

THE ADVANTAGE OF HAVING A FEMALE PARTNER:

Some Reflections on Fourteenth Amendment Equal Protection

Timing matters. I suggest in this essay that there may even be a constitutional dimension to good timing. To begin to see how this idea—vague and strange, at present—makes any sense at all, consider a scene from D.H. Lawrence’s novel, *Lady Chatterley’s Lover*,¹ between Lawrence’s female protagonist, Lady Chatterley (“Connie”), and Michaelis, a man with whom Connie engages in a short-lived extra-marital affair. Lawrence writes:

When at last [Michaelis] drew away from [Connie], he said, in a bitter, almost sneering little voice:

‘You couldn’t go off at the same time as a man, could you?...’

She was stunned by this unexpected piece of brutality, at the moment when she was glowing with a sort of pleasure beyond words, and a sort of love for him. Because after all, like so many modern men, he was finished almost before he had begun...²

In this passage, Lawrence reveals at least a few problems between Connie and Michaelis. For one, Lawrence hints at strain and trouble in the couple’s relationship. The narrator describes Michaelis’ voice as “bitter,” “almost sneering,” and “little,” which conveys a sense of hostility between the lovers. But putting this aside, there remains a blaring sexual issue between Connie and Michaelis—a downright mechanical problem. He “finishe[s] almost before he...beg[ins],” and as a result they do not climax together, which he resents.

The couple has a timing problem.

I raise Lawrence’s bleak post-coital scene to pose the following initial question: How might the scene differ if both lovers were women? Consider the following answers. If Michaelis was a woman, the order of “finishing” would not matter in the same way. If Michaelis was a woman, her “finishing” would not necessarily end (or at least wind down) the specific sex act. If Michaelis was a woman, her “finishing” would not reduce Connie’s chances of also “finishing” during the same session.

Simply put, women are physically able to persist in sexual intercourse even immediately after having climaxed. As a result, a woman’s orgasm during an act of sex does not diminish the probability that her partner will reach orgasm during the same session, nor does it necessarily shorten the duration of the session itself. I take this to be an advantage of having a female partner.

This essay explores whether laws that prohibit homosexual conduct—laws of the variety struck by the United States Supreme Court in *Lawrence v. Texas*³—constitute a form of sex-discrimination by restricting this advantage of female partnership to men. The essay will proceed as follows. After making a few preliminary points, I will lay out the traditional legal arguments for the proposition that “anti-homo laws” (laws prohibiting homosexual conduct) constitute sex-discrimination. Then, I will suggest a new sex-discrimination argument. Here, I will argue that anti-homo laws constitute sex-discrimination because they keep women from a particular good to which men have legal access: a female partner. I will frontload the seminal constitutional arguments, the more legal discussion, but for those more interested in the “mechanics,” you may wish to go on to Part III.B. In a final section, I address some of my own reservations.

I. A FEW PRELIMINARY REMARKS

I do not mean for this essay to read like a manifesto of female supremacy. Women are not better partners for *all* men, nor for *all* women. The point, then, is not that *any* person without a female lover is suffering discrimination or missing out, but that under anti-homo laws, women *who want women* are being denied a specific benefit of female partnership—a benefit that bears on the non-trivial domain of sexual gratification. Heterosexual women and homosexual men do not enjoy this specific benefit or “advantage” of female partnership, but they do not want female partnership, so no exclusion occurs. Thus, rather than argue that women are superior lovers to men (as if such a claim would even make sense), I want to consider the extent to which anti-homo laws deprive women of something important that men may legally enjoy.

Second, I do not intend to make any empirical claim in this essay about the nature of desire, or about homosexuals' reasons for engaging in same-sex relationships. In addition, to the extent that I make empirical claims about sex practices and attitudes towards sex, I restrict my claims to practices and attitudes in the United States of America. Unless otherwise noted, sex studies to which I cite deal only with American subjects.

Lastly, I should say something about why this topic is worth taking up after the Supreme Court's decision in *Lawrence v. Texas*,⁴ which struck the Texas statute that criminalized homosexual intercourse. From the perspective of someone pleased with the result in *Lawrence*, there is arguably no need to attack anti-homo laws from a new angle when the desired outcome—the invalidation of such laws—has already been achieved. But perhaps invalidation of anti-homo laws is not the desired result; perhaps mere invalidation is not enough. Not criminalizing particular conduct differs from approving of such conduct. Noting this difference, Richard Posner observes that mere decriminalization is not “interpreted as placing a stamp of approval on homosexuality.”⁵ Understanding the variety of ways in which it is wrong to criminalize a conduct might actually generate reasons to approve of such conduct. If we care about extending the same respect to homosexuals (as homosexuals) that we do to heterosexuals (as heterosexuals), then mere toleration seems too weak a stance.

A. Orienting the Sex-Discrimination Argument

Consider the following four arguments supporting the proposition that it is wrong to prohibit homosexual conduct:

1. **Keep out** – Statutes that prohibit sexual intercourse between members of the same sex objectionably seek to control a personal and intimate relationship that is within the liberty of persons to choose without being punished as criminals. This argument comes from the Due Process Clause of the Fourteenth Amendment, and is sometimes called the “liberty principle.”
2. **Stop keeping homosexuals out** – Statutes that prohibit sexual intercourse between members of the same sex make homosexuals unequal in the eyes of the law by making homosexual conduct subject to criminal sanction. This argument comes from the Equal Protection Clause of the

Fourteenth Amendment, and is sometimes called the “equality principle.”

