for maintaining the family, as a family duty, as a sign of obedience to one's parents."⁸⁴

As a cautionary caveat, I do not mean to suggest, normatively or descriptively, that the alternative versions of sexualities I have offered are universally generalizable, nor do I mean to "essentialize" the underpinnings of Asian culture.⁸⁵ Rather, I only mean to suggest that there are both benefits and disadvantages to universalizing constructs of gay or lesbian identity across cultures, and that seemingly "established" definitions of sexual identity and orientation often carry important exceptions that may have legal consequences. As the boundaries between public and private differ according to home, context, and community, so do cultural understandings of sexual identity and expression. For example, though there is an emergent "gay" identity among some urban, middle class men throughout cities in Asia, some researchers report that the concept of sexual orientation and self-identification as "gay," used to denote a broader psychosocial identification and acceptance of a sexual orientation toward other men, often does not assume the central role that it is often accorded in many Western gay communities.⁸⁶ Instead, occupation, class, and ethnicity may often play determinative roles in the construction of one's sexual identity.⁸⁷ Here, in stark contrast to the Foucaultian view of intersecting surveillance and sex, lesbian and gay subjectivities do not hinge on the same concept of disclosure to spheres of

⁸⁰ Jeremy Seabrook, *It's What You Do*, 328 NEW INTERNATIONALIST, Oct. 2000, available at <http://www.newint.org/issue328/whatdo.htm>.

⁸¹ See Shivananda Khan, *South Asian Male Sexual Behaviours and Their Impact upon Male Children and Youth*, NAZ KI PUKAAR (Naz Found. Int'l, London, U.K.), Nov. 1997, at 14 [hereinafter Khan, *South Asian Male Sexual Behaviours*].

⁸² Shivananda Khan, *Cultural Constructions of Male Sexualities in India*, NAZ KI PUKAAR (Naz Found. Int'l, London, U.K.), Jan. 1996, at 16.

⁸³ *South Asian Male Sexual Behaviour*, *supra* note 81, at 14.

⁸⁴ SHIVANANDA KHAN, KHUSH: A SHAKTI REPORT 31 (1993).

⁸⁵ For some excellent observations on the dangers of "essentializing" Indian culture, especially in matters of sexuality, see RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 87–93 (2005).

⁸⁶ See Katyal, *supra* note 16, at 157–58; Roberts, *supra* note 53, at 246; see also Debanuj Dasgupta & Deep Purkayastha, *Being in the Game: Perspectives of Married Indian Men Who Have Sex With Men*, TRIKONE MAG., Apr. 1996, at 10 ("The debate around marriage and identity is different in India. Identity is based on caste, class and religious affiliations. Sexual desire is not the focal point of our identities. Hence there is an acceptance of the multi-dimensional personality.").

⁸⁷ See HERDT, *supra* note 51, at 20; Jan W. De Lind van Winjgaarden, *Between Money, Morality and Masculinity: Bar-Based Male Sex Work in Chiang Mai*, in LADY BOYS, *supra* note 55, at 199–200.

home, workplace, or God.⁸⁸ Such identities are “additive rather than substitutive: opening them does not necessarily imply closing” other identities.⁸⁹

These suggestions are not just limited to cross-cultural variance. Indeed, the notion of a “gay essence,” or “gay personhood,” which, according to author Diana Fuss, was so relied upon to mobilize and to legitimate gay activism, has been soundly rejected by social constructionist scholars who have dismissed the notion of a “natural, essential or universal gay identity” in their own historic work.⁹⁰ Similarly, an ensuing proliferation of studies, both sociological and psychological, have also echoed the utter inability of advocates of the “gay essence” to capture an emerging divide between ideology and experience, act and identity across different cultures.⁹¹ Unlike the seemingly lucid nature of the sexual identities often referred to in case law, sexuality has a number of psychological, biological, cultural, and behavioral elements that may or may not correspond to the expressive domains of identity.⁹² Indeed, as one author has pointed out, “what we define as ‘sexuality’ is a historical construction, which brings together a host of different biological and mental possibilities — gender identity, bodily differences, reproductive capacities, needs, desires, and fantasies — which need not be linked together, and in other cultures have not been.”⁹³

The closet represents a perfect binary framework for expressive identity: one is either “out” or “in.” But the explorations of sexualities throughout the world suggests a radically complicated picture, one that suggests that individuals employ a continuum of different identities that differ according to the boundaries of private and public, as well as context and community.⁹⁴ Here, property and privacy play integral

⁸⁸ See Boellstorff, *supra* note 68, at 496.

⁸⁹ *Id.*

⁹⁰ BAMFORTH, *supra* note 32, at 74.

⁹¹ MANDERSON & JOLLY, *supra* note 52, at 5; see also CONCEIVING SEXUALITY: APPROACHES TO SEX RESEARCH IN A POSTMODERN WORLD 11 (Richard G. Parker & John H. Gagnon eds., 1995); JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 97–98 (1995).

⁹² HERDT, *supra* note 51, at 40.

⁹³ JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES 15 (1985).

⁹⁴ For example, as I observed in *Exporting Identity*, in India, a growing body of public health activists have observed the negligible utility of using the label “gay” or “homosexual” to describe males who engage in sexual behavior with other males, preferring instead to use the term “men who have sex with men” (MSM) instead. *Id.* Consequently, “the term is used to denote those for whom homosexuality connotes a behavior, not an identity.” Katyal, *supra* note 16, at 153. The term MSM is used to refer “to men from all age groups, marital status, economic classes, educational backgrounds, caste and religious communities, sexual identities, and gender identities who engage in sexual activity with other men.” *Id.* Many public health experts contend that use of the term is necessary for effective AIDS educative interventions, because MSM do not see themselves as bisexual or “gay,” yet neither are they “conventionally straight.” *Id.* See also JEREMY SEABROOK, LOVE IN A DIFFERENT CLIMATE: MEN WHO HAVE SEX WITH MEN IN INDIA 141 (1999); Shaffiq Essajee, *Rocking the Boat: Anjali Gopalan’s Work With Men Who Have Sex With Men*, TRIKONE MAG., Oct. 1996, at 7 (“Not to say there

roles in constructing these boundaries; essential for the flourishing of human relationships, both inside and outside the objectively “gay” community.⁹⁵ As Boellerstorff concluded in his study:

We find not an epistemology of the closet but an epistemology of life worlds, where healthy subjectivity depends not on integrating diverse domains of life and having a unified, unchanging identity in all situations but on separating domains of life and maintaining their borders against the threat of gossip and discovery.⁹⁶

Consequently, it is more appropriate to think of such complications in terms of their unraveling effect on the notion of the gay essence, which becomes revealed as not an internally homogeneous entity, but rather, an amalgam of multiple subjectivities that the law governs, though somewhat inhospitably.⁹⁷

A serious examination of sexualities reveals enormous complexities stemming from the cultural dynamics surrounding identity — complexities that scholars and activists often headily ignore, a response that others have critiqued as a kind of “lingering imperialism of adjudging sameness and difference from” a Western perspective.⁹⁸ A fuller study of same-sex sexual relations in other cultural contexts can be understood only by reference to the wider structures of the society itself, including its constructions of masculinity, femininity, heterosexuality, bisexuality, and the laws (or lack thereof) which shape and construct these notions.⁹⁹

are no gay men in India but this identity is sort of a luxury that doesn't really extend beyond the educated upper classes. The majority of men who have sex with men don't see themselves as gay or even homosexual.”); Owais Khan, *A Rose by Any Other Name . . . ? Gay vs. MSM*, TRIKONE MAG., July 2000, at 16; Deep Purkayastha, *MSM Networks: Identity Categories Versus Identity Continuum*, 27 NAZ KIPUKAAR (Naz Found. Int'l, London, U.K.), Oct. 1999, at 16.

⁹⁵ For a great discussion of the relationship between property and privacy and their relationship to sexuality, see Strahilevitz, *supra* note 4.

⁹⁶ Boellerstorff, *supra* note 68, at 496.

⁹⁷ *See id.* at 490.

⁹⁸ MANDERSON & JOLLY, *supra* note 52, at 25.

⁹⁹ *See* ANTHROPOLOGY AND HOMOSEXUAL BEHAVIOR 159 (Evelyn Blackwood ed., 1986); *see also* FEMALE DESIRES AND SAME-SEX RELATIONS: TRANSGENDER PRACTICES ACROSS CULTURES (Evelyn Blackwood & Saskia E. Wieringa eds., 1999) (analyzing female same-sex relations in a variety of cultural settings). Interestingly, some groups have therefore joined together in *opposition* to gay-identified groups, for reasons that stem from differences regarding both gender and sexuality. A group in Calcutta, for example, known as Maitreya, has organized and issued a statement against what they term “gender oppression” faced by males who do not conform to the conventional definitions of masculinity. *Maitreya*, 29 NAZ KIPUKAAR (Naz Found. Int'l, London, U.K.), Apr. 2000, at 4. Its press statement explains that “our oppression is not always based on our sexualities, but on our gender affinities, though we firmly believe that many among us who are not heterosexual face a specific stigmatisation as ‘loving males’ is often conceived of as an unmanly thing.” *Id.* Other members joined because they were bisexually oriented and felt excluded from gay identity groups. *See id.* Another individual claims:

Most of us in Maitreya are bisexual or homosexual or those with fluid

For example, while “the North American closet spells liberation through disclosure,” one anthropologist writes that “many native Latin American homosexualities operate through freedoms afforded by secrecy.”¹⁰⁰ Part of this is due to the different role of law in governing sexuality. According to anthropologist Roberto Strongman, in sharp contrast to the United States’ prior prohibition of sodomy, many Latin American states do not have constitutional prohibitions against homosexuality.¹⁰¹ Thus, whenever homosexuals are arrested, it is usually under charges of public indecency.¹⁰² As a result, he explains:

Many native Latin American alternative genders and sexualities do not rely on the same notion of disclosure to exist; the performance of desire is a much more defining moment than the declaration; the act is much more important than the speech-act. . . . Many native Latin American homosexualities still enjoy the freedom of ignorance of the closet and thus operate sometimes with greater liberties because that which isn’t part of *vox populi* is difficult for society to condemn.¹⁰³

Adding to this point, “what is often punished in Latin America is not the homosexual act per se, but the alleged disclosure of it in the public sphere as ‘public indecency.’”¹⁰⁴ Consider a recent case from Colombia, which involved a law student and gay rights activist who was repeatedly kicked by school guards who shouted anti-gay epithets as he waited inside a university campus.¹⁰⁵ After his complaint against the university went unaddressed, various letters of protest on his behalf were answered by the university with the observation that “‘exteriorization of sexual preference goes against the University principles and will not be tolerated.’”¹⁰⁶ In other words, it was the assertion of the identity, the act of naming oneself, or the “exteriorization” of sexual preference that was singularly objectionable, rather than the tendency or desire to engage in same-sex sexual conduct.

In contrast to the function of sodomy laws in the United States, which condemn sexually “private” activities with a host of public repercussions on expression, employment, and otherwise, these other contexts actually suggest an opposite trajectory,

sexualities. We are among the thousands of males who have sex with males in India and the rest of South Asia who are either uncomfortable with putting a premium on their sexual identities or unable to subscribe to the feminine male construction.

Id.

¹⁰⁰ Strongman, *supra* note 60, at 181.

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See* Int’l Gay & Lesbian Hum. Rts. Comm’n, *University Guards Abuse Student in Retaliation for Complaints*, July 2, 2001, available at <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=153> (last visited Jan. 24, 2006).

¹⁰⁶ *Id.*

where the sexually private act is tolerated only insofar as it remains a nameless, behavioral facet of one's personality that is unconnected to larger forms of identity and discrimination. In such contexts, the law opts to condemn *public* expressions of homosexuality, rather than sexual acts in private. Within such contexts, as Strongman has argued, the gay subject, through birth as the coming out narrative, also "forfeit[s] some of the freedoms of not-being,"¹⁰⁷ such as personal security, safety, and an unwillingness to complicate one's sexual identity or marriage by associating one's sexual activity with a particular public persona.

The symbolism of the closet implicitly suggests that to deny one's expressive sexual preference is an act of self-abnegation; a direct assault on one's identity and personhood. The dominant narrative produced largely by gay and lesbian human rights activists in Latin America, according to Strongman, builds on this theme by seeking to homogenize alternative genders and non-heterosexual sexualities through translating them into "a developmental model that positions them as backwards."¹⁰⁸ Adding to this point, anthropologist Martin Manalansan has pointed out that "*gay* gains meaning according to a developmental narrative that begins with an unliberated, 'prepolitical' homosexual practice and that culminates in a liberated, 'out,' politicized, 'modern,' 'gay' subjectivity."¹⁰⁹ Here, I do not mean to devalue the powerful role that the closet has played in Western discourse, or to suggest its complete irrelevance in other cultural contexts, but simply to point out that some individuals might not follow the trajectory offered by Western psychologists or activists; indeed, some personal narratives may prefer to remain within the structured silence that the closet offers, and choose never to equate their sexual preferences with a particular sexual identity.¹¹⁰ Yet to unilaterally deem such individuals as somehow less politically

¹⁰⁷ Strongman, *supra* note 60, at 180.

¹⁰⁸ *Id.* at 181.

¹⁰⁹ Martin F. Manalansan IV, *In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma*, in *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 487 (Lisa Lowe & David Lloyd eds., 1997).

¹¹⁰ Strongman, *supra* note 60, at 181. Yet, on the other hand, the documentary narratives established by anthropologists reflect equally problematic tendencies that are so deeply context-specific that they fail to grapple with the larger political ramifications behind classifications of identity. Strongman offers the example of studies of Latin American homosexualities which rely on oppositional rhetorical strategies that focus on distinguishing between "active" and "passive" homosexuals, in stark comparison to the "egalitarian" systems in the United States.

Id. Strongman writes that such descriptions demonstrate

a polarized distinction that mirrors, in the sexual arena, the problematic images of tyranny and democracy that are used politically by the United States to distinguish the representation of itself from Latin America. In this way, gay discourse operates like other forms of imperialistic propaganda in which the Other is reduced to an opposite of the values desired to be represented in the imperialist self.

Id. at 181–82. Here, too, we might ask whether it is ever possible to describe localized sexual practices without escaping the tendency to exoticize or to erase the political significance of such practices in terms of the project of gay civil rights. Such difficulties in legal translation have integral consequences for the globalization of gay civil rights in general and the construction of sexual rights regarding citizenship in particular.

advanced than other individuals who adopt the trope of expressive identity, is to risk oversimplification and overlook the rich and complicated narratives many individuals offer regarding their sexual identity formation.

B. Postcolonial Resurrections of the Closet

Though identities are complex, contingent, and always shifting, laws against “unnatural acts” have, since colonial times, ironically tended to presume stability in their governance of sexual activities and identities. At the first national workshop on strategies to advance lesbian and gay rights in India in November 1997, a press release observed that “[w]hile homosexuality has been accepted in many Indian cultures, the criminalisation of homosexuality has been an import from the West.”¹¹¹ Curiously, however, in more recent times, the Indian government has enthusiastically defended, and in some cases reinvigorated, provisions against same-sex sexual activities.¹¹² This is so despite the fact that the very colonial regimes that had enacted these laws have long since abandoned them.¹¹³

India’s response can be characterized by simultaneous narratives of exclusion through postcolonial reenactment: here, the Indian government embraces, indeed effectively legislates, the applicability of British colonial law in order to exclude sexual equality from its own construction of citizenship. One form of colonization displaces another, creating, in effect, a modern reenactment of colonial law in order to displace and thus exclude countervailing arguments for equality and inclusion for India’s sexual minorities. The difference, however, in this modern context involves the perceived origins of homosexuality: whereas the colonial period attributed its incidence in India to “primitive” behaviors, the Indian government today attributes its growing visibility to Western decadence and moral decline.¹¹⁴ The result of these narratives of exclusion, enactment, and denial, however, forecloses the possibility of growth, visibility, and protection for sexual minorities in *both* public and private space.¹¹⁵

Although there are no laws which expressly criminalize homosexual status, section 377 criminalizes sodomy in India and remains in force today as a leftover statute from the British era.¹¹⁶ The text of the Indian Penal Code reads as follows: “Of unnatural

¹¹¹ See Sherry Joseph, Press Release, National Workshop to Advance Lesbian, Gay and Bisexual Rights, Nov. 11, 1997 (on file with author). Aside from focusing on the pernicious influence of section 377, the workshop also studied the ways in which family and obscenity laws can be used to discriminate against gays and lesbians. *See id*; *see also* SEABROOK, *supra* note 94, at 162.

