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## The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy

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## SYMPOSIUM ARTICLES

### THE LOGIC AND EXPERIENCE OF LAW: \* *LAWRENCE v. TEXAS* AND THE POLITICS OF PRIVACY

*Danaya C. Wright\*\**

The U.S. Supreme Court's June 2003 decision in *Lawrence v. Texas*<sup>1</sup> may prove to be one of the most important civil rights cases of the twenty-first century. It may do for gay and lesbian people what *Brown v. Board of Education*<sup>2</sup> did for African-Americans and *Roe v. Wade*<sup>3</sup> did for women. While I certainly hope so, my enthusiasm is tempered by the fact that discrimination on the basis of race or gender has not disappeared. Will *Lawrence* signal meaningful change, or will its revolutionary possibilities be stifled by endless cycles of excuse and redefinition? The case is important, but I worry that it may not go far enough. In this Essay, I explore the unique problems of gay civil rights, the limits of legal formalist discourse, and the importance of making the private public. I end with my own story of where I was when I heard the news of *Lawrence* because I believe strongly that making public our private stories is necessary to ensure that the experiences of law become the logic of law.

Looking on the events of the past few months, *Lawrence v. Texas* can be called a watershed moment in the battle for gay rights. Social pundits, politicians, and ordinary people have had their eyes opened to the

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\* The title comes from Justice Oliver Wendell Holmes's pithy mantra of the legal realists' movement that "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1923).

\*\* Professor of Law, University of Florida, Levin College of Law. This Essay began as an introductory presentation for the First Annual Lambda Legal Alliance Law & Policy Conference at the University of Florida, Frederic G. Levin College of Law, on January 24, 2004. The title of the conference was "Re-Framing the Debate: Legal and Social Implications of *Lawrence v. Texas*. In the Areas of Gay Marriage, Florida's Gay Adoption Ban, and U.S. Military Policy." I would like to thank the student members of the U.F. Lambda Legal Alliance, the *University of Florida Journal of Law & Public Policy*, and especially Diane Lourdes Dick, for asking me to speak at the conference, and for encouraging me to write something more formal for publication with the other articles arising out of the conference. This was truly one of the most interesting conferences I have attended in my professional career. I also want to thank all of the University of Florida student organizations who sponsored the conference and enabled us to bring some very exciting speakers to Gainesville.

1. 123 S. Ct. 2472 (2003).
2. 347 U.S. 483 (1954).
3. 410 U.S. 113 (1973).

discrimination that gay people face on a daily basis. Sexual orientation has justified hatred and violence against a minority that has had to fight tooth and nail simply to preserve the right to petition their government for protection.<sup>4</sup> They have been vilified and discriminated against because the very thing that identifies them as gay – homosexual intimacy – has been criminalized in a country that claims to value privacy.<sup>5</sup> When states are allowed to criminalize a particular act, and then define people based on

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4. See *Romer v. Evans*, 517 U.S. 620, 623 (1996). *Romer* struck down Amendment 2, approved by the voters of Colorado to their state constitution, which stated:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

*Id.* at 624; *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994). In the equal rights/special rights discourse, conservatives try to argue that legal protections on the basis of sexual orientation are a form of special rights that blue-eyed, or left-handed people, for instance, do not have. The fallacy, however, is that blue-eyed and left-handed people are not fired from their jobs, viciously attacked, or denied their civil rights because of those characteristics. It is true that most forms of private discrimination are still permitted in the personal choices that people make, including the choice to be homophobic or racist. However, equal protection means that in certain fundamental contexts, like employment, housing, and government benefits, discrimination on the grounds of sexual orientation would be just as illegal as discrimination on the basis of race or gender. It is precisely because people do discriminate on the grounds of sexual orientation and not on the basis of eye color that equal protection demands recognition of equal rights for gay people.

5. See *Roe*, 410 U.S. at 152. Although a fundamental right to privacy is not explicitly listed in the Constitution, the Supreme Court has found a right to privacy in the “penumbras” of other enumerated rights. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In that case, Justice Douglas conceptualized a right of privacy that necessarily accompanies other fundamental rights articulated in the Constitution; for example, the freedom of speech and the notion of personal and bodily liberty both imply that the government will not intrude or dictate the individual’s exercise of these rights. See *id.* After the recognition of this right of privacy, that right has been extended to include numerous areas of intimate decision-making. See, e.g., *Roe*, 410 U.S. at 152-53 (finding that the right of privacy protected the individual’s right to decide whether to procreate); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (finding a right of privacy to possess obscene materials). At the same time, I certainly recognize that there is great debate over the act/identity divide. Are gay people identified as gay because they engage in certain acts? Or do they retain their identity as gay regardless of their sexual activities? For a good discussion of the act/identity issue, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

their desires to so act, the state makes a person's very identity a legitimate reason for discrimination. I hope *Lawrence v. Texas* has changed that.

The history of gay rights in the twentieth century in this country has not been inspiring. Gay and lesbian persons have been fired from their jobs,<sup>6</sup> denied custody of their children,<sup>7</sup> prohibited from adopting children,<sup>8</sup> refused health benefits,<sup>9</sup> excluded from civic organizations,<sup>10</sup> denied the benefits of marriage,<sup>11</sup> and physically maimed and killed by bigots who get lighter sentences because the victims are gay.<sup>12</sup> Gay and lesbian literature has been censored and stifled by criminal obscenity charges.<sup>13</sup> Criminal sodomy laws, passed in over half of the states, outlawed most and

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6. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331-32 (9th Cir. 1979) (holding that employment discrimination based on homosexuality is not prohibited by Title VII); *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (holding that the State of Georgia's revoking its offer of employment because of plaintiff's same-sex "marriage" did not violate her constitutional rights). Not only can homosexuals be fired from private or state employment, they can also be terminated from military service under the federal "Don't Ask, Don't Tell" policy. 10 U.S.C. § 654(b)(2) (2004).

7. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (denying custody to mother based in part on lesbian relationship).

8. See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18, 827 (11th Cir. 2004) (examining Florida's adoption statute under rational basis review, and concluding that its prohibition of adoption by homosexuals is not irrational).

9. See *Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516, 520-22 (Colo. Ct. App. 1994) (holding that definition of "family" for purposes of medical leave policy was a political question, and that denial of application for sick leave to care for same-sex domestic partner was not discrimination because of sexual orientation); *Hinman v. Dep't of Pers. Admin.*, 167 Cal. App. 3d 516, 530-31 (Ct. App. 1985) (holding that administration of dental plan allowing benefits to spouses merely distinguished between married and unmarried employees and did not discriminate against homosexual employees); see also Philip S. Horne, *Challenging Public- and Private-Sector Benefit Schemes Which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners*, 4 LAW & SEX. 35 (1994).

10. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-61 (2000) (holding that the Boy Scouts is an "expressive association" and that forcing such groups to include homosexual members would impinge on their First Amendment rights).

11. See Federal Defense of Marriage Act, 1 U.S.C. § 7 (2004) (defining "marriage" and "spouse" for all purposes of federal law as a union of a man and a woman). For further discussion of gay marriage, see also Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

12. *Schick v. State*, 570 N.E.2d 918, 921 (Ind. Ct. App. 1991) (upholding a conviction for voluntary manslaughter where the defendant beat the victim to death in response to his homosexual advances). See generally WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (discussing laws that permit discrimination against gay people).

13. See Nancy Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 440 (2000).

sometimes all forms of sexual expression between persons of the same sex.<sup>14</sup>

State constitutional amendments have been proposed to deny gay people equal rights.<sup>15</sup> Laws prohibiting gay people from adopting have been passed, and continue to be upheld.<sup>16</sup> Parents continue to lose custody of their children unless they remain in the closet.<sup>17</sup> These legal barriers to full participation in civil society combine with the public intolerance of homosexuality as a contagious social disease; the result is that gay people are forced to live their lives at least partially in the closet.

When gay people cannot tell their coworkers why they must leave early to care for their own children, or when they always show up single to social events, they are constructing a wall between their public and their private lives. That wall forces many gay people to live double lives in fear of exposure that might cost them their jobs, and inevitably forces them to subordinate their personal lives or deny their own identities.<sup>18</sup> The result of the criminalization of homosexual behavior and the denial of civil liberties is that core aspects of gay peoples' lives must be invisible. As their lives are silenced and erased, hidden from history,<sup>19</sup> and denied equal status and meaning, the reality of oppression appears to disappear as well.

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14. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003). As the Court explained in *Lawrence*, most of the statutes that criminalized same-sex sodomy were passed in the 1970s and only nine states had done so. *Id.* at 2479. However, when *Bowers v. Hardwick* was decided in 1986, 25 states criminalized sodomy among same-sex and different-sex couples. *Id.* at 2481 (citing *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986)). By 2003, only 13 states criminalized sodomy in both same-sex and opposite sex couples. *Id.* However, despite the trend away from the criminalization of sodomy, Louisiana upheld its sodomy statute as recently as 2000. *State v. Smith*, 766 So. 2d 501, 503 (La. 2000).

15. See Amendment 2 in Colorado, struck down in *Romer v. Evans*, 517 U.S. 620, 624 (1996). In Oregon, Idaho, and Washington, state initiatives to prohibit the state from granting equal protection rights to gay people were proposed, but most failed by slim margins. See, e.g., ARLENE STEIN, *THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY'S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS* (2001).

16. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); see also Lambda Legal, Overview of State Adoption Laws, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=399> (last visited May 15, 2004).

17. *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); see *Ex Parte D.W.W.*, 717 So. 2d 793, 795-96 (Ala. 1998); *Eldridge v. Eldridge*, 42 S.W.3d 82, 84 (Tenn. 2001); Elizabeth Trainor, Annotation, *Custodial Parent's Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order*, 65 ALR 5TH 591 (2003).

18. See Halley, *supra* note 5; see also EVE SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990).

19. See MARTIN DUBERMAN ET AL., *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* (1989).

Homosexuality disappears, the closet disappears, and with them the moral obligation to refrain from treating people unjustly.<sup>20</sup>

It is troubling that this marked discrimination could occur in a nation that has already embraced a legal recognition of civil rights. Unlike many other forms of difference, homosexuality is easily hidden, and therefore easily ignored by the majority culture. While skin color, gender, physical disability, and even certain religious affiliations can be marked and visible, homosexuality is often disguised or subsumed into a heterosexual public persona,<sup>21</sup> and the criminalization of the mere status of identifying as gay forces it even deeper into the closet. Moreover, though gayness may subject one to unequal treatment, it generally does not qualify one to be a discrete and insular minority for which the Constitution's equal protection provision might provide some relief.<sup>22</sup> The invisibility of gayness is precisely what allows gay people to be denied the rights to equal treatment. Because being gay is defined in our society as an identity based on acts that take place in private, there arises an uneasy tension between the private realm of intimate behavior which is constitutive of identity and the public realm of legal rights and political power which is consequent to that identity. As Justice Kennedy explained in *Lawrence*, "[w]hen homosexual conduct is made criminal by the law of the State, that