3. Stop keeping men/women out (“sex-discrimination_a”) – Statutes that prohibit sexual intercourse between members of the same sex make a formal distinction on the basis of sex. Though a man may legally perform oral sex on a woman, a woman who performed the identical act on another woman would be criminally sanctioned. The same discrimination would operate in the case of a man performing oral sex on another man. This argument also comes from the Equal Protection Clause of the Fourteenth Amendment.
4. Stop keeping women out (“sex-discrimination_b”) – Statutes that prohibit sexual intercourse between members of the same sex are part of an overall pattern of discrimination against women, wherein heterosexual males benefit from the propagation of rigid gender roles that code directly to sex status. Since same-sex relationships distort this coding, beneficiaries of the status quo use prohibitions of same-sex intimacy to prevent the distorting effect, and to perpetuate fixed gender roles that have historically subordinated women. This argument also comes from the Equal Protection Clause of the Fourteenth Amendment.

The first argument—the “keep out” argument—roughly summarizes the Supreme Court’s position in *Lawrence*. Justice Kennedy writing for the majority explained:

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 conduct without intervention of the government.⁶

The “keep out” argument emphasizes “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁷ Such autonomy is, of course, not unique to homosexuals or to women. Rather, the “keep out” argument is a general argument about the

kinds of privacy guaranteed by the Due Process Clause. The argument just happens to catch anti-homo laws in its net.

The second argument—“stop keeping homosexuals out”—roughly summarizes Justice O’Connor’s concurring opinion in *Lawrence*. In that case, Justice O’Connor favored viewing the Texas statute through the lens of the Equal Protection Clause rather than that of the Due Process Clause. Emphasizing that the Texas statute permitted *heterosexual* sodomy but prohibited *homosexual* sodomy, Justice O’Connor argued that by deciding the case on Due Process grounds, the majority overlooked the obvious issue of the statute’s unequal treatment of homosexuals as a group. O’Connor writes:

Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.⁸

The “stop keeping homosexuals out” argument does precisely what the “keep out” argument does not: it makes homosexuals’ group membership salient. Instead of focusing on a homosexual’s right to full ‘autonomy of self’—a right triggered on the basis of the homosexual’s status as a *person*—the “stop keeping homosexuals out” argument views homosexuals *as* homosexuals. The proponent of the “stop keeping homosexuals out” argument might ask: if the anti-homo law views homosexuals *as* homosexuals, ought not the undoing of the law do the same?

Finally, we come to the third and fourth arguments: sex-discrimination_a and sex-discrimination_b, respectively. These are both sex-discrimination arguments, and I consider them carefully in the following section. Before I do, though, it is worth noting that none of the arguments I have discussed so far are mutually exclusive. Perhaps this explains why Justice Kennedy glossed over the “stop keeping homosexuals out” argument, and failed to mention either of the sex-discrimination arguments at all: since none of the arguments are logically in conflict,⁹ selecting one does not require a rigorous comparative analysis or a detailed explanation of their relative merits. Rather, after calling the ‘stop keeping homosexuals out’ argument “tenable,”¹⁰ Justice Kennedy immediately added without elaboration, “...but we conclude the instant case requires us to address whether

Bowers itself has continuing validity.”¹¹ Without rejecting the “stop keeping homosexuals out” argument, and without even registering the sex-discrimination arguments, the *Lawrence* court simply followed a different line of argument—the “keep out” line. I turn now to a closer discussion of the traditional sex-discrimination arguments.

II. TRADITIONAL SEX-DISCRIMINATION ARGUMENTS AGAINST ANTI-HOMO LAWS

A. Stop Keeping Men/Women Out (Sex-Discrimination_a)

Maybe it is a bad sign for the sex-discrimination arguments that the only Justices to even address them in *Lawrence* were the dissenters. In his opinion for the dissent, Justice Scalia identifies the sex-discrimination_a argument, when he observes:

To be sure, [the Texas statute] does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women.¹²

Scalia admits that the Texas statute makes a distinction on the basis of sex. But, of course, some distinctions on the basis of sex are constitutionally permissible,¹³ and some may even be desirable.¹⁴ Recognizing this, Scalia searches for more in the sex-discrimination argument—some claim that either men or women are actually harmed by the formal discrimination. Scalia determines that the formal discrimination, which applies to men *and* women:

...cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.¹⁵

One might ask why Scalia takes formal sex-discrimination in marriage laws to *confirm* the propriety of formal sex-discrimination in anti-homo laws, when he could just as easily call into question both instances of discrimination. Assuming the constitutionality of marriage laws is question-begging in this context. In any event, Scalia sees no merit in the sex-discrimination_a argument by itself, in large part because it applies equally to men *and* to women.

Scalia then considers a difficult objection: the sex-discrimination_a argument is structurally identical to the argument against anti-miscegenation laws. In *Virginia v. Loving*,¹⁶ the Court invalidated anti-miscegenation laws, and deemed formal discrimination that applied “equally” to different groups violative of the Fourteenth Amendment. So why think such “equal” discrimination permissible in the context of sex-discrimination in anti-homo laws? In handling this objection, Scalia sets out to determine the appropriate level of scrutiny to be applied in analyzing anti-homo laws for sex-discrimination. On this, Scalia writes:

The objection is made...that the anti-miscegenation laws invalidated in *Loving v. Virginia* similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was ‘designed to maintain White Supremacy.’ A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.¹⁷

The comparison to *Loving* leads Scalia to consider whether the anti-homo laws betray any evidence of a discriminatory intent. If they do, then the “equal” treatment of men and women might be objectionable. If it turns out that anti-homo laws are designed to maintain Male Supremacy, then despite the fact that the Court subjects sex classifications to intermediate rather than strict scrutiny, *Loving* constitutes a striking precedent.