¹¹² *See, e.g.*, Brief of Respondent, *Naz Found. v. Gov’t of NCT of Delhi* (2001) (on file with author) [hereinafter Government Brief].

¹¹³ *See, e.g.*, SEABROOK, *supra* note 94, at 162.

¹¹⁴ For an excellent discussion of this issue, see Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69 (2000).

¹¹⁵ For a thoughtful analysis of the power of sodomy laws in a non-western context, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001).

¹¹⁶ *See* GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 79

offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall be liable to fine.”¹¹⁷ The British Raj introduced this sodomy law to India in 1861,¹¹⁸ and in other colonies during the same period.¹¹⁹ This provision was largely based upon traditional Judeo-Christian standards, which tended to proscribe all non-procreative sexual activity that fell outside of traditional definitions of penile-vaginal intercourse.¹²⁰ Deeply influenced by Victorian standards that tended to devalue pleasure or sexual activity in general, these enactments were designed, in part, to rectify perceived “primitive” aspects to Indian marital, familial, and sexual arrangements.¹²¹ The author of the Act, Lord Macaulay, explained:

(1996).

¹¹⁷ *Id.*

¹¹⁸ See Brief of Petitioner at 13, *Naz Foundation v. Government of NCT of Delhi* (2001) (on file with author) [hereinafter *Naz Foundation Brief*].

¹¹⁹ See Kris Franklin, *The Rhetorics of Legal Authority Constructing Authoritativeness, the “Ellen Effect,” and the Example of Sodomy Law*, 33 *RUTGERS L.J.* 49, 63 (2001) (“Initially, prohibitions against sodomy in the English colonies were borrowed from British law.”); Robin A. Warren, *Gay Marriage: Analyzing Legal Strategies for Reform in Hong Kong and the United States*, 13 *PAC. RIM L. & POL’Y J.* 771, 775 & n.21 (2004) (noting that Hong Kong’s anti-sodomy laws stemmed from its status as a British colony); see also Case, *supra* note 4, at 123 & n.206 (“At the beginning of the nineteenth century in Britain, sodomy was a capital offense for which a record number of more than fifty men were executed in the first third of the century.”); Goldstein, *supra* note 40, at 1082–85 nn.61–66, 74 (describing the incorporation of English sodomy laws into the new laws of the post-Revolutionary United States).

¹²⁰ See *Naz Foundation Brief*, *supra* note 118, at 11; see also *Recent Developments in International Law*, 26 *N.Y.U. REV. L. & SOC. CHANGE* 169, 175 (2000) (quoting Scott Long describing how top Zambian government leaders, to send the message that homosexuality was “un-Zambian,” were about to reinforce “the existing law on sodomy in Zambia, which was itself a relic of the British colonial administration . . . to preserve Zambian national identity”); Elizabeth A. Leveno, Comment, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 *U. CIN. L. REV.* 1029, 1043 & n.118 (1994) (citing Justice Berger’s concurring opinion in *Bowers v. Hardwick* in which he wrote that “[c]ondemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards.” (alteration in original)).

¹²¹ *Naz Foundation Brief*, *supra* note 118, at 13. One Indian citizen, commenting on section 377, explained that Indian sexuality is traditionally amorphous, and used the example of Hindu deities, which often possess both female and male characteristics, and continued:

[o]nly when things come to be categorised, as in Article Three hundred and seventy-seven of the Penal Code, which speaks of “acts against the order of nature[.]” [sexuality] takes on a crude physicality, concentrating on the sexual act rather than on the whole affective and emotional complexity that goes with being male or female, or any combination of them, along a continuum that knows nothing of such abrupt breaks.

SEABROOK, *supra* note 94, at 138. See also Shivanda Khan, *Cultural Constructions of Male Sexualities in India*, *NAZ KIPUKAAR* (Naz Found. Int’l, London, U.K.), Jan. 1996 (“A form of sexual neo-colonialism has arisen whereby our countries have been invaded by this Western discourse and our own histories have been discounted.”).

[The act] relate[s] to an odious class of offences respecting which it is desirable that as little as possible should be said. . . . We are unwilling to insert, either in the text or the notes, any thing which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.¹²²

Instead, the Commission relied on Sir Edward Coke's influential definition of "sodomy" as "committed by carnal knowledge against the ordinance of the Creator, and other of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."¹²³

Ironically, however, the United Kingdom reversed course in the mid-1950s. After a series of sensational public trials, including Oscar Wilde's some fifty years prior, public sentiment began to rise up against the law.¹²⁴ In 1954, British Parliament appointed a departmental committee, chaired by John Wolfenden, to examine "the law and practice relating to homosexual offenses."¹²⁵ In the ensuing report published three years later, the committee recommended that homosexual behavior between consenting adults in private should no longer be considered a criminal offense.¹²⁶ The Report also found that "homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects."¹²⁷ In the end, the recommendations of the Report were taken under consideration and subject to further research for ten additional years.¹²⁸ Finally, in

¹²² 1 T.B.M. MACAULAY, *THE LIFE AND LETTERS OF LORD MACAULAY* 144 (London, Longmans Green & Co. 1898), *quoted in* Lynnette J. Chua Kher Shing, *Saying No: Sections 377 and 377A of the Penal Code*, 2003 SING. J. LEGAL STUD. 209, 215. *See generally* G.O. TREVELYAN, *THE LIFE AND LETTERS OF LORD MACAULAY* (London, Longmans, Green, & Co. 1923). *See also* Aditya Bondyopadhyay, *Anti-Sodomy Laws*, LAW. COLLECTIVE (May 2000), available at http://www.lawyerscollective.org/lc_hivaid/publications/articles/may_2000.htm (last visited Jan. 24, 2006); Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 LAW & HIST. REV. 631 (2005).

¹²³ EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES*, *quoted in* Shing, *supra* note 122, at 215.

¹²⁴ *See, e.g.*, Wikipedia, *Wolfenden Report* ("The Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, after Lord Wolfenden, the chairman of the committee) was published in Britain on September 3, 1957 after a succession of well-known men were convicted of homosexual offenses."), at http://en.wikipedia.org/wiki/Wolfenden_report (last visited Mar. 7, 2006) [hereinafter *Wolfenden Report*].

¹²⁵ Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 619 n.26 (1998).

¹²⁶ *See id.*

¹²⁷ *See* Bondyopadhyay, *supra* note 122; The Knitting Circle, *Wolfenden*, available at <http://myweb.lsbu.ac.uk/~stafflag/wolfenden.html> (last visited Jan. 24, 2006).

¹²⁸ *See Wolfenden Report*, *supra* note 124 ("The law was only narrowly passed and it was a decade after the report was published before the law was changed.").

1967, Parliament passed the Sexual Offences Act, which decriminalized sexual acts between two men in private.¹²⁹

Despite the fact that Britain saw fit to repeal its own sodomy provisions, India has chosen to retain its enactments, and has now developed a host of interesting cases addressing the commission of same-sex sexual acts. The similarity between *Bowers* and the discussion surrounding section 377 is striking because both statutes, as stated, criminalize sodomy, but are applied to, and equated with, criminalizing homosexuality, rather than sodomy alone.¹³⁰ In one 1983 case, *Fazal Rab vs. State of Bihar*, the Supreme Court of India observed that “the offence is one under Sec. 377, [Indian] Penal Code which implies sexual perversity. No force appears to have been used, . . . nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking.”¹³¹ At the same time, however, given that the acts were consensual, “the Supreme Court reduced the sentence from 3 years . . . to six months rigorous imprisonment.”¹³² While the number of actual cases filed in recent years is extremely low,¹³³ the force of the law lies in its coercive effect in repressing same-sex sexual activity and gay or lesbian self-identification.¹³⁴ Here, sodomy laws are used with alarming regularity to harass, threaten, and silence gay organizing.¹³⁵ In many countries, the involvement of the police has led to a corrupt and often dangerous collusion.¹³⁶

¹²⁹ See Sexual Offences Act, 1967, c. 60, § 1(1) (Eng.), amended by Criminal Justice and Public Order Act, 1994, c. 33, § 145(1) (Eng.).

¹³⁰ In the past, section 377 has applied to males who engage in sexual relations with one another, particularly the “insertive” partner. Sherry Joseph, *The Law and Homosexuality in India*, Int’l Conf. on Preventing Violence, Caring for Survivors: Role of Health Prof’ls & Servs. in Violence (Nov. 28–30, 1998), available at <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0909/rh374.html> (last visited Jan. 24, 2006) (“[D]e jure, it is an attempt to criminalise sodomy while de facto it is an attempt to criminalise and stigmatise homosexuality.”). Further, the Divorce Act permits a wife to apply for divorce if her husband is guilty of sodomy or bestiality. See *id.* The law has also been used to criminalize lesbian relationships. See *id.*; see also INDIA TODAY, Apr. 18, 1990, cited in Background Paper, *infra* note 133, at 4.

¹³¹ Joseph, *supra* note 130.

¹³² *Id.*

¹³³ See *id.* (noting 30 total cases between 1860 and 1992, the majority of which dealt with non-consensual intercourse and assaults on minors); see also Background Paper, *Strategies to Advance Lesbian and Gay Rights*, available at <http://altindia.net/altsex/background-paper.htm>.

¹³⁴ THADANI, *supra* note 116, at 80.

¹³⁵ HUMAN RIGHTS WATCH, INDIA, EPIDEMIC OF ABUSE: POLICE HARASSMENT OF HIV/AIDS OUTREACH WORKERS IN INDIA 3 (July 2002), available at <http://www.hrw.org/reports/2002/india2/india0602.pdf> (last visited Mar. 3, 2006) (“Police have beaten peer educators, claimed without basis that HIV/AIDS outreach work promotes prostitution, and brought trumped-up criminal charges against HIV/AIDS workers. Police also extort money and sex from these workers.”); PUCL-KARNATAKA, HUMAN RIGHTS VIOLATIONS AGAINST SEXUALITY MINORITIES IN INDIA (Feb. 2001), available at <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf> (last visited Mar. 3, 2006); Marion Lloyd, *Out of India’s Antigay Closet, Producer Tries to Ease Strictures*, BOSTON GLOBE, Oct. 24, 1999, at A12; MV Ramana, *Same-Sex South Asia*, HIMAL S. ASIAN MAG., July 2003, available at http://www.himalmag.com/2003/July/commentary_sa_2.htm (last visited Jan. 24, 2006).

¹³⁶ SEABROOK, *supra* note 94, at 104–05. The fact that the offense is cognizable (meaning

The past few years have seen an increased drive to overturn the legacy of section 377, particularly in the wake of fears of the global AIDS pandemic. As one of the leaders of the Indian gay civil rights movement, Aditya Bondyopadhyay, has argued:

In India two parallel trends exist as far as men who have sex with men The first is a pseudo-acceptance of same-sex relationships, arising out of non-acknowledgement of the very existence of homosexuality. . . . This attitude [of ostrich-like blindness] has its benefits in as much as homosexuals are left alone to their own devices and are not untowardly bothered. But it also means that the system and the state does not take any step whatsoever by way of welfare measures for homosexuals, or for the protection of their basic human and fundamental rights.¹³⁷

He continues:

The second trend is an outright homophobic reaction by certain segments [of] society. In misplaced appreciation of what “Indian” culture is all about, the state and many so called cultural organisations categorise homosexuality as a western/foreign import[,] . . . a corrupting influence that needs to be curbed.¹³⁸

Each of these themes shares an intimate relationship with the social norms that surround, and, therefore, entrench conceptions of sexual identity.¹³⁹ Each of these

that the police may arrest without a warrant), and non-bailable exacerbates the situation. See Anuja Gupta, Testimony at the International Tribunal on Human Rights Violations Against Sexual Minorities (Oct. 17, 1995), <http://www.iglhrc.org/files/iglhrc/reports/Tribunal.pdf> (relaying knowledge of incidents of harassment and bribery against Indian men). The same happened in a park in Lucknow, India, where a police spokesman explained that “[p]olice will not allow male couples into the park if they know they are gays.” Rex Wockner, *Indian Gays Banned from Park*, PINKINK, Jan. 1999, available at <http://www.khsnet.net/pinkink/9901/news2.htm> (last visited Jan. 30, 2006). He elaborated: “Policemen will ask them if they are gay. If they hold hands or are demonstrative about their affection, we’ll suspect them of being gay.” *Id.*

¹³⁷ See Aditya Bondyopadhyay, *Anti-Sodomy Laws: An Overview*, NAZ KI PUKAAR (Naz Found. Int’l, London, U.K.), July 2001, at 4.

¹³⁸ *Id.*

¹³⁹ For example, consider this narrative:

I began to dislike myself for being a homosexual and felt ashamed that I had to hide my sexuality all the time. Many questions haunted me. Why did I become a homosexual? Am I not man enough? What if somebody discovers I am gay? Would I be able to live the rest of my life with shame? I could own my sexuality under the cover of darkness, in a world peopled by anonymous individuals; everywhere else I had to suppress it. Leading a double life was tearing me apart.

Person quoted in Arvind Narrain, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in the Era of Hindutva*, 7 HEALTH & HUM. RTS. 3, 8 (2004) [hereinafter Narrain, *Articulation of Rights*]. Elsewhere, Narrain has written other excellent studies of the relationship between sodomy and status in India. See, e.g., Arvind Narrain, *Human*

perspectives demonstrate how the presence of sodomy laws erases the ability to form communities based on group rights and identities due to the risk of public sanction.

In 1994, a medical team visiting a men's jail observed a high incidence of sexual activity among inmates, and recommended making provisions for condom distribution.¹⁴⁰ The jail officials, however, refused on the grounds that condom distribution would encourage male sexual behavior, thereby leading to violations of section 377.¹⁴¹ In response, a human rights group filed a petition challenging the constitutional validity of section 377, and requested that the officials enjoin jail authorities from sequestering those prisoners who were HIV positive or otherwise identified with same-sex sexual activity.¹⁴²

The petition unfortunately languished until 2001, when the issue was revisited again. That July, the police, investigating a complaint of sodomy, raided a public park in Lucknow, India, that was known to be frequented by men who have sex with men and various other sexual minorities.¹⁴³ One of the individuals arrested during the raid was a member of a health education and activist group; later, the police raided the offices of Bharosa and Naz Foundation International (both organizations that work in the MSM community), arrested four individuals, and registered a complaint under section 377, along with other charges regarding the sale of obscene material, conspiracy to commit an offense, and abetment of a crime.¹⁴⁴ Almost instantly, the

Rights and Sexual Minorities: Global and Local Contexts, LGD (2001), at <http://www2.warwick.ac.uk/fac/soc.law.elh.lgd/2001-2/narrain> (last visited Jan. 30, 2006); Arvind Narrain, *Queer People and the Law*, SEMINAR, Apr. 2003 [hereinafter Narrain, *Queer People and the Law*], <http://www.india-seminar.com/2003/524/524%20arvind%20narrain.htm> (last visited Jan. 31, 2006); Arvind Narrain, *There Are No Short Cuts to Queer Utopia: Sodomy, Law, and Social Change*, LINES, Feb. 2004, http://www.lines-magazine.org/Art_Feb04/Arvind.htm (last visited Jan. 30, 2006) [hereinafter Narrain, *Queer Utopia*].