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20. Although the murderers of Matthew Shepard and Brandon Teena were convicted and are serving time, there is a prevalent public perception that homosexuality, and especially sexual overtures made by gay people to straight people, exonerates the violent response. Numerous states permit a homosexual advance to serve as a defense to a murder charge, reducing it to manslaughter. See, e.g., *Schick v. State*, 570 N.E.2d 918 (Ind. Ct. App. 1991); see also Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

21. On passing in the straight world, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

22. Ironically, fundamental equal protection and due process protections for minority groups have been limited to those discrete and insular minorities who are inherently visible, and this criterion derives from an economic substantive due process case about regulations on filled milk. See *U.S. v. Carolene Products*, 304 U.S. 144 (1938). In footnote 4 of *Carolene Products*, Justice Stone acknowledged that economic regulations affecting business relations could be more easily regulated without running afoul of constitutional liberty and property interests than laws infringing enumerated individual rights and discriminating against discrete and insular minorities. *Id.* at 152 n.4. Why equal protection jurisprudence has relied on the footnote 4 mandate of discrete and insular minorities is an interesting subject of much scholarship. The requirement of an insular minority has allowed the denial of equal rights for women, and the requirement of a discrete minority has justified the denial of equal rights to gay people. Because gay people are not visibly different, they generally do not qualify as a discrete class. They cut across race, gender, age, class, and religious categories, and generally they do not isolate themselves in discrete neighborhoods or occupations.

declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>23</sup>

The history of the gay rights movement, therefore, has been a history of making homosexuality visible.<sup>24</sup> For that reason, coming out or proclaiming one’s homosexual identity in a public setting is the ultimate political act of the gay movement. It may be that the visibility of over four thousand gay couples getting married in San Francisco will be more effective in eradicating discrimination than the legal changes inspired by *Lawrence*.<sup>25</sup> Further, it is important that the civil disobedience of the gay rights movement is not about sit-ins at lunchroom counters, or refusing to move to the back of the bus. Rather, it is about the quintessentially private decision to exchange vows of fidelity with another person.<sup>26</sup> This breakdown of the public/private divide not only reflects the feminist mantra that the personal is the political,<sup>27</sup> but it reveals a refusal by gay people to accept the oppression of criminalization of identity as merely a private rather than a political act.

But only if *Lawrence* protects public as well as private rights will it have the capacity to redefine gay life in this country. Though I can think of nothing more intrusive than the police breaking into my bedroom during intimate moments, to the extent the Court’s ruling is interpreted to protect only the privacy rights in the behavior that defines my identity, it has the potential to force me back into the closet. By recognizing a fundamental right to privacy for homosexual as well as heterosexual people, the Court has chosen to protect my private life. The question for the next decade is whether my privacy rights will be recognized as containing the political right to demand equal treatment in public. The Court’s protection of

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23. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

24. DUBERMAN ET AL., *supra* note 19.

25. See Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1; Thomas Crampton, *Spitzer and New Paltz Mayor Meet About Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at B4; Matthew Preusch, *Oregon County, With Portland, Offers Same-Sex Marriages*, N.Y. TIMES, Mar. 4, 2004, at A26 (all discussing the granting of marriage licenses to same-sex couples in San Francisco, California; New Paltz, New York; and Portland, Oregon). Recently, however, the California Supreme Court voided all the San Francisco gay marriages. 2004 WL 1794627 (Aug. 12, 2004).

26. I use the word marriage here not because what the people are doing in San Francisco, Portland, and New Paltz are marrying, for it is unclear whether their actions will carry the legal rights of marriage, but rather because they are participating in a public discourse about the political, legal, and social consequences of an intimate act.

27. See, e.g., SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN’S LIBERATION MOVEMENT (Robin Morgan ed., 1970); see also Catherine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, 93, 100 (1987) (“The private is the public for those whom the personal is the political”).

privacy in *Lawrence* may be defined only to protect my closet. Or, it may be defined to protect the supremely political act of being labeled as gay in the public world. I believe that gay people cannot rest on the decision in *Lawrence* or be content with protections of private life. They must embrace visibility in order to demonstrate how private discrimination has a profoundly public impact. A brief history of one aspect of the Court's jurisprudence, the use of the Brandeis brief, will illustrate why I believe forty-one hundred gay marriages in San Francisco may have more effect on eradicating homophobia than the important decision in *Lawrence*.<sup>28</sup>

In 1905 the Supreme Court was asked to decide whether a New York law prohibiting bakery workers from working more than ten hours a day or more than sixty hours a week was unconstitutional. In that case, *Lochner v. New York*,<sup>29</sup> a bakery owner argued that the law interfered with his right to enter into contracts with bakery workers, that the "right to purchase or to sell labor is part of the liberty protected by the [fourteenth] amendment,"<sup>30</sup> and that the statute did not have an adequate relation to the public health, safety, or welfare to justify the infringement on the owner's liberty of contract. Whatever benefits accrued from such a law, according to the bakery owner, were simply private benefits for the workers themselves and did not have general public effect. Thus, because unwholesome bread did not result from overworked bakers, there was no public benefit sufficient to balance the infringement on liberty permitted by the law. It was argued that the law provided a purely private benefit to the bakers' health, one that could, and should, be negotiated in the free market. The employer argued that bakery workers should be free to bargain with employers to work in unhealthy and dangerous conditions as well as in healthy conditions; any restraints on the ability to freely contract to work in particular conditions was a violation of both parties' rights to freedom of contract.<sup>31</sup>

The Court agreed with the employer and struck down the maximum hours law, just as it had struck down a number of minimum wage and

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28. See Suzanne Herel, *Court Halts Gay Vows*, SAN FRANCISCO CHRON., Mar. 12, 2004, at A-1; Julie Sullivan, *Oregon's Gay Rights Fight*, THE OREGONIAN, Mar. 16, 2004, at A-06.