Asking whether a sex-based discriminatory intent lurks behind anti-homo laws is essentially asking whether the sex-discrimination_b argument, or the “stop keeping women out” argument—as I have been calling it—is a good one. Scalia does not struggle at all with the question, finding simply that, “[n]o purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies.”¹⁸ In one fell swoop, the dissenters conclude that no sex-discrimination argument can invalidate anti-homo laws. But is this conclusion right? In the following section, I consider arguments for the more robust of the two sex-discrimination arguments—the sex-discrimination_b argument that urges “stop keeping women out.”

B. Stop Keeping Women Out (Sex-Discrimination_b)

Given that the National Organization for Women filed an amicus brief in *Lawrence* that spelled out the sex-discrimination_b argument for the Court, the majority's response of stony silence, as well as the dissent's swift dismissal of the argument, is at least a little surprising.

Cass Sunstein, introduces the sex-discrimination_b argument nicely when he asks whether the “legal ban (and the social taboo)” of same-sex marriage¹⁹ may be the “product of a desire to maintain a system of gender hierarchy, a system that same-sex marriages tends to undermine by complicating traditional and still-influential ideas about the ‘natural difference’ between men and women?”²⁰ The idea here is that same-sex relationships call into question the “division of human beings into two simple kinds...[,]” which division is “part of sex-role stereotyping.”²¹

Because same-sex relationships do not divvy up roles according to sex status (since sex status is not a distinguishing factor in such relationships), the doling out of roles like “aggressive” and “passive,” or “breadwinner” and “caretaker” must be determined on the basis of some other criterion or criteria. The danger such relationships pose to proponents of anti-homo laws is that they create new spaces for men and women—spaces beyond traditional gender roles—exposing a lack of necessity in the old order of things.

As same-sex relationships create such new spaces for men and women, they demonstrate the possibility that sex and gender can be pulled apart. On the separation of sex and gender, Judith Butler writes:

When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one.²²

The idea of gender as a “free-floating artifice” threatens to complicate the tried and true system by which women have been historically subordinated. To the extent that same-sex relationships do, or are thought to, help to pull apart sex and gender, they throw a wrench in the machinery of gender hierarchy. This argument strikes me as tenable but, as I will discuss below, is subject to several criticisms.

III. ANOTHER SEX-DISCRIMINATION ARGUMENT AGAINST ANTI-HOMO LAWS: WOMEN ARE DENIED AN ADVANTAGE OF HAVING A FEMALE PARTNER (SEX DISCRIMINATION_C)

A. Reasons to Suggest A New Sex-Discrimination Argument

1. A Negative Reason: We Can Criticize the Old One

One reason to offer a new sex-discrimination argument is that maybe the sex-discrimination_B argument is not robust enough. Sunstein himself notes that because the sex-discrimination_B argument requires a claim about “real world motivations,”²³ the argument cannot show that anti-homo laws are “necessarily unacceptable in all theoretically possible worlds.”²⁴ The sex-discrimination_B argument needs a real world anchoring because it only becomes legally significant if impermissible intent motivates the relevant laws. In short, the sex-discrimination_B argument requires that the heavy lifting be done by the principle that “impermissible motivations are fatal to legislation.”²⁵ But that calls for some heavy lifting. If, in another theoretically possible world, the historical and continuing subordination of women vanished, then so too would the “impermissible intent” upon which the sex-discrimination_B argument depends. But this should not be troubling unless of course the sex-discrimination_B argument is just a veiled way of attacking another problem: discrimination against *homosexuals*, and not discrimination against women.

So let us consider a better criticism of the sex-discrimination_B argument. As a point against the sex-discrimination_B argument, Richard Posner writes, “to assimilate homosexual men to women reinforces rather than combats stereotypical thinking about homosexual orientation.”²⁶ Posner points out that the sex-discrimination_B argument depends upon the claim that same-sex relationships blur opposite-sex relationships. But this claim, Posner argues, has a cost since it assumes that homosexual men are like heterosexual women, and that homosexual women are like heterosexual men (why else would the feared blurring occur?). Or, so I understand Posner’s argument.

But Posner’s criticism of the sex-discrimination_B argument misfires. The sex-discrimination_B argument need not contain the premise that homosexual men act like heterosexual women, or that homosexual women act like heterosexual men. It need only contain the premise that those prohibiting homosexual conduct do so because *they* believe as much.

Or, perhaps better, proponents of the sex-discrimination_B argument could point out that the argument is less about attaching gender roles on the basis of stereotypes about gay people and more about *not*-attaching roles on the basis of sex. The whole basis of the sex-discrimination_B argument is the observation that sex cannot determine partners' roles in same-sex relationships. This alone undermines the "division of human beings into two simple kinds," which division is "part of sex-role stereotyping." Yet, this observation implies nothing about *which* roles will ultimately be played out in same-sex relationships.

Or, perhaps better still, those pressing the sex-discrimination_B point could take a different tack altogether. They could argue that proponents of anti-homo laws oppose homosexuality not because of their beliefs about how people act, but merely because they want women to be available to men, and men available to women, so that traditional gender roles can be played out. Homosexual relationships cannot instantiate the traditional male-female relationship that subordinates women. Proponents of the sex-discrimination_B argument can simply claim that it is for this reason that opponents of homosexuality find same-sex relationships destructive of prescribed gender roles.

Though I do not find Posner's criticism compelling, there is, I think, a problem with the sex-discrimination_B argument: The sex-discrimination_B argument does not seem to capture the *primary* harm inflicted by anti-homo laws.²⁷ While the perpetuation of gender stereotypes may be an incidental effect of the relevant prohibition, it is hard to believe that animus against women fuels anti-homo laws more than animus against homosexuals. The sex-discrimination_B argument can be resuscitated, however, if we recognize that the argument is not about displacing some victims of discrimination to make room for others. The point is not to urge, "It is about women! Not gays!" Rather, proponents of the sex-discrimination_B argument might say, the argument conceptualizes the prohibition of homosexual conduct as part of a larger whole—a heterosexual, patriarchal hegemony.