¹⁴⁰ See Mustikhan, *supra* note 11 (noting that in 1994 a petition similar to one asking prison officials to distribute condoms was filed).

¹⁴¹ *Id.* ("The officer in charge of a prison in Delhi once prevented condom distribution on the grounds that it tacitly condoned sodomy.")

¹⁴² Interestingly, the petition only sought to amend, not repeal, section 377, which would still be used to cover male-on-male rape. *See id.*

¹⁴³ See Saleem Kidwai, *Aliens in Lucknow*, NEW INTERNATIONALIST, June 2002, available at <http://www.newint.org/issue346/aliens.htm> ("[P]olice raided a dingy park near the railway station where cruising homosexuals and male sex-workers mingle with the homeless street people and bleary-eyed commuters. They arrested five people including two alleged pimps and an 'outreach worker' from a local non-governmental group (NGO).")

¹⁴⁴ Narrain, *Articulation of Rights*, *supra* note 139, at 13; see also India Accused of Rights Abuses, Rainbow Network, Apr. 10, 2002, <http://www.rainbownetwork.com/News/detail.asp?iData=15456&iCat=29&iChannel=2&nChannel=News> (describing how one Indian lawyer asked the United Nations Human Rights Commission to hold India responsible for its harassment, arrest, and torture of the Lucknow Four, HIV prevention workers who spent anywhere from forty-five days to seven months in jail without bail); Int'l Gay & Lesbian Human Rights Comm'n, *Indian High Court Dismisses Sodomy Law Challenge*, Sept. 3, 2004, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=518> (last visited Jan. 30, 2006) (noting that seven people had been arrested in public "cruising" areas and that the Lucknow Four had been released on bail); Int'l Gay & Lesbian Human Rights Comm'n, *Sodomy, Obscenity Charges Formally Filed in Trial of "Lucknow Four"*, Dec. 18, 2001, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=95> (last visited Jan. 30, 2006) (summarizing the incident and

incident registered a national public debate regarding health, homosexuality, and the applicability of section 377 to the modern birth of the Indian gay and lesbian movement.¹⁴⁵ Countless editorials and articles were written, many of which decried the modern applicability of such an outdated law to individuals who were merely attempting to educate a disenfranchised community regarding public health and safety.¹⁴⁶

The parallels between the effect of section 377 and the immediate aftermath of *Bowers* is striking. Like the courts in the wake of *Bowers*, section 377 was interpreted to suggest that a gay or lesbian sexual orientation was immediately considered to be tainted with the imprint of criminality.¹⁴⁷ Likewise, any public health education was considered to be an abetment to a criminal offense (sodomy), rather than a brazen act of human dignity and protection.¹⁴⁸ Consider the statement of the Public Prosecutor, quoted with approval by the judge who denied bail for the Lucknow Four on the grounds that “they . . . are polluting the entire society by encouraging the young persons and abetting them for committing the offense of sodomy.”¹⁴⁹ Like the wake of *Bowers*, the act of sodomy — indeed, any and all sexual activity between members of the same sex, or even a discussion of the issue — became a criminal act.¹⁵⁰ As a result, any public education surrounding either the sexuality or the identity of the individuals became an abetment to the offense, a resounding puncture of moral order and heterosexual norms that was remedied by reference to criminal law for its deterrent potential.

Indeed, in such circumstances, the linkage between criminality and sodomy is so pervasive that public health education became a revolutionary act of civil disobedience. As Arvind Narrain eloquently points out, in the case of the Lucknow Four, neither

providing sample letters of protest); *State-Supported Oppression and Persecution of Sexual Minorities in India*, NGO Briefing, U.N. Comm’n on Human Rights (Apr. 8, 2002) (statement of Mr. Aditya Bondyopadhyay, lawyer for the Lucknow Four), available at <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=67> (last visited Jan. 30, 2006).

¹⁴⁵ India, of course, had just recently faced another national public debate in the wake of the film “Fire,” which depicted an emotional and sexual relationship between two sisters-in-law. See Sunder, *supra* note 114. Many excellent articles have been written analyzing the import of “Fire” on India’s lesbian and gay movement. See, e.g., Gayatri Gopinath, *On Fire*, 4 GLQ J. LESBIAN & GAY STUD. 631, 632–33 (1998); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 374 (2001); Sunder, *supra* note 114, at 81 (describing how critics of the film felt that the filmmakers were “attempting to influence India with ideas about sexuality imported from a decadent West”).

¹⁴⁶ Amara Dasa, *India’s Slow Descent Into Homophobia*, VAISHNAVA NEWS, July 12, 2003, available at <http://www.vnn.org/editorials/ET0307/ET12-8214.html> (calling Penal Code section 377 outdated and placing much of the blame on British colonial rule by observing that “[t]he influence that Victorian British scholars and educators had in creating the current homophobic environment of India cannot be underestimated.”); Sharma, *supra* note 14 (pointing out the irony that “while the British drafted Section 377 of the IPC, while replacing a tolerant Indian attitude towards sexuality with a highly oppressive one, this law was repealed in the UK in 1967.”).

¹⁴⁷ See Katyal, *supra* note 16, at 163.

¹⁴⁸ See *supra* note 144 and accompanying text.

¹⁴⁹ Narrain, *Articulation of Rights*, *supra* note 139, at 13 (quoting Criminal Misc. Case No. 2054/2001).

¹⁵⁰ At least in those states which maintained their sodomy laws.

the state nor the media chose to explore the issue in light of the global HIV/AIDS epidemic, choosing instead to sensationalize — and therefore stigmatize — the work of the Naz Foundation and Bharosa by linking it to homosexuality, rather than access to public health education.¹⁵¹

During the pendency of this case, the Naz Foundation decided to revive the issue of constitutionality, and petitioned the Delhi High Court to “read down” or limit the applicability of section 377.¹⁵² Interestingly, the Naz Foundation did not seek to repeal the entire section, but only to officially remove criminal penalties for consensual sexual activities between adults if done in private.¹⁵³ In effect, their proposal maintained that section 377 would remain a viable charge for those who engaged in the sexual abuse of children, as well as those individuals who engaged in public sexual behavior.¹⁵⁴ In making this argument, the Foundation argued that section 377 made HIV-prevention work “impossible” due to its overreaching stigma, which made it difficult to identify vulnerable populations. The resulting threat of criminal sanction forced networks among men who have sex with men underground into secrecy, making opportunities for private, consensual safe sex both spatially and socially difficult.¹⁵⁵

Two particular themes are particularly relevant because they highlight some key divergences between the United States and India regarding both history and litigation strategy. The first notable aspect of this situation involves the comparative invisibility of expressive gay or lesbian identity-based rhetoric in the brief. The term “men who have sex with men,” rather than “gay men,” figures most prominently, generating a set of cultural and public health concerns that avoid, indeed actively transcend, the need for sexual identity and categorization.¹⁵⁶ Rather than focusing on the challenges faced by gay men and lesbians in India, the brief focuses on the particular public health challenges that are raised as a result of the sodomy laws — irrespective of the division made between heterosexual and homosexual identity.¹⁵⁷ Here, the brief emphasizes the stigma of criminality that attaches to *all* non-procreative sex, pointing out that while certain groups face the stigma more strongly than others, section 377 extends its prohibitive taint beyond same-sex conduct alone.¹⁵⁸

¹⁵¹ Narrain, *Articulation of Rights*, *supra* note 139, at 13.

¹⁵² See Siddharth Narrain, *A Battle for Sexual Rights*, FRONTLINE (India), May 7–20, 2005, available at <http://www.hinduonnet.com/fline/fl2210/stories/20050520002410400.htm> (last visited Apr. 9, 2006).

¹⁵³ *See id.*

¹⁵⁴ *See id.* The reason for this strategy, Narrain explains, is the absence of any alternative protections against child sexual abuse. *See id.* In India, rape laws are limited by gender (applies to women only) and only to penile-vaginal intercourse. *See id.* Thus, without section 377, there would be no statutes to protect children (male and female) from sexually abusive acts that fall outside of Indian rape law’s strict categories. *See id.*

¹⁵⁵ See Naz Foundation Brief, *supra* note 118, at 22.

¹⁵⁶ For an excellent, critical description of the term, its implications, and the risks and benefits associated with its employment in several public health studies, see Dasgupta & Purkayastha, *supra* note 86, at 10.

¹⁵⁷ See Naz Foundation Brief, *supra* note 118, at 22–25.

¹⁵⁸ *Id.* at 13.

Second, within its brief, the Naz Foundation emphasized the role of history, citing the findings of two scholars that found “a set of generally tolerant traditions in pre-colonial India”¹⁵⁹ regarding homosexuality that markedly shifted in the late nineteenth century after the advent of colonization.¹⁶⁰ It also cited to evidence of homosexuality throughout various centuries and cultures, pointing to a number of prominent historical figures who are said to have engaged in homosexual conduct, and “[a]nthropological research [that] has found homosexual subcultures in Native American cultures, ancient Greece, Chinese traditions, Subsaharan Africa, and the Samurai traditions in Japan.”¹⁶¹ According to Narrain, one of the crafters of this brief:

It is the above [references to same-sex sexuality throughout Indian history] which provides the strongest rebuttal to the notion of queer rights being a western disease — a careful drawing of a narrative that traces the queer as part of ‘out’ history and embodying a set of practices which exist at times unacknowledged, at others hidden, at yet others struggling to become ‘visible.’ In more simple terms, queer rights is an issue for Indians because there are queer traditions, queer practices, and queer people in India and rights language is one mode of making this history visible.¹⁶²

Despite the Naz Foundation’s attempts at crafting a strategy that would protect only private, consensual behavior, and a historical version that affirmed tolerance for same-sex sexual conduct amidst a timeless Indian tradition, the Indian government’s response offered a stinging tribute to the Act’s colonial origins. Indeed, just after *Lawrence* was handed down, the Indian government filed a vociferous brief: “If an act has a tendency to create breach of peace or to offend public morals it is not in the power of any man to give effectual consent,”¹⁶³ the government explained. “And while the right to respect for private and family life is undisputed, interference by public authority in the interest of public safety and protection of health and morals is equally permissible,” the Government warned, predicting that decriminalization “can well open the floodgates of delinquent behavior and be misconstrued as providing unbridled license for the same.”¹⁶⁴ By reconstructing section 377 as a function of the modern state’s police powers, the government attempted to construe homosexuality as an offense against public order and morals, and deserving of criminal regulation.

Perhaps most notably, the Government mounted a defense of section 377 that turned quite intimately on regulating existing social norms in India. The Government argued that

¹⁵⁹ *Id.* (citing SAME SEX LOVE IN INDIA 194 (Ruth Vanita & Saleem Kidwai eds., 2000)).

¹⁶⁰ *See id.* at 13.

¹⁶¹ *Id.* at 19.

¹⁶² Narrain, *Queer People and the Law*, *supra* note 139.

¹⁶³ Government Brief, *supra* note 112, at 4.

¹⁶⁴ *Id.*

[L]aw does not run separately from the society. It only reflects the perception of the society. When Section 377 was brought under the statute as an act of criminality, it responded to the values and mores of the time in the Indian society. In any parliamentary secular democracy, the legal conception of crime depends on political as well as moral considerations notwithstanding considerable overlap existing between legal and everyday conception of crime (i.e. moral factors). There is no necessary equation between the two. Public tolerance of different activities changes and legal categories get influenced by those changes. The social dynamics take into account the moral aspect also.¹⁶⁵

Later in the brief, the Government cited to a report by the Law Commission of India, which “observed that Indian society by and large disapproves of homosexual and [that] disapproval was strong enough to justify it being treated as a criminal offense even where the adults indulge in it in private.”¹⁶⁶ With respect to the West, the Government replied that “[t]he public, notably in the United Kingdom and the United States of America, have shown tolerance of a new sexual behavior or sexual preference but it is not the universally accepted behavior,” pointing out again to the Law Commission’s report that concluded that comparable tolerance does not exist in India, nor did it exist in Indian society prior to colonial rule.¹⁶⁷

Consider the theme of history and citizenship in this regard. Rather than embracing Indian history, which is replete with its own, well-documented representations of same-sex sexuality through texts,¹⁶⁸ the government chose instead to mount a vociferous campaign against the existence of “modern” homosexuality within its borders.¹⁶⁹ Here, no mention was made of the vast and complex representations, both visual and verbal, of same-sex sexual behavior throughout Indian history — stories and pictorials that predated English colonization.¹⁷⁰ Rather, the Government instead chose to taint same-sex sexual activity with the same *Bowers*-like ability to divide society along the boundaries of identity, instead of universalized conceptions of behavior and desire. Under this view, homosexuality may exist in India, but it deserved relegation to the interior aspects of the home, rather than the public or the street — and certainly nowhere deserved recognition as a legitimate lifestyle or choice of partnership. Along these lines, the Government’s brief turned its attention to underenforcement, assuring the Court that section 377 has “only been applied on the complaint

¹⁶⁵ *Id.* at 7.

¹⁶⁶ *Id.* In another report, however, a government commission did recommend deletion of section 377. LAW COMM’N OF INDIA, 172D REPORT ON REVIEW OF RAPE LAWS (2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

¹⁶⁷ *Id.* at 7–9.

¹⁶⁸ See generally SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY (Ruth Vanita & Saleem Kidwai eds., 2000).

¹⁶⁹ See Government Brief, *supra* note 112.

¹⁷⁰ See Dasa, *supra* note 146 (providing a timeline of Indian history with various examples of tolerance toward non-heterosexual behavior).

of a victim and there are no instances of its being used arbitrarily,”¹⁷¹ and pointing out that it has only been applied to “cases of assault where bodily harm is intended and/or caused.”¹⁷² Section 377, the Government argued, is only intended to apply to situations that are not covered by other sections of the Penal Code,¹⁷³ and argued that the provision fell within the powers of the state “to make special provisions for women and children.”¹⁷⁴ Contrary to the brief filed by the Naz Foundation, the Government argued that section 377 is primarily used to punish child abuse and to complement existing rape laws, and “not mere homosexuality.”¹⁷⁵

In a final, confusing paragraph in its brief, the Government noted that “there is no violation of fundamental liberty as long as any act of homosexuality/lesbianism is practiced between two consenting adults in the privacy [of the home] as in the case of heterosexuality.”¹⁷⁶ Consider, for a moment, the complexity of the Government’s observations. Here, the Government actively renders invisible the myriad ways in which the police, extra-legally, enforce social norms favoring the privatization of same-sex sexuality through extortion, corruption, rape, and threatened the arrest of males who engage in public, same-sex affection. The Government’s reaction suggests that such informal regulations of public sex are better left untouched. By failing to recognize the existence of informal, corrupt regulations of sexuality, and by creating some “private” spaces for same-sex sexuality to exist, the Government’s observations preclude the possibility of a public group identity among those engaged in same-sex sexual activity, relegating it to a private, sexual behavior that should only occur in seclusion. In both respects, the possibility of group rights becomes extinguished in favor of the malleable, variable, and often invisible aspects of same-sex sexual behavior within the circumscribed spaces of the sovereign home.

II. TOWARD A GLOBAL THEORY OF SEXUAL SOVEREIGNTY

The Indian government’s reaction to section 377 is characterized by an implicit reification of the privatization of sexuality. Its observations both reinforce and impose the internal dynamics of the closet discussed in the previous section; and, in doing so, the government reenacts a modern version of colonial rule and control. On one hand, it argues that social norms opposing homosexuality are deeply entrenched throughout Indian society, in stark contrast to the “tolerance” shown in the United States and the United Kingdom of this “new sexual behavior” or “preference.” At the same time, however, the Government is careful to circumscribe the boundaries between public and private in a way that reifies the presumption that sexuality — whether of the same or opposite sex — should always be rightly confined to the home. One of the brief’s central themes dismisses any visibility for lesbian and gay sexu-

¹⁷¹ Government Brief, *supra* note 112, at 4.