29. 198 U.S. 45 (1905).

30. *Id.* at 53.

31. *Id.* at 56. The Court held that both employers and employees are similarly situated for purposes of exercising their rights to freedom of contract. *Id.* It stated: "Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." *Id.* The Court also elaborated, however, on how the occupation of baker is not inherently unhealthy, though any job if pursued for long periods could become unhealthy. In rejecting the health justification of the law, the Court distinguished between the job of a baker, which is relatively harmless, and the job of a miner, which is inherently dangerous. *Id.* at 59-62.



protective labor laws in the preceding decades.<sup>32</sup> The majority felt that there was no real basis on which to justify the law as a health law, and that instead “the real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business.”<sup>33</sup> In essence, the majority held that the Constitution was based on a free market economy that enabled employers to wrench as much work as they could out of employees who were “free” to decline the job, or negotiate for better terms, if they did not like the conditions. The *Lochner* decision epitomized the abstract legal principle of freedom of contract and was applauded as a correct application of formal legal rules and prior precedents.<sup>34</sup> Freedom, for the Court, would include freedom to enter into contracts to harm oneself. Such absolutist thinking would presumably allow a person to voluntarily and freely sell herself into slavery.<sup>35</sup>

In a strong dissent, Justice Harlan voiced the progressive view that the

liberty secured by the Constitution of the United States to every person within its jurisdiction does not import . . . an absolute right

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32. The period between the mid-1870s and 1937 has been referred to as the “*Lochner* era” because the *Lochner* decision is seen as typical of the Court’s laissez faire approach to state and federal legislation. The Court took an activist position in striking down a wide variety of state and federal laws that interfered with the free market economy on the grounds that liberty interests in freedom of contract and property interests protected by the due process clause of the Fourteenth Amendment can be infringed only upon a showing of a compelling public health, safety, or welfare justification. Despite being referred to negatively as the “*Lochner* era,” and despite the Court’s complete repudiation of the reasoning in *Lochner* and thus the demise of substantive economic due process, empirical research shows that the Court during this period upheld more legislation than it struck down. See EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARDS A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (1996) (discussing economic substantive due process).

33. *Lochner*, 198 U.S. at 64.

34. The decision accorded with legal formalist principles as enforced by such Justices as Stephen Field, Joseph Bradley, Rufus Peckham, and Mahlon Pitney who authored numerous decisions striking down state and federal laws that interfered with economic interests. KEYNES, *supra* note 32, at 117-23.

35. Ironically, while most liberal thinkers of the past few centuries have been unwilling to allow the principle of freedom of contract to be expanded so far as to allow a contract for slavery, or a contract to end one’s own life, they have not been troubled by the marriage contract which, according to some views, is not very different. Under nineteenth-century marriage laws, women surrendered all legal rights except the right not to be killed, to their husbands. They would be divested of all property, of rights to their children, of the responsibility for certain criminal behavior; they could be locked up, removed to other states, chastised and constrained by their husbands. For an interesting look at the differences between traditional liberal contract theory and the application of contract doctrines to women, see generally CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

in each person to be, at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.<sup>36</sup>

Justice Harlan reiterated a truism that has always been accepted by civil society, that freedom necessitates reasonable restraints so that others can meaningfully exercise their own rights as well.<sup>37</sup> My right to swing my fist ends at your nose. Despite the rhetoric, the *Lochner* decision was not, at its core, about absolute freedom of contract on the one hand and restraints on those freedoms on the other; rather, it was about the wisdom and legitimacy of protective labor legislation in the Gilded Age of expanding capital markets and a surplus of labor that was causing destructive competition, wholesale exploitation of workers, and pricing schemes that would ultimately lead to the Sherman Antitrust Act and the creation of the Interstate Commerce Commission.<sup>38</sup> What one does not get from reading the *Lochner* decision is any context as to why bakery owners wanted bakers to work more than sixty hours per week, what impact that was having on the overall market in bread, nor why bakery workers felt that legislation was a more effective means of protecting their interests than free negotiation.<sup>39</sup> The harnessing of abstract legal principles to promote a particular economic theory ultimately resulted in the Court privileging employers' interests while laying claim to a position of objective neutrality. That claim to neutrality masked the injustice of a legal rule that ignored the reality of the law's impact on different peoples' lives.

Labor organizations, which had once again been defeated in their attempts to outlaw unfair labor practices and to provide healthy work conditions, decided to try a different approach after their loss in *Lochner*. Instead of focusing on labor conditions for all employees, they would seek to get a law passed that would protect working conditions for women on

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36. *Lochner*, 198 U.S. at 67 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

37. The idea that rights are always correlative, i.e. only as extensive as equal and correlative rights of others, is a classic liberal position illustrated in the Lockean Proviso, developed by John Locke, that property could be privatized by the mixing of one's labor in unowned resources only to the extent that there is no waste and that enough is left for others to do the same. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27, *TWO TREATISES OF GOVERNMENT* 265, 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (property rights are only justified "where there is enough, and as good left in the common for others").