Sylvia Law, a proponent of the sex-discrimination_B argument, makes just this point when she explains that her work focuses on "heterosexism" rather than "homophobia" (and rather than "sexism," I would add). Law writes:

Although some individuals are indeed homophobic, heterosexism is a much broader phenomenon, structured into basic familial, economic and political relationships. Heterosexism shapes the lives, choices,

beliefs and attitudes of millions of people who experience neither fear nor hatred of gay and lesbian people.²⁸

Here, Law introduces “the broader phenomenon of heterosexism, not simply the more individualist homophobic attitude.”²⁹ Thus, Law situates anti-homo laws in the broader context of “heterosexism,” which phenomenon, she argues, seeks to preserve the social meaning of gender and to privilege gender-differentiated family arrangements. It is this heterosexist agenda, Law argues, that animates anti-homo laws, and marginalizes women and homosexuals at once. Understood this way, the sex-discrimination_b argument does not displace gay victims of discrimination to focus on female victims of discrimination. Rather, the argument exposes the common culprit behind both kinds of discrimination.

Many feminists and queer theorists alike have found the feminist-queer alliance fruitful. Broader theories, which align these two groups, seem to have great explanatory power and elegance. For example, in her paper, “The Traffic of Women: The ‘Political Economy’ of Sex,”³⁰ Gayle Rubin clarifies the relationship between compulsory heterosexuality and the compulsory adoption of gender roles, finding the situs for both forms of social coercion in gender:

Gender is not only an identification with one sex; it also entails that sexual desire be directed toward the other sex. The sexual division of labor is implicated in both aspects of gender—male and female it creates them, and it creates them heterosexual.³¹

Rubin argues that in one stroke—the prescription of gender roles—gendered sexes and heterosexuality become inextricably bound up. In this sense, it is easy to see that the sex-discrimination_b argument need not be seen as pitting victims of discrimination against each other at all. Rather it captures the sense in which anti-homo laws, rather than constituting a discrete example of discrimination, reveal a far-reaching web of discriminatory beliefs and practices, which affect multiple groups.³²

Fair enough. Understanding the sex-discrimination_b argument as an additional rather than exclusive argument makes it useful and appealing. I will therefore suggest a positive reason to offer a new sex-discrimination argument rather than a negative one.

2. A Positive Reason: A Due Process/Equal Protection Hybrid

A positive reason to offer a new sex-discrimination argument is that it would be nice to fashion a sex-discrimination argument that took some

lessons from *Lawrence*. If Law’s version of the sex-discrimination_b argument brings together two kinds of equal-protection claims—one that a homosexual might bring, and one that a woman might bring—I hope that my sex-discrimination_c argument will bring together two kinds of *Fourteenth Amendment* claims.

One nice thing about *Lawrence* is that it highlights the importance and sensitivity of sexual activity. And one nice thing about O’Connor’s “stop keeping gays out” argument—as well as the various “stop keeping women out” arguments that I discussed earlier—is that they highlight the importance of equality. By putting these two insights together, the sex-discrimination_c argument seizes on both the importance and sensitivity of intimacy with women and on a specific kind of inequality that requires redress. Let me turn, then, to what I call the sex-discrimination_c argument.

B. Some Mechanics

1. Of Sexual Satisfaction

A heterosexual male derives a certain benefit from having sex with a woman: his partner’s climax need not end the sexual interaction. The question is, does a woman derive the same benefit in having sex with a man? I suggest, the answer is, usually not.

Recall Connie and Michaelis in *Lady Chatterley’s Lover*. The full scene—from which I quoted only a portion at the beginning of this essay—tells an even more complex and somewhat unexpected story of the couple’s incompatibility. Lawrence writes:

When at last [Michaelis] drew away from [Connie], he said, in a bitter, almost sneering little voice:

‘You couldn’t go off at the same time as a man, could you? You’d have to bring yourself off! You’d have to run the show!’

This little speech, at the moment, was one of the shocks of her life. Because that passive sort of giving himself was so obviously his only real mode of intercourse.

‘What do you mean?’ she said.

‘You know what I mean. You keep on for hours after I’ve gone off...and I have to hang on with my teeth till you bring yourself off by your own exertions.’

She was stunned by this unexpected piece of brutality, at the moment when she was glowing with a sort of pleasure beyond words, and a sort of love for him. Because after all, like so many modern men, he was finished almost before he had begun. And that forced the woman to be active.

‘But you want me to go on, to get my own satisfaction?’ she said.

He laughed grimly: ‘I want it!’ he said. ‘That’s good! I want to hang on with my teeth clenched, while you go for me!’

‘But don’t you?’ she insisted.

He avoided the question. ‘All the darned women are like that,’ he said. ‘Either they don’t go at all, as if they were dead in there...or else they wait till a chap’s really done, and then they start in to bring themselves off, and a chap’s got to hang on. I never had a woman yet who went off just at the same moment I did.’

Connie only half heard this piece of novel, masculine information. She was only stunned by his feeling against her...his incomprehensible brutality. She felt so innocent.

‘But you want me to have my satisfaction too, don’t you?’ she repeated.

‘Oh, all right! I’m quite willing. But I am darned if hanging on waiting for a woman to go off is much of a game for a man.’³³

This scene, which readers learn constitutes “one of the crucial blows of Connie’s life,”³⁴ demonstrates a temporal incongruity likely to come up in opposite-sex sexual interactions that involve a penis and vagina.³⁵ In such interactions, a male is virtually guaranteed a sexual climax. Most often, it is male ejaculation that defines the duration of the sexual experience. For Connie, this set-up poses a problem because, in her experience, “so many modern men...finished almost before [they] had begun.”