¹⁷² *Id.* at 4–5.

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.* at 6.

¹⁷⁶ *Id.* at 12.

ality as part of the identities, activities, or loyalties of the Indian people. Here, despite the rich verbal and pictorial history of same-sex sexuality, the Government refuses to name it as part of a gay or lesbian history, thereby precluding the possibility for identification across time, history, and space.

As this section will discuss, there is, however, an answer to the divergence between public and private space and identity: *Lawrence*'s underlying theme of sexual self-determination, or sexual sovereignty. As this section argues, *Lawrence*'s tripartite structure allows for some development and capability surrounding sexuality and identity that traverses both public and private boundaries in favor of offering a vision of sexual autonomy that, while it initially overshadows these divisions, is still, ultimately, circumscribed by them.

Sovereignty, as it is defined in international law, comprises both internal and external facets; a sovereign government "faces both outward at other states and inward at its population."¹⁷⁷ The principle of internal sovereignty in international law entails the exercise of authority within certain, circumscribed boundaries, permitting governments to provide political goods for citizens.¹⁷⁸ It draws substantially upon principles of self-determination, which involves the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."¹⁷⁹ In contrast, sovereignty's outward aspects — external sovereignty — focuses on an equality of status between the states and requires "freedom from outside interference."¹⁸⁰ Both of these strands carry important Hobbesian and Lockean dimensions; the Hobbesian strand "emphasize[s] the inviolability of national borders"¹⁸¹ and absolute control within the nation-state, whereas the Lockean construction premises its meaning on the social contract that exists between a government and its citizens that places property, life, and liberty as fundamental values.¹⁸²

The notion of state sovereignty quite beautifully parallels the notion of a sovereign self. Louis Henkin, for example, has listed several aspects of sovereignty — independence, personhood, autonomy, and impermeability, among others — that correspond nicely to both the person as well as the nation-state.¹⁸³ As I will show, these principles

¹⁷⁷ See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 27–29 (1990); see also MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 5 (1995); F.H. HINSLEY, SOVEREIGNTY 107, 122–32 (2d ed. 1986); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 43–72 (1999).

¹⁷⁸ JACKSON, *supra* note 177, at 29.

¹⁷⁹ International Covenant on Civil and Political Rights art. 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

¹⁸⁰ JACKSON, *supra* note 177, at 27. See also Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 236 (1992).

¹⁸¹ Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2033 (2003).

¹⁸² For further explication, see *id.* at 2033–34.

¹⁸³ See LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 9–10 (Devs. in Int'l L. Series No. 18, 1995), cited in Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 756–57 (1997). Some of these attributes involve "claim" elements, which correspond to statehood; and some of these elements involve "exercise" elements, which correspond to a set of rights, responsibilities, and obligations that attach to a sovereign entity. *Id.* at 756.

also carry substantial resonance when we compare them to *Lawrence*. This section seeks to sketch out some elements — mutually reinforcing, overlapping, and ultimately cohesive — that also bear witness to the growing development of a jurisprudence that establishes both internal and external sovereignties with respect to sexuality, the community, and the self.¹⁸⁴ Here, I argue that Henkin’s vision of sovereign statehood parallels the notion of sovereign personhood that is offered in *Lawrence*. Henkin’s notion of independence, for example, embraces the principle of separateness and political and physical distinctiveness.¹⁸⁵ This principle roughly corresponds to *Lawrence*’s embrace of spatial privacy, a principle that applies the idea of sovereignty to the private domain of the home. Henkin’s exposition of personhood, too, also corresponds to both personal and national sovereignty: it involves the notion of recognition of the nation-state entity as a national actor.¹⁸⁶ Autonomy, too, has dual meanings: in the state context, it means the ability to act independently of external influence and control, but in the *Lawrence* context, it corresponds to the deliberative right of sexual self-determination.¹⁸⁷

Together, I argue that *Lawrence* comprises the starting points for a global theory of sexual sovereignty that is bordered, deliberative, and ultimately expressive in character, and offers a trilogy of protections for spatial privacy, expressive liberty, and deliberative autonomy. Yet, as Part III will continue, this theory is not without its faults and ultimately offers us a critical challenge in contemplating a more inclusive future for global gay rights and autonomy.¹⁸⁸ One critical element remains missing from the parallel prisms I have offered: the notion of sovereign equality, which involves the principle that each state exists on an equal plane to all others.¹⁸⁹ This absence, like its global counterpart in international relations, signals a host of limitations for *Lawrence*’s progeny, and a danger of globalized containment of the rights of sexual minorities.

¹⁸⁴ Many scholars have also explored *Lawrence*’s reliance on case law from other jurisdictions that have overturned sodomy laws. See, e.g., Larsen, *supra* note 4; John K. Setear, *A Forest With No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579 (2005); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 487 (2005).

¹⁸⁵ See HENKIN, *supra* note 183, at 10.

¹⁸⁶ Taylor, *supra* note 183, at 760–61 (describing Henkin’s views on “personhood”).

¹⁸⁷ *Id.* at 762.

¹⁸⁸ Others have offered cogent critiques of *Lawrence* as compared to other cases involving the repeal of sodomy laws. See, e.g., Franke, *supra* note 4, at 1404 (citing the 1998 South African case of *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1999 (1) SAG (66), which found that the 1957 Sexual Offenses Act, a national anti-sodomy law, violated the South African Constitution on three theories: equality, dignity, and privacy, and arguing that this case demonstrates that the U.S. Supreme Court could have chosen to invalidate the Texas sodomy law with a “genus of rights” rather than solely on the basis of privatized liberty); Hernández-Truyol, *supra* note 4.

¹⁸⁹ See HENKIN, *supra* note 183, at 10.

A. Spatial Privacy

In 1998, a Texas-area neighbor called the police with a report of a suspicious black man in John Geddes Lawrence's apartment.¹⁹⁰ After pushing their way into the dwelling, they found Lawrence having sex with another man, Tyson Garner.¹⁹¹ At the time, Texas rarely enforced its antisodomy law, but officers decided to jail them overnight on charges of "deviate sexual intercourse with another individual of the same sex."¹⁹² They were each arrested, fined two hundred dollars plus court costs, and kept in jail overnight.¹⁹³

Unlike most defendants, who might opt to simply pay the fine and move forward, the defendants chose to mount an appeal on constitutional grounds. In affirming their convictions under both the state and federal constitutions, the state court of appeals held that the statute was not unconstitutional and considered *Bowers v. Hardwick* to be controlling on that point.¹⁹⁴ The United States Supreme Court, however, ultimately granted certiorari on the question of whether the criminal convictions under the Texas statute, which criminalized sexual acts between members of the same sex, but not different sexes, violated the Equal Protection Clause, in addition to the interests in liberty and privacy protected by the Due Process clause.¹⁹⁵

Like *Bowers*, the most palpable aspect of the case involved the reach of the prosecutory powers of the law into the previously sacred sphere of the home. For this reason, at the outset of *Lawrence*, the Court began from a notion of spatial privacy, reminding the audience at every turn that the law in question governs activities in "the most private of places, the home."¹⁹⁶ In doing so, the *Lawrence* court focused a scrutinizing gaze on the heightened degree of state intrusion into the home.¹⁹⁷ By using its observatory powers, the Court discursively defined the home as an area of sovereignty, free from interference by the state that treads upon the right to territorial integrity.¹⁹⁸ The opinion, for example, began with the unapologetic observation that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."¹⁹⁹

¹⁹⁰ See Eskridge, *supra* note 4, at 1021; see also Respondent's Brief, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), available at 2003 WL 470184.

¹⁹¹ Eskridge, *supra* note 4, at 1021.

¹⁹² TEXAS PENAL CODE ANN. § 21.06(a) (2003). See also Eskridge, *supra* note 4, at 1021.

¹⁹³ Anne Gearan, *Court Appears Divided on Anti-Sodomy Case*, ASSOCIATED PRESS, Mar. 26, 2003.

¹⁹⁴ *Lawrence v. State*, 41 S.W.3d 349, 360–61, 364 (Tex. Crim. App. 2001), *rev'd*, 539 U.S. 558 (2003).

¹⁹⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁹⁶ *Id.* at 567.

¹⁹⁷ *Id.*

¹⁹⁸ See Paul R. Williams & Karen Heymann, *Earned Sovereignty: An Emerging Conflict Resolution Approach*, 10 ILSA J. INT'L & COMP. L. 437, 443 (2004).

¹⁹⁹ *Lawrence*, 539 U.S. at 562.

This observation, obviously, resonates with the long-standing constitutional tradition of protecting the home from state intrusion. Even from the beginning of American history, the home has been traditionally thought to be a sanctuary that falls outside of the aegis of state control. In *Griswold v. Connecticut*,²⁰⁰ the Court invalidated a law prohibiting the use of contraceptives or aiding and abetting the use of contraceptives by a married couple.²⁰¹ The *Griswold* majority found that a fundamental right of privacy, defined as the right to be free from governmental intrusion, existed under the “penumbra” of the Bill of Rights.²⁰² In delineating the scope of this right, the *Griswold* court relied upon an early case, *Boyd v. United States*, that declared the importance of protection against “all invasions on the part of the government . . . of the sanctity of a man’s home and the privacies of life.”²⁰³

Griswold, of course, took these observations a step further, applying notions of privacy to the context of “the marriage relation and the protected space of the marital bedroom.”²⁰⁴ The “marital bedroom” thusly served as the locus for the origins of the right to privacy in American jurisprudence, particularly where the expression of sexuality is concerned. Previously, in *Bowers*, the Court declined to immunize the conduct based on the fact that it took place within the confines of Hardwick’s home.²⁰⁵ In reaching this earlier conclusion, the Court admitted that homosexual conduct between consenting adults was essentially a “victimless crime,” but concluded that “it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.”²⁰⁶

It is thus significant that the *Lawrence* court, in its opening paragraph, began its inquiry by focusing on the importance of spatial privacy.²⁰⁷ In doing so, the Court offered a vision of privacy that is carefully tethered to the existence of private property and the home. The Court’s opening observations on the subject of privacy, obviously, resonate with the long-standing constitutional tradition of protecting the home from state intervention. Later, *Lawrence* also relied on *Eisenstadt v. Baird*, in which the Court extended this right beyond the marital relationship, and invalidated a law prohibiting the distribution of contraceptives to unmarried persons.²⁰⁸ Here, the Court neatly separated the privacy interests from the marital relationship, observing that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion.”²⁰⁹ Applying these principles to *Lawrence*, by extension, sexual activity is (somewhat tautologically) considered “private,” seemingly by virtue of its secluded location and not because

²⁰⁰ 381 U.S. 479 (1965).

²⁰¹ *Id.*

²⁰² *Id.* at 484.

²⁰³ *Id.* at 484 n.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

²⁰⁴ *Lawrence*, 539 U.S. at 565.

²⁰⁵ *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986).

²⁰⁶ *Id.*

²⁰⁷ *Lawrence*, 539 U.S. at 562.

²⁰⁸ *Id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

²⁰⁹ *Id.* (quoting *Eisenstadt*, 405 U.S. at 453) (emphasis in original).

of the marital-like qualities of the relationship between the two parties, Garner and Lawrence.²¹⁰ Towards the end of the opinion, the *Lawrence* Court argued:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their [sexual] conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.²¹¹

This unstated emphasis on the *individual’s* choice of sexual intimacies in private space, rather than on the couple, marks a crucial, deeply liberatory vision of human sexuality — as long as it occurs within the home. The Court’s extension of the protective sphere of spatial privacy in *Griswold* to address a wholly separate context — that of two unmarried, gay men during a sexual encounter — is indeed striking, and notable, because it extends the protective sphere of spatial privacy beyond that of a married couple, and instead uses it to protect individuals who were, under *Bowers*, previously thought undeserving of wholly private spaces due to their gay or lesbian identities. “The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act,” Justice Kennedy wrote.²¹² “Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”²¹³ Indeed, the *Lawrence* Court carefully pointed out that “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private,” but instead focused primarily on predatory acts against those who were unable to or did not consent to such activity, or acts which took place in public space.²¹⁴

In making this observation, the *Lawrence* Court set forth a view of the privacy of the home that strikingly mirrors many of the observations often made by scholars on the function of sovereignty itself in the global arena. Theoretically, this principle establishes a notion of autonomy within the home that is striking in its global, idealistic possibility. The right offered by *Lawrence* is both positive and negative: it focuses on cordoning off spheres of the home from state interference, and it also focuses on the possibility — read most broadly — of a fundamental right to engage in sexual intimacy.

²¹⁰ Indeed, the Court suggests that one possible reason for why there is little historical discussion of the policy behind punishing consenting adults for same-sex sexual acts within the law is due to the “very private nature of the conduct” at issue. *Id.* at 570.

²¹¹ *Id.* at 578 (internal citation omitted).

²¹² *Id.* at 567.

²¹³ *Id.*

²¹⁴ *Id.* at 569.

Consider, for example, the global significance of recognizing the sanctity of the home in constructing a boundary between private and public space, so that an individual may safely retreat from others' gaze and scrutiny.²¹⁵ The private sphere, according to Edward Shils, involves a sphere where a person "is not bound by the rules that govern public life The 'private life' is a secluded life, a life separated from the compelling burdens of public authority."²¹⁶ Similarly, Hannah Arendt points out:

[T]he four walls of one's private property offer the only reliable hiding place from the common public world, not only from everything that goes on in it but also from its very publicity, from being seen and being heard. A life spent entirely in public, in the presence of others, becomes, as we would say, shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense.²¹⁷

On one level, Arendt's metaphors of visibility and depth help us to understand the functions of spatial privacy in constructing a self-actualized existence. Private property constructs and underpins notions of autonomy by ensuring a degree of solitude that is necessary for true human self-actualization. None of this is particularly new or shocking, except when we consider that none of these protections extended to individuals engaged in same-sex sexual activity before now.

This principle is perhaps most valuable when we consider how it specially impacts individuals whose sexualities escape the polarizing categories I listed earlier. Here, I would argue that *Lawrence*, taken to its widest extent, is inescapably anti-essentialist in character because it tends to focus less on the expressive identity that characterizes most case law on gay rights. Anti-essentialist thought argues "that identity cannot be reduced to an essence that is so central to an individual's being that it precludes other categories of analysis along the axes of race/ethnicity, gender, class, religion, and sexual orientation."²¹⁸ Along these lines, instead of predicating

²¹⁵ See Seidman, *supra* note 4, at 1330 ("[C]onstitutional law remains all about boundaries. The great constitutional struggles of our history have concerned the boundaries between legislative and executive power, between the public and the private, or between the national and the local.").

²¹⁶ See Edward Shils, *Privacy: Its Constructions and Vicissitudes*, 31 L. & CONTEMP. PROBS. 281, 283 (1966).

²¹⁷ HANNAH ARENDT, *THE HUMAN CONDITION* 71 (1958).

²¹⁸ Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 108–09 (2003). For an excellent exploration of anti-essentialism's potential impact on feminism, see Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 102–03 (1996) (describing feminist anti-essentialism as an approach that rethinks the assumption that gender oppression can be described meaningfully along a single globalized axis and instead focuses "on local, contextualized problems of gender oppression. . . . Like cultural relativism, feminist anti-essentialism seems to lead to the conclusion that gender inequality cannot be explained cross-culturally.").

legal protection on an asserted or public identity, the Court opts instead to predicate its protection on the expressive significance of a level of sexual intimacy between persons.