38. See KEYNES, *supra* note 32, at 98.

39. *Id.* at 120-21. The real reasons may have had more to do with debates between union shops and nonunionized shops than public health. Competition from nonunion shops was undermining the protective labor movement. See also PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990).

the grounds that unhealthy work for women led to unhealthy women which led to unhealthy homes and unhealthy children.<sup>40</sup> By singling women out for differential treatment on the grounds that the health of the race depended on healthy mothers, these labor organizers hoped that once the Court accepted special treatment, they would be forced to extend the protections to men under the equal protection clause.<sup>41</sup> Just four years later, in 1908, the Court faced an Oregon law that prohibited women laundry workers from working more than ten hours a day.<sup>42</sup> After the employer challenged the Oregon law figuring it would be a slam dunk after *Lochner*, the State of Oregon hired Louis Brandeis, who had not yet been elevated to the bench of the Supreme Court, to write its brief.

Brandeis' brief was an entirely new approach to legal argument.<sup>43</sup> In the brief he collated examples of U.S. and foreign legislation supporting the state's position, as well as extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor were dangerous for women.<sup>44</sup> And in a complete repudiation of the legal formalism of *Lochner*, the Court upheld the Oregon law. Justice Brewer explained that the law could treat women differently from men because they simply are not similarly situated:

Even though all restrictions on political, personal and contractual rights were taken away, and [woman] stood, so far as statutes are

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40. For a thorough history of the labor movement in the early twentieth century and the importance of special protective legislation for women, see SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN: 1905-1925* (1987).

41. I cannot help but watch the debates about a constitutional amendment prohibiting gay marriages as the resurrection of differential treatment as a strategy for protecting fundamental rights. As I discuss further, *infra*, the idea that equality, freedom, and liberty can be protected through unequal treatment raises a host of theoretical problems. In feminist theory, differential treatment has been a staple of progressive claims, but it has not been proposed very seriously in the sexual orientation debates. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1993); DEBORAH RHODE, *JUSTICE AND GENDER* (1989).

42. *Muller v. Oregon*, 208 U.S. 412, 416 (1908).

43. For interesting discussions of the history of the Brandeis brief and the role of social science data in litigation, see generally Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993); Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Mary Murphy Schroeder, *The Brandeis Legacy*, 37 SAN DIEGO L. REV. 711 (2000); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000).

44. *Muller*, 208 U.S. at 419 n.1. Some might call it junk science today. See Rustad & Koenig, *supra* note 43, at 106 n.63.

concerned, upon an absolutely equal plane with [man], it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.<sup>45</sup>

The decision in *Muller v. Oregon* was the wedge that would open the door to progressive labor legislation, as well as a whole host of new deal policies regulating businesses and labor practices. In the midst of destructive economic practices of the day and a recalcitrant Court, the Brandeis brief opened the door to looking on the very real, contextualized experiences of the people affected by the laws rather than on the abstract legal principle of freedom of contract.<sup>46</sup> Nearly ten years later, the Court would fully reverse its *Lochner* decision in *Bunting v. Oregon*<sup>47</sup> and uphold protective labor legislation for men not just for a limited class of people. The Brandeis brief was critical in proving that what appear to be just legal principles do not necessarily result in justice for those who live their lives in the shadow of those laws.

With the overruling of *Lochner* and the gradual acceptance of a whole host of new deal legislation regulating wages, hours, licensing standards, and working conditions,<sup>48</sup> the Supreme Court finally took the position that human liberty interests — privacy, speech, health, and autonomy — would prevail over the capitalist worship of the almighty dollar. The demise of substantive economic due process, which was motivated in great part by the social science data used in the Brandeis brief of *Muller*, not only

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45. *Muller*, 208 U.S. at 422.

46. *Muller* marked the triumph of legal realism, a jurisprudential theory that recognized the changing nature of law, that rejected *stare decisis* when equity demanded, and that looked to the reality of law's effects rather than the logic of the law. Oliver Wendell Holmes, Jr. and Louis Brandeis were early proponents of the legal realist movement. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1923). It is generally safe to say that legal formalism was completely replaced by legal realism at the latest by the mid-1960s when the Court took what many believe were activist positions in striking down laws interfering in personal liberties such as privacy rights, abortion rights, and equality rights.

47. 243 U.S. 426 (1917).

48. The Supreme Court, in response to Franklin Roosevelt's threat to expand the Court from nine justices to fifteen, arguably relinquished the battlefield to the legislatures to regulate business and economic interests because it accepted the appropriate place of social science data. Legislatures are routinely credited with having the resources to undertake substantial fact-finding and are recognized as the appropriate body to consider extrinsic data in making their determinations. Courts, on the other hand, are constrained by the limits of the case or controversy doctrine to consider only such data as directly pertains to resolving the dispute at hand. See KEYNES, *supra* note 32, at 132-33.

subordinated class and property interests to fundamental liberty interests, but it showed that formal legal principles about freedom do not always result in real freedom for the people governed by those laws.

Probably the most important example of the influence of the Brandeis brief in the twentieth century, and of the critical principle that examining people's lived experiences is fundamental to evaluating the justness of any given law, are the companion cases of *Plessy v. Ferguson*<sup>49</sup> and *Brown v. Board of Education*.<sup>50</sup> In 1892, Homer Plessy purchased a ticket to travel in a whites-only railroad car. Plessy was arrested when he refused to comply with the conductor's order to sit in the car reserved for colored people and was ejected from the train. The railroad company was merely complying with a Louisiana statute that required segregation of the races in railroad cars.<sup>51</sup> In studying the 1890 railroad segregation law, Cheryl Harris claims that it "represented the rising sense that legislatively mandated segregation was needed to protect white womanhood, and by extension white civilization from the chaos of Black freedom."<sup>52</sup> The Louisiana law, similar to hundreds of Jim Crow laws, was premised on the idea that intermingling of the races would destroy the purity of the white race and the order of white society.<sup>53</sup> Plessy's challenge called into question the idea that extending rights to a minority undermined the privileges of the majority.