Connie’s experience is not unusual. According to the well-known Kinsey sex study, 65% of college-aged men reach orgasm within five minutes of penetration, and 75% of married men reach orgasm within two minutes of penetration.³⁶

Once Connie determines that Michaelis' "passive sort of giving himself [is] so obviously his only real mode of intercourse[,]”³⁷ she solves the problem of their temporal incongruity by remaining “active” even following his climax. To Connie’s shock, this solution emasculates rather than gratifies Michaelis. For Michaelis, Connie’s persistence in the sex act following his orgasm robs him of his sexual agency and renders him useless. He accuses her of having “to run the show[,]” and of “go[ing] for [him],” indicating that he interprets her continuation of sex as a denigration of his sexual ability, and as an aggressive power-play.

That Michaelis and Connie do not climax simultaneously does not pose the real problem. Rather, Michaelis’s inability to continue in the sex act after he has climaxed does. If Connie ‘goes for him,’ then he resents her; if she does not, then she forfeits her opportunity to enjoy a climax.³⁸ If Michaelis and Connie’s case widely applies, then we would expect to see what I will call a “climax asymmetry”—a real disparity in orgasm rates between heterosexual men and women.

American sex research confirms that there exists such a climax asymmetry. According to a fairly recent sex study, 75% of men “always” achieve orgasm with their partner, as compared to only 29% of women (and this figure is not limited to orgasms from phallic penetration; it includes all orgasms).³⁹ In *The Case of the Female Orgasm: Bias in the Science of Evolution*,⁴⁰ Elisabeth A. Lloyd conducts a virtually exhaustive analysis of sexology itself, and the bias therein. She compiles the results of 32 sex studies that include data on orgasm frequency with intercourse, and critically assesses 21 scientific explanations of the female orgasm. In this work, Lloyd confirms the existence of a climax asymmetry and proceeds to explain why matters are actually worse than conveyed in the sexology literature. Lloyd summarizes considerable number-crunching from data across studies, and writes:

...it is well established in sexology literature that men and women do not necessarily have the same response to intercourse. There are very substantial numbers of women who do not have orgasm with intercourse on any given occasion, and also a substantial minority that *never* do, even though they are orgasmic. Nevertheless, a number of the authors I examined...all assume that sexual intercourse unproblematically yields orgasm for both men and women. What is most peculiar about these authors is their ritual citation of the sex literature, despite the

fact that the very results cited show exactly the discrepancy they ignore.⁴¹

Beyond the intellectual negligence that Lloyd describes above, she explains the ways in which a range of biases plague sexology. Some biases are scientific in nature (e.g., adaptationism—the presupposition that a trait that evolved served a particular adaptive function)⁴² while others are social in nature (e.g., androcentricism—the constant recourse to an exclusively male perspective).⁴³ But even *with* biases in sexology, the fact of a climax asymmetry seems undeniable.

Of course, the climax asymmetry is not necessary in opposite-sex sexual relationships. Michaelis could turn to other modes of sexually pleasuring Connie once his penis can no longer remain erect during a specific session of sex. He could, for example, use his hands or mouth to pleasure Connie once the temporal asymmetry springs up. To put the point simply: men can do everything to women that women can do to women, *and more*. But to also put the retort simply: they do not.

More often than not, opposite-sex lovemaking centers around the penis first and most.⁴⁴ Vaginal intercourse is deemed standard, while other modes of sexual pleasure (petting, digital and oral stimulation) are considered incidental or secondary to vaginal intercourse.⁴⁵ Additionally, given Kinsey's data regarding duration of intercourse (recall that 75% of men from Kinsey's married sample reported ejaculating within two minutes of penetration), the possibility that men might continue to engage in other forms of sex immediately following ejaculation would seem to depend somewhat on their post-orgasm energy levels. Unfortunately, these data do not give great promise for post-orgasmic follow-ups: some data suggests that "there is a strong tendency to sleep" following orgasm, and that such evidence "applies to male orgasm only."⁴⁶ To add insult to injury, there is "prominent evidence that *females* often have tendencies to wakefulness and continued states of arousal after orgasm."⁴⁷

But even if men were the ones apt to wakefulness and continued states of arousal after orgasm, a tendency to focus primarily on the penis would not be surprising. Underneath Michaelis' sneering voice and obvious hostility, readers can see his disappointment: women who are "dead down there" or who can only achieve orgasm by some non-phallic means make Michaelis feel like a sexual failure. It is not that Michaelis wants Connie's satisfaction *per se* (if this were so he would be happy about her "going for him"). Rather, he wants her satisfaction *through him*, and more specifically, *through his penis*.

Unsympathetic and sarcastic though Michaelis may be in his delivery, many men share his sentiment. Earning the disdain of feminists everywhere, Sigmund Freud theorized, “The sole criterion of frigidity is the absence of vaginal orgasm.”⁴⁸ For Freud, women who did not orgasm from phallic penetration were, in some sense, sick. Making a related point in more low-brow terms, a thirty-three year old man interviewed by *Glamour* magazine advised men everywhere, “When you find a woman who can come to orgasm through penetration and not just clitoral stimulation, keep her. She is a rare and wondrous thing.”⁴⁹ Like Michealis and Freud, this *Glamour* interviewee clearly has a pleasure hierarchy with stimulation *to and from* the phallus ranking at the top: he desperately craves a woman who can achieve more than “just” clitoral stimulation.