Perhaps the function of *Lawrence* lies in presenting a view of same-sex sexuality that surpasses legal ossification, one that refuses to deny the sexualization of identity, but one that also protects a scenario of intimacy between persons that does not always require the public assertion of gay or lesbian identity in public space — or even legal recognition through marriage — in order for it to be valuable or constitutionally protected. This cultural breathing space is significant because it implicitly advances an anti-essentialist platform; the home, and the persons within it, neither attain nor require any special identity or expression, but the space is simply provided, and secluded, for the benefit of the persons within it and for the exercise of human autonomy, intimacy, and deliberation. Recall that *Lawrence* extended its protection to homosexuals, lesbians, or bisexuals “either by ‘orientation, conduct, practices or relationships.’”²¹⁹

I would argue that this principle is particularly valuable where social norms mirror those we have explored in India, where there are countless individuals who use the term “gay” to refer to a sexual behavior alone, not an identity in and of itself.²²⁰ As a prominent public health activist describes:

In India, for the majority of men who have sex with men, personal identity is not seen as the main [] issue. Behaviours are constructed within cultural frameworks of compulsory marriage and procreation, in terms of homosociability, lack of privacy, extended and joint family networks and so on. What we have then is a range of sexualities, a range of homosexualities and homosexual behaviours, a range of identities that very often are very differently constructed than in the West.²²¹

For this reason, many men who have sexual activities with other men, gay-identified or not, are often married to women in India and elsewhere.²²² For many, and contrary

²¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Romer v. Evans*, 517 U.S. 620, 624 (1996)).

²²⁰ See Katyal, *supra* note 16, at 153.

²²¹ Shivananda Khan, *Community Action in Action*, 10 NAZ KI PUKAAR 14 (July 1995); see also Shivananda Khan, *Sexuality and Sexual Health in India*, 14 NAZ KI PUKAAR 15 (July 1996) (making same observation).

²²² See Boellstorff, *supra* note 68, at 489. For example, in Indonesia, despite the existence of a “gay world,” and a relatively less pronounced spectre of legal sanction, the persistence of marriage appears a “mystery” to the average Western gay man meeting other gay-identified Indonesian men. *Id.* at 489–90. As one scholar explained:

Andy identified as gay, explaining that his boyfriend of ten years was married with two children. When I asked if the boyfriend should get divorced, he stared in shock: “Of course not. He needs descendants and a wife. I want to get married in five years — I already have a girlfriend. You mean you won’t marry as long as you live?” When I nodded, the other men confronted me in astonishment . . .

Id. at 489 (emphasis in original).

to many Western perceptions, a “gay” identity (and love relationships between men) can be viewed as compatible within a heterosexual marriage structure framework.²²³

Here, *Lawrence* presents a view, set forth in both *Griswold* and *Boyd*, that mirrors many of the observations often made by scholars on the function of sovereignty. Like spatial privacy, sovereignty is about space; it is about a clear delineation between private and public that empowers the former by separating the latter. To this end, *Lawrence*’s affirmation of the private carries an additional level of protection that surpasses the strictures of an expressive, identity-based imperative. *Lawrence* does not deny the value of identity, but it emphasizes the value of intimacy within a private space. This conceptual leap — that individuals can choose to have sexual relations with members of the same sex, but do not necessarily have to attach public, fixed, and presentative identities to their behavior, or demand particular formations of legal recognition for that relationship — is particularly relevant for those who may engage in same sex sexual conduct, but who fail to adopt expressive identities as gay or lesbian individuals.²²⁴

In making this observation, it is important to remain aware of the multiple limitations of private seclusion. As Kendall Thomas so eloquently wrote, years after *Bowers*:

Under the existing legal and political regime, gay men and lesbians are aware that the chief value of the language of privacy is that it can be used not so much to provide a space for self-discovery, but to provide against the dangers of disclosure. What this means, I think, is that when gay men and lesbians use the language of privacy, they do so based on a *tactical* decision [G]iven their vulnerability, gays and lesbians recognize the more urgent need for some legal protection which will enable them to avoid being forced out of what has come to be known as “the closet.”²²⁵

Thomas’s point, made years ago, still rings completely true today. The question for our purposes is to recognize that although *Lawrence*, standing on its own, accomplishes this goal, it may not do enough to alter preferences so that individuals will readily choose to be publicly recognized as part of the gay community; the conferral of privacy on a sexual act between two people of the same sex still permits the drawing of a cloak of secrecy around gay and lesbian lives, a point which Thomas

²²³ See *id.* at 490.

²²⁴ On this point, Richard Mohr has offered a slightly different, and valuable, view. He argues that for Justice Kennedy, “sexual behavior is constitutionally protected, not on its own, but because of some relationship that it has to what he goes on to call the ‘personal relationship[s]’ which ‘homosexual persons’ ‘choose to enter upon.’” Mohr, *supra* note 4, at 373 (alteration in original). In his article, Mohr nicely excavates the necessity of this linkage between “homosexual sex acts” and “same-sex personal relationships,” arguing that it is the relationship that Justice Kennedy seeks to protect (by “moral retrofit,” according to Mohr), rather than the sexual acts alone. *Id.*

²²⁵ Thomas, *supra* note 43, at 1455 (emphasis in original).

argues in turn allows heterosexuals to maintain “the epistemological privilege of unknowing,”²²⁶ of believing that individuals who engage in same-sex sexual or homoerotic behavior are invisible when they are in fact imbricated throughout culture and history.

Even on spatial terms, *Lawrence*’s version of privacy — or spatial sovereignty, as we might look at it — has its limitations, particularly in the global context, where issues of space, identity, and the boundaries between public and private can often vary widely. Given the disparities among wealth with respect to class and caste, the notion of privacy is often circumscribed by material limitations. Reaching somewhat similar conclusions from her work in Taiwan, Cindy Patton writes that

[t]he very concept of public versus private or domestic space on which the elaboration of American sexual freedom efforts rest, and around which queer politics’ performances have centered, is radically different in Taiwan. Space is not fundamentally matrixed as male-female/public-private, as in the United States.²²⁷

Patton’s observations suggest that the implicit privatization of sexuality in *Lawrence* carries significant repercussions for those who cannot enjoy the protections of privacy within the home, particularly in a joint family context, as is most often the case throughout the world.

Further, even if the concept of spatial privacy carries with it a sort of license for freedom within the home, it is important to explore whether there are implicit limits to the protection at stake, particularly in cases where sexuality takes on a public character, *e.g.*, particularly in cases where sexuality is taken out of the bedroom — as it is so often in the case of individuals throughout the world, who are often married or unable to utilize their private spaces for consensual sexual encounters for a wide variety of reasons.²²⁸ As Nan Hunter has aptly noted, situations of “sexual speech” (solicitation in public space, for example) raise the important question of whether *Lawrence*’s clear boundaries between private and public space leads to containment, rather than autonomous expression.²²⁹ Containment does nothing to protect the vast numbers of men and women who are denied acceptance in public space, and therefore rely on informal “cruising areas” in order to socialize and network with other sexual minorities.²³⁰ As Martha Nussbaum insightfully noted, years before *Lawrence*:

²²⁶ *Id.* at 1455–56.

²²⁷ Cindy Patton, *Stealth Bombers of Desire*, in QUEER GLOBALIZATIONS, *supra* note 17, at 208.

²²⁸ See Strahilevitz, *supra* note 4, at 671, 676–77.

²²⁹ See Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1546 (2004).

²³⁰ See PUCL-KARNATAKA, *supra* note 135, at 14.

[T]he recent tendency to protect homosexual sodomy on grounds of the privacy of the home suggests a pernicious distinction: if men have sex in their own dwelling place, it is legally protected. But if they frequent a bathhouse — even if all the people there are consenting and non-offended — the act no longer enjoys the same protection.²³¹

Even aside from the issue of public sexuality, *Lawrence* overlooks the fragility of tethering equality to the division between private and public, particularly given the fact that anti-gay discrimination often places the recognition of gay and lesbian families into question (I discuss this factor in the third section).

And then there is the issue of consent itself. The concept of spatial privacy, as many scholars have noted, can be equally liberating and threatening, depending upon the circumstances within the boundaries of private space, and the varying bargaining power of those inside. As Marc Spindelman has cogently asked, “When sexual intimacy is thought to be normatively good, the basis for relationships ‘more enduring,’ as it is in *Lawrence*, how can it (also) be a prison of abuse? Can it be? What about when, not if, in actuality, it is?”²³² As Spindelman writes, *Lawrence* vindicates (homo)sexual intimacy by adopting a “like-straight” lens that continually compares, and then equalizes sexual intimacy between members of the same sex to that of members of the opposite sex.²³³ But this move of equalizing both types of sexual intimacy, Spindelman warns, risks overlooking the unpleasant incidence of sexual abuse in both contexts. “The commonplace that sexual intimacy of the sort *Lawrence* approves should be heralded as the measure of non-violation,” Spindelman writes, “has been uncovered as a myth, a way of ignoring and protecting the widespread abuses, including sexual assault, domestic violence, and sexual abuse of children, by more powerful partners in intimate relationships, typically, though not exclusively, men.”²³⁴ Put more simply, particularly in a global context, privacy does not always mean freedom from harm.²³⁵

²³¹ See Martha C. Nussbaum, *Is Privacy Bad for Women?*, BOSTON REV., Apr./May 2000, <http://www.bostonreview.net/BR25.2/nussbaum.html> (last visited Jan. 30, 2006).

²³² See Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1634–35 (2004). See also *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005), where a plaintiff who brought an action for injuries caused by herpes infection during sexual intercourse received no relief due to the Virginia Supreme Court’s decision to overturn a fornication statute under *Lawrence*.

²³³ Spindelman, *supra* note 232, at 1619.

²³⁴ *Id.* at 1634.

²³⁵ Consider the following:

Privacy is often important, but there can be too much as well as too little privacy; subordinating as well as equalizing forms of privacy; fairly distributed, as well as unfairly distributed privacy; privacy used for good, as well as privacy used for evil; privacy that moves a people forward, and privacy that moves a people backwards.

For example, there are several cases that suggest that the veil of privacy can often be used to obscure the importance of protecting the sexual autonomy of *both* partners within the home. Consider, for example, *People v. Onofre*,²³⁶ a case mentioned by some of the briefs in *Lawrence*, where the New York Court of Appeals rejected a man's conviction for consensual sodomy with a seventeen-year-old²³⁷ on the grounds that the law protected sexual decisions "voluntarily made by adults in a noncommercial, private setting."²³⁸ Though the court drew a solid line between public and private morality, and rejected the state's exercise of police power within the home, arguing that no harm from consensual sodomy had been shown,²³⁹ it ignored the fact that the case had actually been precipitated by the seventeen-year-old's allegations of physical injury as a result of the sexual activity.²⁴⁰ Equally disconcerting is the case of *Powell v. State*,²⁴¹ a case in which the Georgia Supreme Court similarly invalidated the state's sodomy law on privacy grounds.²⁴² In that case, the defendant Anthony Powell was accused of having sex with his seventeen-year-old niece against her will.²⁴³ Indeed, as this case and others show,²⁴⁴ privacy may be deserving of recognition under *Lawrence*'s protective aegis, but it may necessitate further limitations within the potential confines of the home and other private spaces, particularly to protect the more vulnerable.

In a global context, this principle demonstrates that privacy may be necessary, but certainly not sufficient, for global gay and lesbian equality, in either the public or the private sphere. Many feminists have launched cogent critiques of the boundaries between private and public, pointing out the need for expansive concepts of state accountability for harms committed by private actors rather than the state.²⁴⁵ Today, the undeniable product of such critiques has enabled the slow erosion of this previously stalwart division between public and private and also heralded an extension of state responsibility into previously private spheres.²⁴⁶ It remains to be seen whether

Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1200 (2000). See also MacKinnon, *supra* note 4, at 1089–90 (2004) (arguing that *Lawrence*, though having undoubtably positive legal ramifications, also extends the shield of privacy from heterosexuals to homosexuals, a situation that might allow inequalities and sexual abuse to flourish). For more background on the relations between genders, specifically gender inequalities, see CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

²³⁶ 415 N.E.2d 936 (N.Y. Ct. App. 1980).

²³⁷ *Id.*

²³⁸ *Id.* at 940–41. See also Spindelman, *supra* note 232, at 1638.

²³⁹ *Onofre*, 415 N.E.2d at 943; see also Hernández-Truyol, *supra* note 4, at 1242–43 (discussing this case).

²⁴⁰ Hernández-Truyol, *supra* note 4, at 1243.

²⁴¹ 510 S.E.2d 18 (Ga. 1998).

²⁴² *Id.*; see also Spindelman, *supra* note 232, at 1636–39.

²⁴³ *Powell*, 510 S.E.2d at 20.

²⁴⁴ For a fuller discussion of this case and others, see Hernández-Truyol, *supra* note 4, at 1243–44 (citing *Powell*, 510 S.E.2d 18, and *State v. Eastwood*, 535 S.E.2d 246 (Ga. Ct. App. 2000)).

²⁴⁵ Indeed, initially, the U.N. system did not consider "acts perpetrated by 'private' actors and that take place in traditionally private spheres such as the home . . . to be human rights violations." Bond, *supra* note 218, at 89.

²⁴⁶ *Id.*

the sovereignty that *Lawrence* affords to the home is as readily pierced in times of necessity.²⁴⁷ According to one Delhi high court, for example, fundamental constitutional rights to equality and freedom have no place in the home; “[i]t is like introducing a bull in a china shop,” the judge wrote, and would “prove to be a ruthless destroyer of the marriage institution.”²⁴⁸

B. Deliberative Autonomy

Like the private and public boundaries explored in *Lawrence*, sovereignty has both inward and outward facets.²⁴⁹ The outward aspects, like the findings in *Lawrence* and *Griswold*, focus on a particular type of “freedom from outside interference,” as discussed above.²⁵⁰ In contrast, internal sovereignty entails the exercise of authority within certain, circumscribed boundaries, in order to permit governments to provide political goods for citizens.²⁵¹ It draws substantially upon elements of self-determination, which involves the right of individuals and groups to “freely determine their political status and freely pursue their economic, social and cultural development.”²⁵²

Viewed within this prism, *Lawrence* strikingly reaffirms both the internal and external aspects of sovereignty, but it does so by noting a critical link to personal self-determination. In doing so, it offers a striking parallel with contemporary discussions of sexual autonomy. As Stephen Schulhofer has emphasized, sexual autonomy centers on the freedom to seek sexual fulfillment and freedom from sexual coercion.²⁵³ It is the product of a complex interaction of conditions, requiring mental competency, an awareness of one’s options, and sufficient information to choose between various possibilities, *i.e.*, whether or not to become sexually intimate with another person.²⁵⁴ Schulhofer also defines sexual autonomy in terms of (1) an internal dimension, involving the moral and intellectual capacity to choose without impermissible pressures and limitations; (2) an external dimension involving a “freedom from impermissible

²⁴⁷ See Spindelman, *supra* note 232, at 1653–50.

²⁴⁸ Nussbaum, *supra* note 231 (quoting the Delhi High Court in *Harvinder Kaur v. Harmander Singh*).

²⁴⁹ See HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (rev. ed. 1996); JACKSON, *supra* note 177, at 28; KRASNER, *supra* note 177, at 43–72.

²⁵⁰ JACKSON, *supra* note 177, at 27. See also HANNUM, *supra* note 249, at 15 (“Many writers essentially equate sovereignty with independence, the fundamental authority of a state to exercise its powers without being subservient to any outside authority.”).

²⁵¹ See JACKSON *supra* note 177, at 29.

²⁵² ICCPR, *supra* note 179, at art. 1. See also the U.N. Declaration of Friendly Relations, G.A. Res. 2625, Annex, at 124, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc A/5217 (Oct. 24, 1970). “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.” *Id.*

²⁵³ STEVEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 111 (1998).