In 1896, by a vote of 7 to 1, the Supreme Court rejected the challenge and held that separate but equal satisfied the dictates of equality embedded in the Fourteenth Amendment. The majority opinion stated that the object of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality."<sup>54</sup> Separate but

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49. 163 U.S. 537 (1896).

50. 347 U.S. 483 (1954).

51. *Plessy*, 163 U.S. at 540; 1890 La. Acts 111, at 152.

52. Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in *CONSTITUTIONAL LAW STORIES*, 200-01 (Michael Dorf ed., 2004).

53. Does that sound familiar? Conservative advocates of the Jim Crow laws argued that the purity of the white race would be destroyed by extending legal rights to excluded minorities, the social order for the white majority would somehow be threatened. In contemporary discussions of gay marriage, echoes of these earlier arguments are clearly discernible. Opponents of gay marriage assert that the expansion of the legal and social institution to include same-sex pairings would somehow undermine the hegemony of heterosexual marriage.

54. *Plessy*, 163 U.S. at 544. The majority tried to justify race-based distinctions as being for the public good and not for the annoyance of a particular class, when it stated:

equal was held to be legal equality even if people's lives were not equal. Justice Brewer waved away the reality of segregation when he stated:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>55</sup>

Not only was the reality of African-American lives subsumed in an abstract legal principle, Justice Brewer suggested that whatever inequality was felt by the stigmatized class was a result of their own thin skin in feeling ashamed or angry or hurt at their exclusion from the rights and privileges of the majority class. For Justice Brewer, inequality would exist only in the logic of formal legal rules, not in the experiences of those governed by the rules.

Justice Harlan's dissent pointed out the fallacy of thinking that extending rights to some lessens the rights of all. He stated:

Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.<sup>56</sup>

Justice Harlan scorned the thin disguise of "equal" accommodations, for everyone knew that separate but equal was everything but equal. Most

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In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring . . . white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.

*Id.* at 549-50.

55. *Id.* at 551.

56. *Id.* at 560.

importantly, however, Harlan scorned the claim that protecting constitutional rights for a small minority would undermine the peace and order of the overwhelming majority.

Nearly sixty years later, in 1954, the Court reversed its *Plessy* decision in the landmark case of *Brown v. Board of Education*.<sup>57</sup> With a lengthy brief outlining the very destructive impact of separate but equal, and with social science data on the psychological harm of racial difference, a unanimous Court rejected the abstract legal principle that equality could be achieved through the institutionalization of difference. The sanctioning of different treatment for persons of different races, at least for a time, would be no longer permitted. Footnote 11 of the decision in *Brown* referenced six psychology articles detailing the harms that racial minorities experienced under separate but equal,<sup>58</sup> yet nearly fifty years after *Muller* and the Brandeis brief, numerous critics decried the Court's reliance on "such flimsy foundation as some of the scientific demonstrations in these records."<sup>59</sup> If the science was bad, they argued, then supreme constitutional rights not based on abstract principles would be founded on thin air.

Despite the Court's acceptance of social science data to inform it of the real life effects of legal rules, thirty-two years after *Brown* the Supreme Court ruled that there was no express constitutional right to engage in homosexual sodomy in the 1986 decision of *Bowers v. Hardwick*.<sup>60</sup> Because there was no privacy right, there would also be no equal protection violation when homosexual persons were treated differently than heterosexual persons in the enforcement of criminal sodomy laws.<sup>61</sup> A law treating the two groups differently could be justified on the basis of protecting heterosexual privacy, just as racial segregation was justified on the grounds of protecting the white majority. Although the Court focused solely on the narrow issue of a fundamental right to homosexual sodomy,

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57. 347 U.S. 483 (1954).

58. *Id.* at 494 n.11.

59. Edmund Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 158 (1955); see also Blumenthal, *supra* note 43, at 14 (discussing the legal community's criticism of the reliance on social science data in *Brown*).

60. 478 U.S. 186, 187 (1986).

61. Because the Georgia statute at issue in *Bowers* outlawed sodomy between homosexual as well as heterosexual adults, the Court chose not to address the equal protection violation that lay in the fact that the statute was enforced only against the former. Justice Stevens, dissenting in *Bowers*, did not understand why the Court accepted the case as an as-applied challenge to the Georgia law rather than a facial challenge which would, presumably, raise the privacy rights of heterosexual couples. Ironically, because the case was decided as an as-applied challenge, the equal protection issue did not arise because the state did not have to justify its differential application of the statute. *Id.* at 200-01 (Stevens, J., dissenting).

which it claimed it could not find anywhere in the text of the Constitution, its denial of a privacy right meant that gay people's public lives would be defined by a lack of rights in their private lives. Such a denial of privacy would starkly contrast with the recognized and protected privacy rights to marriage and procreation that inhere in heterosexual couples and highlight how the protection of private decision-making necessitates protection of public rights. Without privacy, gay peoples' private actions could be labeled criminal, and they could therefore be denied a multiplicity of public rights and privileges.