But phallocentrism runs even deeper than a mere pleasure hierarchy with the penis at the top. Phallocentrism prevails so completely that many people *exclusively define* intercourse as phallic penetration. Take for example the following dialogue between a self-described lesbian (“Alyssa”) and a heterosexual male (“Holden”) from the film *Chasing Amy*:⁵⁰

ALYSSA

...I’ve never really been attracted to men. I’m more comfortable with the idea of girls.

HOLDEN

Wait, wait, wait—you’re still a virgin?

ALYSSA

No.

HOLDEN

But you’ve only been with girls.

ALYSSA

You’re saying a person’s a virgin until they’ve had intercourse with a member of the opposite sex?

...Why? Why only then?

HOLDEN

...Because that’s the standard.

Okay, I’ll revise. Virginity is lost when the hymen is broken.

ALYSSA

Then I lost my virginity at ten, because I fell on a fence post when I was ten, and it broke my hymen. Now I have to tell people that I lost it to a wooden post I'd known my whole young life?

HOLDEN

Second revision—virginity is lost through penetration.

ALYSSA

Physical penetration or emotional?

HOLDEN

Emotional?

ALYSSA

Well, I fell in love hard with Caitlin Bree when we were in high school.

HOLDEN

Physical penetration.

ALYSSA

We had sex.

HOLDEN

Yeah, but not real sex.

ALYSSA

I move to have that remark stricken from the record. On account of it makes you come off as completely naive and infantile.

HOLDEN

Well where's the penetration in lesbian sex.

Alyssa holds up her hand.

HOLDEN

A finger? Come on. I've had my finger in my ass but I wouldn't say I've had anal sex.⁵¹

Holden is willing to call a promiscuous lesbian (a woman who, by her own account, has “slept with half the women in New York City”⁵²) a virgin because, for him, phallic penetration constitutes the touchstone for sexual activity. For Holden, phallic penetration exhausts the definition of true intercourse or, as he puts it, “real sex.”

Though Holden and Alyssa debate playfully in the scene above, viewers later learn that Holden was not joking. When a romantic relationship (unexpectedly) develops between the two, the film goes on to examine the effects of Holden's rigid definition of sex on the couples' relationship. Though Holden expresses no jealousy or judgment regarding Alyssa's extensive, hyper-active sex life with women, and in fact seems fascinated by the same, he becomes unhinged upon discovering that she experienced (some adventurous) sex with *men* in her youth. Upon learning this information, Holden suddenly becomes plagued with insecurity and anxiety about Alyssa's promiscuity. Alyssa confronts him about this:

ALYSSA

Do you mean to tell me that—while you have zero problem with me sleeping with half the women in New York City—you have some sort of half-assed, mealy-mouthed objection to pubescent antics, that took place almost ten years ago? What the fuck is your problem?!⁵³

Alyssa seizes on an apparent contradiction: Holden feels comfortable with (perhaps even excited by) Alyssa's sex life in one context (the context of homosexual intercourse), but feels threatened (perhaps even repulsed by) her sex life in another context (the context of heterosexual intercourse). The explanation is that Holden does not even *count* Alyssa's sex with women as sex. For Holden, all the lesbian "sex" in the world wouldn't render a woman promiscuous. On the other hand—and to Holden's dismay—Alyssa's sex with *men* counts, and because it cannot be uncounted, makes Holden question his feelings for Alyssa.

Holden is not alone. His perspective typifies the American attitude about what constitutes "real" sex. Professor Solanka, a character in Salman Rushdie's novel, *Fury*,⁵⁴ best explains the view that phallic penetration alone constitutes sex by comparing American attitudes towards oral sex with those in Great Britain:

In England...the heterosexual b.j. is almost never offered or received before full, penetrative coitus has taken place, and sometimes not even then.... It's *rare*. Whereas in America, with your well-established tradition of teenage, ah, 'make-outs' in the back of various iconic automobiles, 'giving head,' to use the technical term, precedes 'full' missionary-position sex more often than not; indeed, it's the most common

way for young girls to preserve their virginity while keeping their sweethearts satisfied...Thus, when Clinton affirms that he had never had sex with that woman, Moonica, the Bovine Ms. L, everyone in England thinks he's a pink-faced liar, whereas the whole of teen (and much of pre- and post-teen) America understands that he's telling the truth as culturally defined in the United States. Oral sex is precisely *not sex*.⁵⁵

Since oral sex is “precisely not sex,” sexual fantasy and energy remains steadily focused upon phallic penetration—the only “real” thing.

Not only does phallocentrism influence sex at the most atomic, definitional level, it also influence's common ideas about sexual pleasure: in addition to (allegedly) constituting the only “real” sex, phallic penetration also (allegedly) feels better than any other form of sexual or intimate contact. For example, *The Joy of Sex* a 1970s “how-to” sex manual —describes a full range of things partners can do to and for each other, but concludes by noting that of all the hundreds of possibilities, the “matrimonial position” (i.e., the missionary position) is the “most satisfying.”⁵⁶ But how is satisfaction determined, and whose satisfaction is being measured? If heterosexual females' satisfaction is being considered, and if climax is one fair proxy for satisfaction, then the author is, well, flatly wrong.

Women's preferences for clitoral and labial stimulation over vaginal stimulation are widely known, and have been repeatedly confirmed in the canon of American sex research.⁵⁷ One way to see this is to see how women bring themselves to climax when masturbating. According to the Hite Report, only 1.5% of women masturbate by vaginal insertion alone.⁵⁸ Kinsey likewise notes that women almost never masturbate solely in imitation of intercourse (by inserting something into their vaginas).⁵⁹ Further, clitoral stimulation appears vastly more likely to produce climax since orgasm is 370% more likely with masturbation than it is with vaginal intercourse. While Hite found that only 26% of her total population (of 3,000 subjects) regularly experienced orgasm from intercourse, she found a staggering 95% of the women who masturbated “could orgasm easily and readily, whenever they wanted.”⁶⁰ Kinsey found similar results,⁶¹ and concluded, “...the average female responds more slowly than the average male in coitus, but this seems to be due to the ineffectiveness of coital techniques.”⁶² Kinsey later added, “...the techniques of masturbation and of petting are more specifically calculated to effect orgasm than the tech-

niques of coitus itself.”⁶³ To put the point mildly, the weight of the scientific evidence suggests that the centrality of phallic penetration is not, contrary to the *Joy of Sex*, the most satisfying sexual arrangement for women.