²⁵⁴ See *id.*

pressures and constraints”;²⁵⁵ and (3) a physical dimension, comprising the bodily integrity of a person.²⁵⁶

Contemporary understandings of sovereignty, both personal and national, underscore the vital, mutually supporting interchange between its internal and external facets.²⁵⁷ Like sovereignty itself, the home functions as a discrete, delineated space, free from state intrusion and intervention, allowing the individual a sort of “breathing space” from which to develop oneself outside of public view.²⁵⁸ Like Schulhofer’s own discussion, *Lawrence*’s postulation of sexual autonomy can be easily extended to the realm of sexual identity. Schulhofer defines sexual autonomy in terms of an “active” facet — namely, the right to determine the kind of life one wishes to live, and the kind of activities one may wish to pursue — and in terms of a “right of refusal” — involving the right to refuse to undertake certain activities with others.²⁵⁹ Likewise, this version of sexual autonomy also recognizes the role that social conditions — cultural influences, education, the realistic availability of alternative options, and a culture that supports personal introspection — can have an enormous impact on ensuring a person’s autonomous decisions.²⁶⁰

I would argue that many of Schulhofer’s descriptions find pride of place within a utopian reading of *Lawrence*. Along these lines, others have suggested that *Lawrence* offers a version of sexual self-determination that enables and protects the individual’s own deliberative process.²⁶¹ Francisco Valdes has written that *Lawrence* “responds to the regulation of sexuality” by recognizing the fluid and constitutive part of self-realization which honors the ongoing search for meaning and individual personhood that can be fashioned, in part, through sexual interaction with another person.²⁶² The opinion actually defines liberty to *presume* “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²⁶³ By placing autonomy along the same continuum as liberty and privacy, the Court suggests a vision that is, again, equally balanced between positive and negative facets: it encompasses the freedom to choose and to deliberate, along with the spatial and emotional freedom to do so. *Lawrence* relied heavily on the *Casey* decision in this respect, observing that *Casey* “confirmed that our laws and tradition afforded constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”²⁶⁴ Constitutionally speaking, the deliberative autonomy framework includes the right to privacy, expressive association, and intimate association in constitutional law.²⁶⁵ Initially defined by Justice Blackmun in *Planned*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See HANNUM, *supra* note 249, at 1 n.1, 15; see also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 26–27 (1979).

²⁵⁸ See Julie E. Cohen, *DRM and Privacy*, 18 *BERKELEY TECH. L.J.* 575, 578 (2003).

²⁵⁹ See SCHULHOFER, *supra* note 253, at 110–11.

²⁶⁰ *Id.*

²⁶¹ See, e.g., Valdes, *supra* note 4, at 1396.

²⁶² *Id.*

²⁶³ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²⁶⁴ *Id.* at 573–74.

²⁶⁵ James E. Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1, 5 (1995).

Parenthood v. Casey,²⁶⁶ the right of privacy included “the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government.”²⁶⁷

According to James Fleming, these observations in *Casey*, which highlight both decisional autonomy and bodily integrity, “evinced[] deliberative autonomy.”²⁶⁸ The same can also be said for Stevens’s dissent in *Bowers v. Hardwick*, which mentions the “individual’s right to make certain unusually important decisions that will affect his own, or his family’s destiny,” and “the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.”²⁶⁹ The same observation is also made by Justice Blackmun, who characterizes (as Fleming points out) the “freedom of intimate association” to include the “decisional and the spatial aspects of the right to privacy.”²⁷⁰ In Fleming’s view, rights that involve bodily integrity, decisional autonomy, and integrity — involving “persons’ destiny, identity, or way of life” — constitute “basic liberties that are significant preconditions for deliberative autonomy.”²⁷¹

Lawrence continues to affirm this position. The Court, for example, quoted from a passage of the *Casey* opinion that observed that

[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁷²

The *Lawrence* court then observed that “[p]ersons in a homosexual relationship may seek autonomy for these [same] purposes, just as heterosexual persons do.”²⁷³ As this observation implicitly suggests, instead of concentrating on sexual identity, the Court chooses to concentrate on sexual autonomy as a framework for legal protection.

As such cases suggest, these liberties (regarding destiny, identity, and way of life) become even more important when we consider the boundaries of the contested intersections between sexual identity and sexual activity in the global arena. Just as bodily integrity comprises a certain type of personal sovereignty that is inviolate, a framework for deliberative sexual autonomy permits individuals to make their own

²⁶⁶ 505 U.S. 833 (1992).

²⁶⁷ Fleming, *supra* note 265, at 11 (quoting *Casey*, 505 U.S. at 927 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part)).

²⁶⁸ *Id.*

²⁶⁹ 478 U.S. 186, 217 (1986) (Stevens, J., dissenting).

²⁷⁰ Fleming, *supra* note 265, at 10 (quoting *Bowers*, 478 U.S. at 202, 204 (Blackmun, J., dissenting)).

²⁷¹ *Id.* at 13 (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719–20 (7th Cir. 1975)).

²⁷² *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

²⁷³ *Id.*

decisions about how or whether or not they choose to adopt or express a particular type of sexual identity. This kind of “sexual self-determination” draws a boundary that allows persons to undertake their own process of deliberation to ultimately decide how they may choose to represent themselves.²⁷⁴ Since sexual autonomy includes the right to make one’s decisions about bodily integrity and sexual self-satisfaction, it also necessarily includes a decision about public and private identity in this regard.

Given these principles, I argue that *Lawrence*’s deliberative autonomy framework differs from the other types of rights we have examined, particularly because of its emphasis on privacy rather than the imperative of expressive identity. For example, *Lawrence*’s framework takes the right of privacy a step further by allowing an individual a kind of “inviolable space” for making decisions about how or whether to identify oneself sexually. In reaching these conclusions, *Lawrence*’s framework peacefully coexists with identity-based models; it is entirely possible to construe the right to privacy to include *both* the deliberative and expressive aspects of a person’s sexual identity. In this way, *Lawrence*’s sexual autonomy model is most clearly akin to the original goals and objectives of the gay liberation movement, which initially was understood as a multi-intersectional movement that connected threads of various struggles.²⁷⁵ A sexual autonomy model does just that: it equalizes one’s sexual and identity preferences by focusing on the *act of choosing*, rather than *the gender or identity chosen*, as a focal point of protection. Here, *Lawrence*’s deliberative sexual autonomy framework provides a much more expansive view of protection, encompassing both the internal and external aspects of a person.

While this vision of deliberative autonomy might be laudatory at first glance, it is important not to overstate my optimism. As Robert Post eloquently observed, “the theme of autonomy floats weightlessly through *Lawrence*, invoked but never endowed with analytic traction.”²⁷⁶ Perhaps most troubling is the evidence that some courts consider the power of *Lawrence* to be strictly limited to the dynamics between adult, same-sex couples, and thus exclude other issues that closely bear on a broader, and more fundamental, right to sexual intimacy. Consider the unfortunate case of *State v. Limon*,²⁷⁷ which involved a conviction against an eighteen-year-old boy who engaged in consensual oral sex with a fourteen-year-old just a week after his eighteenth birthday.²⁷⁸ Limon was convicted under a statute that prohibited sodomy with a child between the ages of fourteen and sixteen.²⁷⁹ Although Kansas had a “Romeo and Juliet” law that reduced penalties if the older teen was less than nineteen and if the age difference was less than four years, the law did not apply to members of the same

²⁷⁴ See also Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. INT’L & COMP. L. 343 (2000).

²⁷⁵ See ANNAMARIE JAGOSE, *QUEER THEORY* 34–35 (1996). Here, in pointing out that gender and sex roles oppress everyone, not just gay people, gay liberationists seek “not only recognition of homosexuality as a legitimate identity for a minority population but also to ‘free the homosexual in everyone.’” *Id.* at 40.

²⁷⁶ Post, *supra* note 26, at 97.

²⁷⁷ 122 P.3d 22 (Kan. 2005).

²⁷⁸ *Id.* at 24.

²⁷⁹ *Id.*

sex.²⁸⁰ Even in the wake of *Lawrence*, Limon's conviction was initially upheld on the grounds that the gender classification was valid on rational basis grounds.²⁸¹ Later, the case was overturned,²⁸² but it still demonstrates the limited power of *Lawrence* in the wake of countervailing concerns involving gender or the rights of youth.

Indeed, one might even argue that *Lawrence*'s failure to articulate a specific, fundamental right to sexual intimacy anticipates a host of obstacles regarding the exercise of deliberative sexual autonomy entirely. This is particularly true regarding types of non-normative sexual activity that may fall outside hetero- or homo-sexual coupling, either in public or private space. Consider, for example, the Eleventh Circuit case of *Williams v. Attorney General of Alabama*,²⁸³ which addressed the constitutionality of an Alabama law that prohibited, among other things, the commercial distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”²⁸⁴ In that case, the Eleventh Circuit resoundingly rejected the existence of a right to privacy or personal autonomy, observing that, “[i]n the abstract . . . there is no fundamental right to either.”²⁸⁵ In doing so, the court refused to invoke strict scrutiny analysis, and instead analyzed the statute on rational basis scrutiny alone.²⁸⁶ It relied on an earlier Eleventh Circuit case that held that *Lawrence* did not identify a fundamental right to private sexual intimacy, because it failed to offer the requisite level of talismanic description.²⁸⁷ It then criticized the district court for finding a right to sexual privacy, noting that the district court's formulation “encompass[e]d a great universe of sexual activities, including many that historically have been, and continue to be, prohibited.”²⁸⁸ It cited prostitution, obscenity, and adult incest as examples that would fall within this right.²⁸⁹ In making this observation, the court was careful to define the right at issue to involve the right to purchase and sell sexual devices, arguing that “[t]he statute invades the privacy of Alabama residents in their bedrooms no more than does any statute restricting the availability of commercial products for use in private quarters as sexual enhancements,”²⁹⁰ comparing these aids to a bevy of illegal aids — the services of a willing prostitute, hallucinogens, or depictions of child pornography, for example.²⁹¹

²⁸⁰ *Id.*

²⁸¹ *See id.* at 25–27.

²⁸² *Id.* at 24.

²⁸³ 378 F.3d 1232 (11th Cir. 2004).

²⁸⁴ *See id.* at 1233 (quoting ALA. CODE § 13A-12-200.2 (Supp. 2003)).

²⁸⁵ *Id.* at 1235.

²⁸⁶ *Id.* at 1236.

²⁸⁷ *Id.* (citing *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida's law banning gay men and lesbians from adopting children)).

²⁸⁸ *Id.* at 1239–40.

²⁸⁹ *Id.* at 1240.

²⁹⁰ *Id.* at 1241.

²⁹¹ *Id.* at 1241 n.12. Yet paradoxically, at the same time that the court reached such problematic conclusions, it also noted that restrictions on the sale of such items were, in fact, tantamount to restrictions on the *use* of the item, citing *Carey v. Population Services International*, 431 U.S. 678 (1977), which observed that the same test had to be applied to state regulations which burden an individual's right as those which prohibit the right entirely. *Williams*, 378 F.3d 1242.

The court criticized the district court's equation of historical non-interference with regulating sexual devices with protection, observing that state non-interference nowhere suggested such protection.²⁹² "Under this approach," the court observed, "the freedom to smoke, to pollute, to engage in private discrimination, to commit marital rape — at one time or another — all could have been elevated to fundamental-rights status."²⁹³ Given the historical existence of the "Comstock laws" regulating the trade and circulation of obscene literature and articles of immoral use, the court concluded that *Lawrence*'s import could not immunize such conduct, even within the home, as a fundamental right.²⁹⁴ In this case, we see clear limitations on the exercise of deliberative autonomy, implicit in *Lawrence*'s soaring rhetoric. But the real victims here are, as Mary Anne Case has aptly noted, women:

Everything about the case genders the use of sex aids as female and feminine: The "vendor plaintiffs" are women who appear to market their wares largely to other women, either at "in-house 'Tupperware' style parties . . . [for] sexual aids and novelties" or in retail stores featuring "romance enhancing products and novelties" Among the user plaintiffs are a married couple and another married woman "who uses sexual devices during intimate relations with her husband." Even more extraordinarily, also among the user plaintiffs and the customers of the vendor plaintiffs and given a no less sympathetic hearing by the lower court are single women who "prefer to avoid sexual relations with others, due to prior negative relationships, or the risks of sexually transmitted diseases, or other risks associated with developing an intimate relationship."²⁹⁵

of sexual self-determination, and the particular, articulated, and respectable" co-splend in order to become effective.²⁹⁶ We see that *Lawrence*'s lack of specificity offers a limited vision of sexual self-determination; it fails to offer any clear positive protections beyond same-sex sexual activity within the home, and thus may fail to protect other vulnerable groups throughout the world: women seeking "aided orgasm"²⁹⁷ (as Case puts it so eloquently) or teenagers engaged in homoerotic, consensual sexual activity. In sum, *Lawrence* reaffirms the sovereignty of the home without expressly affirming the parallel need for the sovereignty of the universal person: adult, teenager, male, female, or otherwise. In doing so, this omission, as we now see, fails to protect parallel activities that

²⁹² *Williams*, 378 F.3d at 1244.

²⁹³ *Id.*

²⁹⁴ *Id.* at 1245.

²⁹⁵ Case, *supra* note 4, at 132–33 (footnotes omitted) (first omission and first alteration in original).

²⁹⁶ See Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?*, 23 SOCIAL TEXT 235, 238–39 (2005).

²⁹⁷ Case, *supra* note 4, at 131.

raise similar questions regarding the exercise and protection of sexual autonomy. In short, *Lawrence* winds up offering a right to sexual autonomy that is both fragile and vulnerable; as such, it risks leaving the less powerful unrecognized in either public or private space. At the same time, however, its rhetorical flourish suggests that it may serve as the starting point for a more fruitful explication of sexual autonomy at a later date.

C. Expressive Liberty

The final part of *Lawrence*'s tripartite prism involves expressive liberty. Here, the *Lawrence* Court extends the notion of spatial privacy outward, linking spatial principles of privacy to its comparably more substantive aspects.²⁹⁸ This important linkage between the "spatial" and "transcendent" notions of privacy then transfers into the zone of liberty.²⁹⁹ After observing the importance of spatial privacy as a theatrical backdrop of its findings, the Court then points out that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds."³⁰⁰ It defined the case before it to involve the "liberty of the person both in its spatial and in its more transcendent dimensions."³⁰¹

Indeed, the most striking aspect of the opinion is perhaps its central emphasis on liberty, rather than privacy.³⁰² This transition from spatial notions of privacy towards a freedom that extends into areas of human self-actualization suggests the rising significance of a notion of liberty that is both expressive and normative in its significance, denoting a particular type of "expressive liberty." As applied to the person, internal sovereignty, as I have described it, also operates within the self, allowing the person to determine for himself or herself which aspects of their personhood to develop, emphasize, and express, either through associations with others or through the individual expression (or not) of certain aspects of their character. Capturing this point, Laurence Tribe observes that the failure of the Court to name specifics "reflects the Court's recognition that it was not attaching rights to spatial intersections or to configurations of body parts; instead, the Court was protecting the right of adults to define for themselves the borders and contents of deeply personal human relationships."³⁰³ Obviously, however, the framework of deliberative autonomy and expressive liberty that is offered falls on cultural and social norms for its execution and attainment. Here perhaps is where

²⁹⁸ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Many scholars have focused at great length on this point. *See, e.g.*, Strahilevitz, *supra* note 4, at 676; *see also* Koppelman, *supra* note 4, at 1173–74 ("The Court also limited its holding in other ways, by conspicuously ignoring legal arguments that were stronger and more persuasive than the mushy right-to-liberty argument . . ."); Mohr, *supra* note 4, at 368 ("[T]he Court gives no account of how substantive privacy rights are grounded in due process.").

³⁰³ Tribe, *supra* note 4, at 1915.

we see the greatest possible divergence from its objectives and its limitations — and the most striking import for *Lawrence*'s global effectiveness.