According to the *Bowers* majority, allowing a small minority the freedom to partake of the same rights and privileges as the majority would destroy the heterosexual family, marriage, and the foundations of civil society. The decision in *Bowers v. Hardwick* stunned the liberal legal community who thought *Brown* had settled the matter.<sup>62</sup> Even if gay people did not deserve the strict legal protections that were reserved for racial minorities, there could be no question that longstanding animus and discrimination had prevented gay people from living safe and free lives. If laws discriminating against racial minorities, women, illegitimate children, and illegal aliens would be struck down, how could laws discriminating against homosexuality still stand in the late twentieth century? Of course, one reason was that *Bowers* was decided on due process privacy grounds and not on equality grounds.<sup>63</sup> But the fact that the

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62. Joseph Robert Thornton, *Bowers v. Hardwick: An Incomplete Constitutional Analysis*, 65 N.C. L. REV. 1100 (1987); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Mitchell Lloyd Pearl, Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773 (1988); Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988); George W. M. Thomas, Note, *Privacy: Right or Privilege: An Examination of Privacy After Bowers v. Hardwick*, 39 SYRACUSE L. REV. 875 (1988); Michael R. Engleman, Note, *Bowers v. Hardwick: The Right of Privacy — Only Within the Traditional Family?*, 26 J. FAM. L. 373 (1987/1988); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988).

63. Justice Stevens, dissenting, noted that this case cannot be limited to its due process logic, for he recognized that intimate sexual behavior could not be regulated between married adults. Consequently, either certain persons do not have the same privacy interests as others, which he believes violates equal protection doctrines, or the state can legitimately enforce the law unequally against gay people because it has a compelling state reason to do so. Habitual dislike or ignorance, however, does not satisfy a legitimate state interest in unequal enforcement. *Bowers*, 478 U.S. at 218-91 (Stevens, J., dissenting).



justices relied on due process does not explain how they could have believed the protection precedents did not apply.

When I was in law school in 1991, I attended a talk by then-retired Justice Lewis Powell, the swing vote in *Bowers*, and I heard him say to the audience of hundreds of law students and law professors, that he had been wrong in *Bowers*.<sup>64</sup> The southern gentleman, who knew the horrors of race discrimination first-hand, admitted when it was just a bit too late, that he now realized he had made a mistake. For nearly twenty more years, one man's error would haunt the lives of millions of Americans. Gay people would continue to be fired, beaten, imprisoned, scorned, hated, and made to feel ashamed of who they were because of one man's mistake. If you do not think it matters who is in the oval office, just think of the legacy of a single Supreme Court justice. It matters. It is a matter of life and death.

This brings me to the point of the conference. It took nearly sixty years to correct *Plessy*, and over thirty to correct all of the adverse legal consequences of *Lochner*.<sup>65</sup> Perhaps we should count ourselves lucky that it took less than twenty to correct *Bowers*. While time perhaps has brought more rapid change to the way people think of gay people in this country, the decision in *Lawrence* relied, once again, on the wealth of social science data that showed the Court that separate but equal is not equal in practice, that freedom of contract is not freedom in people's lives, and that a denial of privacy has ramifications that extend far beyond the bedroom. Abstract legal principles about equality, freedom, and privacy have great power to uplift our spirits and they may be the staple of political rhetoric, but they cannot be the sole source of legal rules. Law exists in the interactions between people, in the interstices of human relationships. Laws affect people's lives in very real ways. Equality and freedom in the abstract are not equality and freedom in real life. Perhaps we cannot ever really obtain equality, freedom, and privacy in our own lives. Perhaps laws are inevitably too abstract. But if we cannot achieve true equality, at least by finally addressing the lived experiences of GLBT people, the Court has achieved another important value of law: justice.

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64. See Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling: Vote to Sustain Sodomy Law at High Court Called Mistake*, N.Y. L.J., Oct 26, 1990, at 1; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct 26, 1990, at A3; DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE*, 660-61, 667 (1994) (all reporting how Justice Powell in October 1990 stated that "I think I probably made a mistake" in voting with the majority in *Bowers*).

65. Although *Lochner* was reversed in 1917 in *Bunting v. Oregon*, 243 U.S. 426 (1917), it was not until 1937, and the landmark case of *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937), that the Court firmly adopted the rule that it would not interfere with economic legislation.

It is ironic that in *Brown*, *Muller*, and *Bunting* the word justice never once appeared. It did appear in one quote in *Bowers* which was repeated in a footnote in *Lawrence*. The only case that actually engaged the idea of justice was *Plessy* and that was done only by Harlan in the dissent. But the recognition of the impact of laws on people's public and private lives that underscored the decisions in the latter three cases shows that attempting to do justice is more important than taking about it. Not only did the Texas sodomy law label a voluntary intimate act criminal, it carried collateral consequences, such as mandatory sex offender registration in other states and notification of the conviction on job applications. Impacts such as these, in addition to "demean[ing] their existence [and] control[ing] their destiny,"<sup>66</sup> makes the intimate decisions of gay people grounds for subjecting them to surveillance and coercion in public areas of employment, family decision-making, and housing.<sup>67</sup> While it is not always true that considering the impact of laws in peoples' lives will lead us toward just results, I firmly believe that *not* considering such impact is unjust.