Thus, in opposite-sex lovemaking there is profound difference between the possible and the actual: though it is of course *possible* for heterosexuals to continue sexual activity immediately following the male’s orgasm, as a general matter, the centrality and priority of the phallus prevents the realization of such a possibility.

2. Female-Female Intimacy Better Avoids Climax Asymmetry— The Stone Butch And Reciprocal Sex

Females are able to persist in sexual activity even after climaxing. Thus, during sex between two women, one woman’s climax need not mark the end of the sexual interaction, and the opportunity for a climax symmetry remains. Rather than make any broad descriptive claims about the ways in which women have sex with other women, I will use a few specific examples to make my point.

Take the case of female-to-female sex in the 1940’s and 1950’s. In *Boots of Leather, Slippers of Gold* (“*Boots*”),⁶⁴ Elizabeth Lapovsky Kennedy and Madeline D. Davis document the nature and movement of a specific community of lesbians in Buffalo, New York in the middle of the twentieth century. In chapter five of *Boots*, Kennedy and Davis characterize the Buffalo lesbians as either “butch” or “fem.” Describing this distinction, the authors write that being a butch or a fem involved the adoption of a style of dress, a manner, and a particular sexual role. The butches wore heavily starched shirts, with big cuff-links, and jackets that went below their waists; the fems wore high-heels, and make-up, and would have their hair done in a bun, a French twist, or with a ribbon in a pony-tail.⁶⁵ The butches “were expert mimics who had mastered the subtleties of masculine nonverbal communication”; the fems were “ladylike” and “glamorous” and would show their elegance in the way they held their cigarettes and drinks.⁶⁶

The Buffalo lesbians dragged their rigid butch-fem roles into the bedroom as well. There, butches focused on being “stone” or “untouchable,” meaning that they touched their fems’ vaginas, but not vice-versa.⁶⁷ Sandy, a stone butch interviewed by Kennedy and Davis explains, “I wanted to satisfy them [women], and I wanted to make love—I love to make love. I still say that’s the greatest thing in the world. And I don’t want them to touch me. It spoils the whole thing...I am the way I am.”⁶⁸ Later, Sandy adds, “I’ll swear on this tape or any bible you want, no girl has ever touched me. I mean the whole shot...You know they say, ‘Well what do

you get out of this?’ I say, don’t worry about me. Because I’m happy when they are, that is my specific role and I do my best.”⁶⁹ Elaborating on the concept of stone butches being “happy when [the fems] are,” Kennedy and Davis describe the “spontaneously orgasmic butches.”⁷⁰ For these butches, “their excitement level peaks to orgasm while they make love orally or digitally to a woman.”⁷¹ Some spontaneously orgasmic butches explain that masturbation gives them no pleasure whatever because “their sexuality [is] completely defined in terms of pleasing their fem.”⁷² Therefore, for the Buffalo butches and fems any sexual interaction would produce at least two orgasms (one for each partner), or none. At the risk of sounding depressingly consumed with reciprocity, I will put the point as follows: the Buffalo stone butches and fems experienced orgasms in even numbers.

Unlike Michaelis and Connie, a 1940’s Buffalo butch could always continue sex until her fem achieved climax. In fact, rather than having the male’s climax set the duration of the sexual encounter, for the Buffalo lesbians, it was the *fem’s* climax that marked the end. The difference: because the butch’s climax was based on, and immediately followed, the fem’s, no climax asymmetry resulted when one partner climaxed.

The butch-fem social and sexual dynamic marked a particular community at a particular time. The practices described above neither represent actual, nor exhaust possible, female-female sexual dynamics. In fact *Boots* itself notes the transition away from butch-fem sex roles to reciprocal love-making.⁷³ In the female-female mutual love-making model as well, women are likely to realize climax symmetry since female orgasms do not interrupt sexual encounters, giving both partners an opportunity to climax.

3. Sexual Satisfaction Is Important

In being denied the option to have a female partner, women are denied the benefit of having sexual experiences that continue even after their partners have climaxed. This, I claim, amounts to denying some women (those who wish to have female partners) access to an important mode of sexual gratification. Though men enjoy a particular benefit of having a female partner, women are denied the identical benefit.

My claim here may strike my reader as silly. Surely there is no constitutional right to an orgasm, the best orgasm, an orgasm achieved in record time, or to multiple orgasms. Fair enough. So I will say a few words here about why sexual satisfaction matters, and more specifically why discrimination in this area should be deemed a real threat to female development.

Before discussing the opportunity to achieve sexual satisfaction as a *right*, though, I’ll offer first a less legalistic point. Sexual gratification

makes people happy, and happy people are more likely to remain in committed relationships. The Kinsey group, studying sex practices in the 1950s, found a relationship between divorce and decreases in a wife's orgasm rate.⁷⁴ Opponents of homosexuality often talk about the importance to society of stable family units.⁷⁵ It seems to me that this recognition together with Kinsey's observation, would counsel in favor of arranging people with partners best-suited to provide sexual gratification. This point is really about understanding sexual gratification as a proxy for stability. Though the observation may be interesting to note (if true), there are certainly deeper reasons to ensure that women have adequate opportunities to achieve sexual gratification.