The *Bowers* Court held that the Constitution does not protect a “right of homosexuals to engage in acts of sodomy,” nor, alternatively, did it contain a “fundamental right to engage in homosexual sodomy.”³⁰⁴ The Court rejected the proposition that the right to privacy as outlined in its prior jurisprudence on procreation, marriage, child rearing and education, and abortion extended to homosexual sodomy.³⁰⁵ Justice White wrote:

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated³⁰⁶

If privacy provided the backdrop for *Bowers*' reasoning, liberty served as the vehicle by which *Bowers* was overturned. The *Lawrence* Court, for example, noted that, by construing the original question in *Bowers* to be whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy demonstrated “the Court's own failure to appreciate the extent of the liberty at stake.”³⁰⁷ The *Bowers* Court defined fundamental rights as “those fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’”³⁰⁸ It then concluded that it was “obvious” that neither formulation would extend to homosexuals to engage in acts of consensual sodomy, principally because proscriptions against homosexual conduct have “ancient roots” and were criminalized in nearly half of the states at the time the opinion was written.³⁰⁹ Because the laws against sodomy were based on “notions of morality,” the *Bowers* Court then declined to overturn the law due to its majoritarian origins.³¹⁰

In analyzing this part of *Bowers*, the *Lawrence* Court observed that:

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 to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that

³⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

³⁰⁵ *See id.* at 190.

³⁰⁶ *Id.* at 190–91.

³⁰⁷ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

³⁰⁸ *Bowers*, 478 U.S. at 191–92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)) (alteration in original).

³⁰⁹ *Id.* at 192–94.

³¹⁰ *Id.* at 193–94, 196.

purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.³¹¹

Throughout these observations, the Court emphasized the function of privacy in its spatial and transcendent dimensions — but placed them both under the rubric of liberty. This shift is tremendously significant — it simultaneously emphasizes the expressive significance of sodomy laws, just as it highlights the expressive value of sexual behavior between two consenting adults in a relationship.

We might wonder whether the absence of focus on public, expressive identities in *Lawrence* suggests the need for containment; of implicitly keeping same-sex sexual identities in the bedroom (or the closet, as the case may be). As Francisco Valdes notes, “*Lawrence* thereby moves sexual minorities into an interstitial place in constitutional law — from the status of formal outlaws but shy of the status of formal recognition; a traditionally subordinated social group now to be tolerated, but not necessarily accepted.”³¹² The implicit theme of containment, as I have suggested, is deeply contradictory and multi-faceted: while it may seclude and therefore protect the emergence of sexuality within the home, it carries no protections in public space, nor does it call for any other degree of public entitlements that encourage the dynamism that surrounds group visibility through “coming out.” As Berta Hernández-Truyol aptly observes: “[T]he sexually private location of *Lawrence* is dangerously close to the bad privacy of the closet. If the decision means that only hidden gay (and lesbian) existence will obtain constitutional protection, gays’ and lesbians’ and their families’ lives will continue to be rife with danger.”³¹³ For support, Hernández-Truyol points to a case where a lesbian family was broken up due to the existence of same-sex affection within the confines of the home,³¹⁴ and Justice Scalia’s *Lawrence* dissent which trumpeted the observation that many “Americans” wish to “and should be able to legitimately exclude gays and lesbians” from a wide variety of public and private places — work, schools, religious institutions, and street parades.³¹⁵ Indeed, her predictions have, sadly, come to pass in (again) the Eleventh Circuit, which upheld a Florida adoption ban directed specifically at lesbians and gay men, partly on the grounds that *Lawrence* did not “identif[y] a new fundamental right to private sexual intimacy.”³¹⁶

³¹¹ *Lawrence*, 539 U.S. at 567.

³¹² Valdes, *supra* note 4, at 1342.

³¹³ Hernández-Truyol, *supra* note 4, at 1241.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

Thus, *Lawrence*'s unabashed affirmation of the boundaries between public and private raises the important question of what sorts of protections attach to sexual expressions between members of the same sex in public, and whether the extension of privacy protections to sodomy laws carries with it an implicit desire to contain, to seclude, and to hide gay and lesbian social and sexual expression from the public sphere. On this larger issue, *Lawrence* provides an insufficient answer. After quickly noting the importance of spatial privacy as a theatrical backdrop for its findings, the Court notes that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds."³¹⁷ Spatial privacy — a grant on its own — answers none of these important questions regarding the public; it instead relegates everything to the private.

One could argue that the Court offered the sexual minority community a largely toothless version of external sovereignty. The Court's version merely offers the principle of inviolability of boundaries, assuming, of course, that this protects the principle of "domesticated liberty" within the home.³¹⁸ Missing from this formulation is the true notion of external sovereignty, a term that is normally used to encompass the notion of equality in relationships to other entities, including the right to belong to membership organizations, the right to sign international agreements and to abide by international principles, and the capacity to act as a legal entity in consort with other nation-states.³¹⁹

External sovereignty, as international law has taught us so well, requires, at the very minimum, some formal equality within the membership of nations to flourish. The same, therefore, is also true of the self — a factor which suggests the need for true equality in areas of marriage, family, expression, and anti-discrimination. Yet the *Lawrence* Court, on this point, misses the mark. It merely declares that its previous jurisprudence recognized the principle that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."³²⁰ It then drew upon other decisions regarding a woman's liberty right under the Due Process Clause, observing that *Roe*, for example, "recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."³²¹ At the same time, the Court pointed out that the sodomy statutes "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."³²² In reaching this observation, the Court noted that adults are free to choose to enter upon a homosexual relationship "in the confines of their homes

³¹⁷ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

³¹⁸ *Cf. Franke, supra* note 4, at 1413.

³¹⁹ *See Williams & Heymann, supra* note 198, at 443.

³²⁰ *Lawrence*, 539 U.S. at 565 (recognizing the impact of *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

³²¹ *Id.* at 565.

³²² *Id.* at 567.

and their own private lives.”³²³ “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”³²⁴ The liberty protected by the Constitution, the Court observed, permits this choice.³²⁵

It is easy to see how significant this transition is from spatial privacy, to marital privacy, to expressive privacy, and then, finally, to expressive liberty. Here, the Court emphasized not only the private nature of sexual relationships, but also highlighted the expressive functions that sexuality may serve within a relationship. In this sense, the *Lawrence* Court honored a conception of the self that is premised on protecting the ability to choose to enter into a personal relationship with a member of the same sex and highlights the expressive significance of sexual activity in catalyzing the bonds between humans. In making this recognition, *Lawrence* also rejected many of the historical premises upon which *Bowers* was based.³²⁶ But it also carried a theme of global cosmopolitanism throughout the opinion, highlighting the fact that other jurisdictions, including those of various states, have rejected sodomy laws.

Much can be made of the Court’s observation that sodomy laws seek to control a personal relationship, whether or not it is entitled to formal legal recognition in the law.³²⁷ From my perspective, leaving the question of legal recognition unsettled allows for a discursive emphasis on the expressive function of sexuality itself in providing a formidable bond between persons. This referential function has been deeply contested by scholars who have argued that it masks an underlying theme throughout *Lawrence* in implicitly requiring same-sex relationships to demonstrate intimacy, monogamy, or other heteronormative qualities.³²⁸ In this sense, one might argue that the function of sexuality, within the premises of a spatially private space, might be able to serve a similar function to marriage itself: it provides for a type of expression that is valuable, and, as *Lawrence* plainly recognizes, clearly within the liberty of persons to choose.

Again, one might argue that *Lawrence*’s conflation of liberty with privacy is a significant development, particularly as it relates to the creation of identity itself. It does not require the assertion of a public identity in order to protect a private sphere, but instead uses the value of a private sphere to honor *both* the public and private choices of individuals. Expressive liberty, then, goes one step further than expressive identity: it permits the choice of with whom to have sexual relations, how to identify oneself, and whether or not the relationships one chooses should be publicly recognized. This notion embraces a corollary principle of “sexual self-determination,” a key concept that animates the foundations of *Lawrence*. We also see elements of preference-shaping

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *See id.*

³²⁶ *Lawrence*, 539 U.S. at 568–73 (rejecting *Bowers v. Hardwick*, 478 U.S. 186, 192–95 (1986)).

³²⁷ For a fuller discussion of this point, see Ball, *supra* note 4.

³²⁸ *See* Ruskola, *supra* note 296, at 236–38.

behavior in the Court's observations that lesbians and gay men are "entitled to respect"³²⁹ and to "retain their dignity as free persons."³³⁰ According to Carlos Ball, these observations suggest a subtle expansiveness in the Court's concerns with liberty:

The Court, to put it differently, could have applied a minimalist libertarian understanding of the Due Process Clause in matters of sexual intimacy by simply concluding that because the sexual acts at issue in the case were consensual, took place in the privacy of the home, and did not harm third parties, they were constitutionally protected. The Court, by bringing into the analysis notions of respect and dignity in the context of gay lives and relationships, went beyond such minimalism.³³¹

To go beyond such minimalism, I would posit, demonstrates the implicit promise of a new, institutional role for courts in establishing the boundaries of dignity, privacy, and liberty for its citizens. It suggests, as Professor Ball also does, a role that engages in protecting rights that are positive, rather than negative, in character, and in actively protecting the dignitary interests of *all* of its citizens, sexual minorities included.

At the same time, however, we must recognize that the implicit logic of containment still creates a hierarchical divergence between private and public recognition, as we have seen in the various case law in its wake. As both Katherine Franke and Mary Anne Case have insightfully pointed out, *Lawrence* lends itself to a type of liberty that is privatized, and therefore dangerously affirms the home, at the cost of a greater and more powerful recognition in public space.³³² Case law, as both suggest, has already suggested the possibility of this outcome in *Stanley v. Georgia*,³³³ a case where the Supreme Court held that the right to information prohibits making mere private possession of obscene material a crime.³³⁴ In that case, the Court recognized that the valid governmental interest in dealing with the problem of obscenity could not justify its insulation from other constitutional rights, particularly those implicated in a statute forbidding the mere possession of obscene materials.³³⁵ As the *Stanley* Court observed:

This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Moreover, in the context of this case — a prosecution for mere possession of printed

³²⁹ *Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

³³⁰ *Id.* at 567.

³³¹ Ball, *supra* note 4, at 1215.

³³² See generally Franke, *supra* note 4. See also Case, *supra* note 4.

³³³ 394 U.S. 557 (1969).

³³⁴ *Id.*

³³⁵ *Id.* at 563–68.

or filmed matter in the privacy of a person's own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.³³⁶

Yet, as Katherine Franke aptly notes, in *Stanley*, “the Court tolerated obscenity at the price of demeaning it, characterizing it as ‘a base thing that should nonetheless be tolerated so long as it takes place in private.’”³³⁷ Franke's worried analogy to *Lawrence* is striking — the logic of containment may operate, though implicitly, in *Lawrence*, to suggest that same-sex sexuality is only valued, and valuable, as long as it takes place within the confines of the home.

Of course, given the breadth the Court provides to its formulation of expressive liberty, it is important to recognize its public and private limits in the global arena, just as the Court has done in its own jurisprudence in the First Amendment area. In short, *Lawrence* does little to protect expressive liberty and inclusion in public spaces, or even public organizations. Applying these observations to the global arena, we can see some risk that *Lawrence* heralds a limited success for lesbian and gay equality within securing access to public spaces and recognition. Speaker autonomy (even of the homophobic variety) continues to receive primary status.³³⁸ Under *Lawrence*, gay marriage is but a mixed mirage of possibility with a hint towards legal recognition for gay and lesbian families. And, as some cases suggest, the regulation of same-sex sexuality within public spaces — bathrooms, parks, and the like — will continue unabated. In short, *Lawrence*'s failure to offer a robust conception of public, rather than private, protection signals its global limitations.

Consider the recent case law challenging the military's anti-sodomy rules, which have resoundingly deferred to the military despite clear liberty and privacy issues.³³⁹ And the Supreme Court has rarely been willing to demand inclusion in public spaces for cultural dissent. For example, in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,³⁴⁰ the Court considered whether the application of a state public accommodations law requiring the inclusion of gay and lesbian parade marchers violated the parade organizers' First Amendment rights.³⁴¹ The Court found that it did violate the organizers' rights, observing that “whatever the reason [for the chosen exclusion], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.”³⁴²

³³⁶ *Id.* at 564 (internal citation omitted).

³³⁷ Franke, *supra* note 4, at 1407 (quoting Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 537 (1989)).

³³⁸ See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 506 (2001).

³³⁹ See, e.g., *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), *cert. denied*, 125 S. Ct. 1682 (2005); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

³⁴⁰ 515 U.S. 557 (1995).

³⁴¹ *Id.*

³⁴² *Id.* at 575.

More recently, the Court continued to emphasize the limitations of expressive liberty in *Boy Scouts of America v. Dale*.³⁴³ The question presented in that case was whether a state public accommodations law violated the Boy Scouts' right to ban homosexuals from serving as Boy Scouts under its First Amendment rights of expressive association.³⁴⁴ Significantly, the Scouts' own position, which initially proscribed homosexual conduct, and later homosexual status, traces the judicial emphasis we have discussed. In 1991, the Boy Scouts tailored their message of exclusivity to maintain that "'homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.'"³⁴⁵ Yet just two years later, the Boy Scouts redrafted their position to state instead that "[w]e do not believe that homosexuals provide a role model consistent with the[] expectations" that Scouting families have had of the organization.³⁴⁶

Here, too, the Court concluded that the inclusion of an openly gay scoutmaster ran afoul of the Scouts' freedom of expressive association, because it would change the message that it chooses to send: "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."³⁴⁷ Here, the Court made it perfectly clear that the mere presence of a "gay rights" activist openly questioned the policy, irrespective of whether or not he actively chose to do so.

In recognizing this jurisprudence within the confines of *Lawrence*'s expressive liberty, the Court has implicitly drawn a line between private and public, protecting private acts, and a person's chosen identity, but only within certain circumscribed boundaries. The suggestion made by the Court is that expressive liberty is a right that is enjoyed by everyone, but in times of conflict between two speakers, the Court will refuse to demand inclusion, and instead defer to the author, even if the author has chosen to exclude particular identities for discriminating reasons.

III. BEYOND SOVEREIGN RECOGNITION

Despite its limitations, *Lawrence* still represents a powerful, indeed, inspirational, precedent that dynamically positions the United States as part of an increasingly global constituency that has chosen to recognize the role of liberty, privacy, and autonomy in issues concerning same-sex sexuality. Perhaps its greatest effect, therefore, lies not in the excavation of its executory promise, but rather in its placement as what Robert Post has termed "the opening bid in a conversation that the Court expects to hold with the American public."³⁴⁸ But, as I have suggested, the conversation needs to unfold on both

³⁴³ 530 U.S. 640 (2000).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 652.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 655–56.

³⁴⁸ Post, *supra* note 26, at 104.

a macro and micro level, both globally and within the home, if this conversation is to be at all effective. As Charles Taylor has beautifully argued, the discovery of one's self-identity doesn't just mean that one negotiates it in isolation, but rather, it is constructed and mediated through dialogue, both internal and external, with others.³⁴⁹ This is why identities need both dialogue and recognition.³⁵⁰

In this section, I will argue for the protection of a robust conception of intersectionality, post-*Lawrence*, that centers upon this value of crossing from private solace to public recognition. Intersectionality, as defined by Kimberle Crenshaw, focuses on the principle that aspects of identity, such as race and gender, do not operate independently of one another, but are instead part and parcel of a person's lived experience.³⁵¹ Both anti-essentialism and intersectionality involve a complex, fluid notion of the self, one that recognizes that "race, gender, and sexual orientation are not fixed, biological characteristics."³⁵² As Joanna Bond observes, "Intersectionality facilitates such a recognition and encourages analysis of human rights as they affect the whole person or complex 'self' rather than providing only a snapshot of identity frozen behind the lens of either gender, race, or sexual orientation."³⁵³

On one hand, as I have argued, *Lawrence*'s emphasis on the protection of conduct is globally appealing because it surpasses the tenuous fragility of expressive identity, and instead focuses on the need for freedom from interference instead. In addition, *Lawrence* honors a vision of sexual self-determination that, unlike the dominant imperatives of expressive identity, allows for a potential deliberative space between one's private, sexual activities and one's choices of self-definition. As I have suggested, recognizing these areas of potential disaggregation is vital in order to protect individuals across the world who may face legal sanction due to the existence of sodomy laws, even when they do not adopt expressively "gay," "lesbian," or "bisexual" identities. In an extremely powerful article, Ryan Goodman makes a similar point with reference to South Africa, whose empirical study of the effects of decriminalization demonstrates the constitutive effects of sodomy laws on gay and lesbian identity formation.³⁵⁴ His work shows that the presence of legal prohibition of sodomy laws, far from having a purely symbolic effect, has also had a profoundly negative effect on the social, expressive, and constitutive elements of gay self-identification.³⁵⁵ At the same time, however, Goodman's work also demonstrates the lasting effects of decriminalization on both the personal and political aspects of gay personhood, a point that squarely applies to the events in the wake of *Lawrence* as well.