So how do we become a legal system in which judicial decision-making can properly take account of the impact of laws in peoples' lives? Does the judiciary usurp the proper realm of the legislature when it turns to social science data to understand how laws play out in real-life contexts? Certainly some scholars and jurists would try to limit the influence of social science data; many claim that this literature is often biased and unreliable, constantly open to reinterpretation in light of changing attitudes. If the social science data that often fills amicus briefs is little more than *junk science* compiled to serve particular political ends, then does the Court have an obligation to not stray away from abstract legal principles and into the realm of normative values if it would seek to do justice? There is much debate in scholarly circles about the reliability of social science data and its capacity to reproduce mainstream values and socialized hierarchies.<sup>68</sup> While I am not qualified to pass judgment on those arguments I am convinced that the way each of us lives our lives, on an individual level, has profound implications for the justness of legal rules.

Let me illustrate this point by reminiscing about where I was when I heard about the *Lawrence* decision. I was in the Charlotte airport when the

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66. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

67. *Id.* at 2485 (O'Connor, J., concurring).

68. See, e.g., Rustad & Koenig, *supra* note 43, at 91; Monahan & Walker, *supra* note 43, at 477; K.L. Broad, *Critical Borderlands & Interdisciplinary, Intersectional Coalitions*, 78 DENV. U. L. REV. 1141 (2001).

decision came down and I had called home on my cell phone to say that I had safely arrived from the first leg of my trip. My partner told me all about the headlines and was frustrated that she could not obtain the text of the Court's opinion. I remember quite vividly that I was standing right outside the candy store on the end of the food court and was trying to find a quiet, isolated place to talk on the phone with her about the details of the decision. I used the words "gay," "queer," "sodomy," "equal protection," "due process," "privacy," and a whole lot of other words that I just knew were being overheard by passersby. I felt uncomfortable that I was talking about things the rest of the world did not want to hear, things that affected my life in countless ways, but did not affect theirs. To be more private, I tucked in between a wall and a decorative pillar outside one of the stores in the concourse, with my back to the hallway of people streaming toward their planes.

We talked for what seemed like hours, but was instead just a few minutes and when we were finished, I walked on toward my plane feeling tremendous joy and relief; I was just thinking about the decision and letting it all soak in. By the time I got on the plane I was feeling really good — it was as though I had somehow been holding my breath for the Court to finally prove to me that it deserved all the faith I had had in it for the past twenty years. I happily ordered a glass of wine on the plane and announced to the passengers next to me that the Supreme Court came down with a really important decision that day and that I was celebrating. I did not tell them what the decision was about; I thought I should let them hear about it on the news and then think about the crazy woman sitting next to them happily muttering to herself and drinking her wine. That was a day of simply feeling on top of the world. I thought, "no one will be able to stop us now."

When I got off the plane I was amazed how the news coverage of the *Lawrence* decision eclipsed everything, even the coverage of the Michigan affirmative action decision in *Grutter* that had come down just the day before.<sup>69</sup> Both were important decisions, but I felt that *Lawrence* was a giant leap from the dark ages into the light, whereas the Michigan decision was one more small step in the sputtering fits and starts the Court has adopted in its approach to racial discrimination. Where it hemmed and hawed on race, it came down soundly and solidly in favor of a privacy right for all of us who do not adopt the dominant heterosexist model of intimate relations. One of the passengers had asked me if I had had anything to do with the decision and I said "no — not personally." But over the next few days I reconsidered what it meant to witness a change

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69. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

like this. I came to realize that I was not just a witness but also a participant.

What struck me was that I had witnessed one of those rare moments when the Court reverses itself. I became aware that my life, simply living my life as different and refusing to conform to an unjust legal norm, had had some impact on the decision. I thought of other watershed moments and became convinced that *Lawrence* happened because gay people refused to live their lives in the closet. It is not very often that the Court reverses itself so completely. The decision happened because gay people refused to accept injustice and refused to change their lives to fit a particular ideology. By stepping out of the closet, raising our voices, and making our private lives the visible signs of our oppression, we reclaimed our right to privacy. We proved the link between private and public choices.

But the success is also tempered by a fear that the true legacy of *Lawrence* may be the mere protection of intimate private behavior, i.e., protection of the closet, and not protection of the visible act of coming out of the closet that thousands of gay couples have begun by demanding legal recognition of their intimate relationships.<sup>70</sup> As the San Francisco newspapers chronicle the thousands of people who want public recognition of their love, these people make visible the reality that the private is the public. And it is not just gay marriage that is changing the American social landscape. It is conferences like the one put on here at this law school. It is the personal act of coming out to one's friends and employers. It is the mainstreaming of gay life through television shows like *Queer as Folk* and *The L Word*. It is the ordination of a gay Episcopal Bishop. It is the steadily increasing number of gay and lesbian persons who are raising children, taking care of aging parents, paying mortgages, doing their jobs, and trying desperately to lead meaningful and productive lives in a world of intolerance and bigotry. The greatest legacy of *Lawrence* may be the mobilization of the millions of gay people and their heterosexual allies who will fight against a constitutional amendment that, for the first time in this nation's history, legitimizes bigotry and hatred.<sup>71</sup>

We should never forget that it is the making visible of our private lives that has motivated the conservative elements of our society to push for a constitutional amendment that will force us back into the closet. This

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70. See *supra* note 25 (listing articles on same-sex marriages in San Francisco, California; New Paltz, New York; and Portland, Oregon).

71. For a discussion of the defeat of a federal constitutional amendment, see Sandeep Kaushik, *Two Battles Over Gay Marriage, Two Different Outcomes*, BOSTON GLOBE, July 26, 2004, at A3.

conference, and the papers that have been submitted for this symposium issue, reflect on the progress we have made, and the distance we have yet to go before the reality of our lives will be manifested in just and equal laws.