³⁴⁹ See Taylor, *supra* note 77, at 34.

³⁵⁰ *Id.*

³⁵¹ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 n.9 (1991); see also Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485 (2002).

³⁵² Bond, *supra* note 218, at 109.

³⁵³ *Id.* at 137.

³⁵⁴ See Goodman, *supra* note 115.

³⁵⁵ *Id.*

But this right, as I have suggested, is primarily a representational one: while it goes a long way in removing the stigma of criminality from homosexuality, it does little to formally affirm the recognition in public entitlements, like marriage or domestic partnership. Here, I want to suggest the need for a radical type of intersectionality post-*Lawrence*, one that instead actively engages with the dynamics of public and private entitlements regarding individual and group identity. There is a need to bring same-sex sexuality out into the open — not for all, but for some, who seek to identify with a community. This project, if it is to be effective, requires creating the necessary conditions that recognize full equality in citizenship for the panoply of sexualities throughout the world, rather than requiring allegiance to particular categories of expressive identity. Amy Gutmann has argued that “[i]f human identity is dialogically created,” then true public recognition requires a deliberative space that allows us to share aspects of our identity publicly with others.³⁵⁶ Part of this requires recognizing the rich intersectional nature of individual experience. For example, Angela Harris, in her seminal article entitled *Race and Essentialism in Feminist Legal Theory*, echoes the need for “multiple consciousness” in feminist thought.³⁵⁷ Her work points out that black women have called into question the notion of a unitary women’s experience by pointing out how difficult it is to assume that a monolithic women’s experience can be described independent of other facets like race, class, and sexual orientation.³⁵⁸ The result of essentialism, Harris writes, is a reduction in the lives of women who would experience multiple forms of oppression, forcibly fragmenting the rich intertextual natures of their experiences.³⁵⁹

In one particularly rich example, Harris points to Catharine MacKinnon’s reading³⁶⁰ of the case *Martinez v. Santa Clara Pueblo*,³⁶¹ a case in which Julie Martinez sued her Native American tribe to challenge an ordinance that provided that if women married outside of the tribe, the resulting children were not considered full members of the tribe.³⁶² In contrast, if men married outside of the tribe, their children were considered to be full members.³⁶³ Since Martinez married a Navajo man, her children were not allowed to vote or to inherit communal land.³⁶⁴

In her commentary, MacKinnon has Martinez ask her tribe, “Why do you make me choose between my equality as woman and my cultural identity?,”³⁶⁵ using the question to provocatively frame the importance of gender equity and pointing out that “the

³⁵⁶ Amy Gutmann, *Introduction to MULTICULTURALISM*, *supra* note 77, at 7.

³⁵⁷ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990).

³⁵⁸ *Id.* at 589.

³⁵⁹ *Id.*

³⁶⁰ See CATHARINE MACKINNON, *Whose Culture: A Case Note on Martinez v. Santa Clara Pueblo (1983)*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987).

³⁶¹ 436 U.S. 49 (1978).

³⁶² *Id.*

³⁶³ See *id.* at 51.

³⁶⁴ *Id.* at 52.

³⁶⁵ MACKINNON, *supra* note 360, at 67.

aspiration of women to be no less than men . . . is an aspiration indigenous to women across place and across time.”³⁶⁶ Harris takes up MacKinnon’s critique, reminding MacKinnon that “though the aspiration may be everywhere the same, its expression must depend on the social historical circumstances” that frame the location of the question itself.³⁶⁷ Harris’s contribution, therefore, leads us to focus on the confusing and comparably less static identities that operate in the foreground of the conflict between womanhood and culture. “In a jurisprudence based on multiple consciousness, rather than the unitary consciousness of MacKinnon’s dominance theory,” she writes, “these questions would have to be answered before the ordinance could be considered on its merits and even before the Court’s decision to stay out could be evaluated.”³⁶⁸

To some extent, Harris’s suggestion should rightfully operate at the forefront of our discussions regarding sexuality and culture. As many gay, lesbian, bisexual, or transgendered South Asians often explain, the world forces them to choose between multiple identities — gender, race, sexual orientation, cultural expectation — themes that individuals grapple with in both private and public spaces and across time. Yet, the nomenclature of each category is rarely questioned, even though it raises poignant and conflicting representations. In the end, many individuals may find that navigating such complicated spaces requires a dynamic, fluid picture, rather than a single, fixed identity that presupposes the importance of some identities at the expense of others. As Ryan Goodman’s work clearly shows, this ongoing project is not an enterprise that flourishes outside of state intervention; rather, state intervention is intimately connected to every aspect of both personhood and representation.³⁶⁹ Consequently, what we need is a greater recognition of how protecting the public aspects of identity leads to a greater protection of the private self, and vice-versa.

To do this, we must understand and undertake the difficult project of “fore[ing] privacy to go public,” as Kendall Thomas wrote in his seminal article.³⁷⁰ We cannot adopt *Lawrence*’s rigorous drawing of the boundaries between private and public, or internal and external sovereignty, as I have argued, but we must go further. To do this, I draw on Helen Stacy’s notion of “relational sovereignty.”³⁷¹ This particular type of sovereignty emerges out of the growing recognition that the existing frameworks of external and internal sovereignty were far too limiting.³⁷² She argues that perspectives that define sovereignty as a receding phenomenon tend to overdetermine the division between public and private, and, as a result, tend to presume that “government’s overriding objective is to step back from ‘private’ activity, rather than step in to facilitate it.”³⁷³ Rather than espouse this view, Stacy proposes redefining sovereignty so that it

³⁶⁶ *Id.* at 68.

³⁶⁷ Harris, *supra* note 357, at 594.

³⁶⁸ *Id.*

³⁶⁹ See Goodman, *supra* note 115, at 697.

³⁷⁰ Thomas, *supra* note 43, at 1443.

³⁷¹ Stacy, *supra* note 181.

³⁷² See *id.* at 2031.

³⁷³ *Id.* at 2045.

recognizes how the public and private, national and international, are deeply connected, rather than bordered entities. As she writes, “Globalization creates a dynamic interchange that has enlarged the scope of all forms of relationships — economic, political, social, cultural, and religious — between those living in the United States and those living outside its borders.”³⁷⁴ As examples, Stacy cites Anne-Marie Slaughter’s and Harold Koh’s work, which views globalization as a powerful tool in creating ways for private citizens to influence their world; one powerful example that she offers is the example of courts who seek guidance in court decisions from other jurisdictions.³⁷⁵ Koh, too, recognizes globalization as a new world order that supplants the previous system of sovereignty; as part of this trend, he draws attention to the existence of individuals who face multiple loyalties, to “sub-national ethnic groups and broader global, religious, ethnic, cultural, and issue-based movements.”³⁷⁶ Within this context, individuals face a broad array of loyalties — some corporate, some private, and some community-based — and each intersect powerfully with national boundaries.³⁷⁷ While one might conclude that the nation-state might be shrinking, or perhaps becoming less relevant, Stacy argues, powerfully, that sovereignty is not receding, but rather changing in response to the transformation of the social contract that reflects the changing conditions of globalization and the growth of international human rights.³⁷⁸

A very influential work by Abram and Antonia Handler Chayes discusses an emerging principle that relates to Stacy’s in many respects: “the new sovereignty.”³⁷⁹ Their principle of a new sovereignty focuses on a robust conception of membership in a

³⁷⁴ *Id.* at 2031.

³⁷⁵ *See id.* at 2041 (citing Anne-Marie Slaughter & William Burke-White, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1115 (2000)).

³⁷⁶ *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 303 (2002).

³⁷⁷ *See* Stacy, *supra* note 181, at 2043 (citing Koh, *supra* note 376, at 305).

³⁷⁸ *Id.* at 2044. Consider, for example, the large number of international sources mentioned in Lawrence-Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). *See, e.g.*, P.G. & J.H. v. United Kingdom, 2001-IX Eur. Ct. H.R. 197; *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981); *see also Eldred v. Ashcroft*, 537 U.S. 186, 195–96 (2003) (referring to how the 1976 U.S. Copyright Act aligned U.S. terms with the international standard adopted under the Berne Convention and how the Copyright Term Extension Act harmonizes with the copyright term adopted by the European Union in 1993). For more discussion of the role of international law in U.S. Supreme Court decisions, see generally Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 126 (2005); Janet Koven Levit, *Going Public With Transnational Law: The 2002–2003 Supreme Court Term*, 39 TULSA L. REV. 155 (2003).

³⁷⁹ *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995). A key development, which relates to the new sovereignty, involves the development of legal scholarship questioning the role of the state in comparison to the emergence of transnational norm development. *See, e.g.*, Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism”*, 5 THEORETICAL INQUIRIES L. 47, 59 (2004); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005).

global community, which Anne-Marie Slaughter has described as a positive conception of sovereignty, which empowers states to join in collective efforts to address global and regional issues.³⁸⁰ As she further explains:

In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, “connection to the rest of the world and the political ability to be an actor within it.”³⁸¹

The recharacterization of sovereignty is dynamically poised to consider sovereignty, less as a function of control, and more as a set of responsibilities that affect both internal functions and external duties.³⁸² In this way, the authors posit that an international regime does more than simply reduce transaction costs, but instead takes on an active role in “modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime.”³⁸³

To accomplish this goal, Stacy proposes a framework of responsible governance, one that embraces a framework of representative democracy, an assumption of full agency that rests with the citizen, and a sovereign’s obligation to the social, economic, and cultural rights of the citizen as well.³⁸⁴ We see elements of this approach in the Court’s observations in *Lawrence* that majoritarian morality serves as insufficient grounds for regulating same-sex sexuality.³⁸⁵ Because *Lawrence* operates without and outside of a stated requirement of expressive identity, it offers us a richer and more complicated picture of the private self. In doing so, perhaps a utopian reading of *Lawrence* offers us the ability to consider gay rights and sexual identity in terms of the need to reckon with the relevancy of categories like race, class, ethnicity, religion, and disability, among others.³⁸⁶ At the same time, to the extent that such considerations affirm the private at the cost of the public, it fails to take up a more radical approach, and instead ignores, and in fact perpetuates, lasting inequalities in public spaces for sexual minorities.

Yet perhaps *Lawrence*’s limitations, as I have suggested, signal the need for a more robust conception of intersectionality between the private and public as well. Here, its offering of a theory of sexual sovereignty decries a need for the recognition of the

³⁸⁰ See Anne-Marie Slaughter, *Security, Solidarity and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619 (2005).

³⁸¹ See *id.* at 629.

³⁸² *Id.* at 630–31.

³⁸³ CHAYES & CHAYES, *supra* note 379, at 229.

³⁸⁴ Stacy, *supra* note 181, at 2048.

³⁸⁵ *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).

³⁸⁶ Bond, *supra* note 218, at 74.

intersections between public and private spaces for empowerment with respect to sexual autonomy, just as it requires a similar recognition of the interaction between positive and negative conceptions of liberty. In other words, *Lawrence* must, to be truly effective, take up the call of intersectionality — and recognize that empowering the private domain of sexuality requires a fuller protection of the “publics” of sexuality — whether they affect one’s outward expression, one’s choice of partner, one’s sexual activities in public, or one’s associational choices.

By recognizing a dynamic, rather than static relationship between the private and public aspects of sexuality, future courts interpreting *Lawrence* might look more closely at how, for example, empowerment in private spaces affects, and thereby lends support to, equality in public spaces, and vice versa. Charles Taylor’s formulation of recognition argues that the discourse of recognition requires both a dialogue in the private, intimate sphere, as well as the public one.³⁸⁷ The public sphere, he writes, concentrates on the notion of “a politics of equal recognition,”³⁸⁸ comprising the equal dignity and universal equality of all citizens, which requires the equalizing of rights and entitlements, as well as the notion that the politics of equal dignity require not only an “identical basket of rights and immunities,”³⁸⁹ but also a seminal principle that correlates with the “politics of difference,”³⁹⁰ namely that each individual or group carries a unique, distinct identity that is separate from everyone else.³⁹¹ Along these lines, consider Katherine Franke’s treatment of the case handed down by the Constitutional Court in South Africa, which found the Sexual Offenses Act to be unconstitutional on equality, dignity, and privacy grounds. In that case, Justice Ackermann compared the law’s treatment of a kiss between two males to a kiss between two females or a heterosexual couple at a public gathering.³⁹² Under the law’s treatment of a same-sex sexual act in a public place, Justice Ackermann observed that the male couple would be guilty of an offense, even though the lesbian and heterosexual couples were not.³⁹³ Commenting on this striking observation, Franke argues:

What is remarkable about this hypothetical is the degree to which its absurdity does not depend on a conception of privacy. The kiss is in public, in front of an audience, and is explicitly erotic in nature. It is the disparate legal treatment of similarly situated kissers that strikes Justice Ackermann as absurd and unfair, not the location in which the same-sex kissing takes place.

By reading the dignity right in light of an equality right, the court in *National Coalition* was able to articulate the constitutional infirmity of the Sexual Offenses Act in a way that differs substantially from what the Court accomplished in *Lawrence*. While

³⁸⁷ Taylor, *supra* note 77, at 37.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 38.

³⁹⁰ *Id.*

³⁹¹ *See id.* at 37–38.

³⁹² *See* Franke, *supra* note 4, at 1406.

³⁹³ *See id.*

Justice Ackermann foregrounds equality and dignity and backgrounds privacy in his opinion, Justice Kennedy foregrounds privacy, backgrounds dignity, and rejects the equality argument altogether. With a change of emphasis, Justice Kennedy could have made *Lawrence* turn on a recognition of how sodomy laws inflict a badge of inferiority, indeed a *badge of the closet*, on gay men and lesbians.³⁹⁴

Here, as Franke suggests, I would argue for a more dynamic — indeed, intersectional — picture of the relationship between private and public in the wake of *Lawrence*. It calls for a realization that acceptance in public space is equally vital to a flourishing, healthy identity in private space, and vice versa.

CONCLUSION

In the end, however, as *Lawrence*'s progeny has demonstratively shown, a politics of privacy, to be effective, must be melded to a broad notion of equality in citizenship if the concept of *true* sexual autonomy is to be at all effective. Whether *Lawrence* accomplishes this goal on a global scale depends on context and community, as I have suggested; but it also represents a dynamic shift in the global conversation beyond moralistic principle towards larger goals of liberty, autonomy, and tolerance. In short, *Lawrence* reflects the dynamic, converging, and sometimes conflicting relationship between culture and law, but it does so on a grand, global scale that demonstrates the need for drawing upon other jurisdictions to define our conceptions of citizenship. At the same time, it also demonstrates the potential for law to transcend its limitations, and to offer to the public a normative vision that fails to distinguish between gay, straight, lesbian, or bisexual in protecting the right to seek self-fulfillment and expression. That in itself is a crucial triumph which signals an unlimited host of possibilities.

³⁹⁴ *Id.* (footnote omitted) (emphasis in original).