Restrictions in the domain of sexual activity are, I would suggest, on the same plane as those that deprive women of other important opportunities—educational, professional, and so on. Having just opted to pursue the sex-discrimination argument over *Lawrence's* due process argument, it may seem ironic that I now turn to *Lawrence* to develop my point about sexual satisfaction, but as I mentioned above, I view the sex-discrimination argument as approaching a hybrid due-process/equal-protection argument. At least, I think *Lawrence* offers some valuable lessons.

In reversing *Bowers v. Hardwick*,⁷⁶ the 1986 Supreme Court case that upheld a Georgia statute prohibiting sodomy (irrespective of the sex or sexual orientation of the participants), the *Lawrence* majority articulated the need to properly define the liberty interest at stake. Where the *Bowers* court defined the issue presented in that case as, “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,”⁷⁷ the *Lawrence* court defined the relevant liberty interest far more broadly. Concluding that the *Bowers* court had made a straw-man of its opponent by defining the relevant liberty interest too narrowly, Kennedy wrote, “To say that the issue in *Bowers* was simply the right to engage in *certain* sexual conduct demeans the claim the individual put forward.”⁷⁸ Just so here. Though I am not discussing a liberty interest in sexual activity (as the *Lawrence* court did), the insight remains applicable: while it seems silly to say that women have a constitutional right to “get off” a certain way (construing the relevant interest too narrowly), it does not seem silly to say that sexual satisfaction as understood in the context of full bodily integrity is something to which women deserve equal access (construing the relevant interest broadly). I can schematize the point as follows:

	The interest(s) at stake in <i>Bowers/Lawrence</i>	The interest(s) at stake in denying women access to sexual gratification with other women
Narrow construal of the relevant interest	Do homosexuals have a fundamental right to engage in sodomy? (The <i>Bowers</i> formulation.)	Do anti-homo laws deny women equal protection under the law by preventing them from having sex partners who can engage in a single act of sexual intercourse for an indefinite period of time?
Broad construal of the relevant interest	Does the State have the right to control the most private of human conduct (sexual behavior) in the most private of places (the home). (The <i>Lawrence</i> formulation.)	Do anti-homo laws deny women equal protection under the law by systematically denying them opportunities for sexual satisfaction that men enjoy?

Not only is the interest not-silly, it has been recognized as partially constitutive of full-blown human functioning.⁷⁹ In her book, *Woman and Human Development: The Capabilities Approach*,⁸⁰ philosopher Martha Nussbaum places “bodily integrity” on her list of ten central human functioning capabilities. Nussbaum defines “bodily integrity” as follows:

Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, i.e., being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; *having opportunities for sexual satisfaction* and for choice in matters of reproduction.⁸¹

Nussbaum recognizes the basic human need to have “opportunities for sexual satisfaction.” Understanding this capability narrowly, we might think Nussbaum is talking about a woman’s right to be free from genital mutilation—a practice that destroys any possibility of sexual satisfaction. But of course this is not (just) what Nussbaum has in mind. Rather, she views “bodily integrity” as among those capabilities that “exert a moral claim that they should be developed.”⁸² A moment’s reflection on what it might mean to “develop” one’s opportunity for sexual satisfaction leads to an understanding of the gravity of anti-homo laws. When a woman is prohibited from a kind of sexual satisfaction that men enjoy (e.g., intimacy with a woman), she is prohibited from developing her opportunity for sex-

ual satisfaction. This is a compromise of her bodily integrity, and perhaps a waste of one of her central human capabilities.⁸³

IV. OBJECTIONS AND REPLIES

A. The Sex-Discrimination_c Argument Makes Too Much of Mechanics

One might object to the sex-discrimination_c argument makes too much of the mechanics of sex. Mechanics have little to do with the actual experience of sex. As I myself have noted a few times already, what is “possible” has little bearing on what actually happens between two people. Perhaps sexual satisfaction is more like an accident of circumstances—the way a person smells, moves, the expression that falls over his or her face, and so on—rather than the predictable outcome of grinding parts.

I do not disagree that there is more to sex than its mechanics. To be sure, it may have played an important role in what soured Connie’s sexual relationship with Michaelis, but there was more of course—his “bitter, almost sneering little voice[,]” and perhaps a million other aspects of his person, personality, and presence that fell flat. True though all this may be, it is beside the point. Even if mechanics aren’t everything, they matter. It is by no means trivial that heterosexual men enjoy the quiet (or booming) confidence that penetration will almost surely lead to a climactic ejaculation. Though mechanics may not do or undo love, they can bear on a woman’s sexual luck (i.e., her chances of realizing climactic symmetry with her partner).

B. The Sex-Discrimination_c Argument Is Too Literal About Pleasure

Judith Butler might argue that I am too literal about pleasure. In *Gender Trouble*, Butler suggests that the conflation of pleasure with the real, or, “the belief that it is parts of the body, the ‘literal’ penis, the ‘literal’ vagina, which cause pleasure and desire is precisely the kind of literalizing fantasy characteristic of the syndrome of melancholic heterosexuality.”⁸⁴ By ‘syndrome of melancholic heterosexuality,’ Butler refers to a process of “becoming” gendered (or becoming “naturalized”), which means learning where on one’s body pleasure and desire literally reside, but doing so according to heterosexual norms.⁸⁵ Butler writes, “pleasures are said to reside in the penis, the vagina, and the breasts, or to emanate from them, but such descriptions correspond to a body which has already been constructed or naturalized as gender-specific.”⁸⁶ Butler might argue that by comparing the penis’ *literal* functions to the vagina’s *literal*

functions, I have unwittingly submitted to a hyper-literal (and probably gendered) conception of pleasure and desire.

In response, I can only suggest that this essay, which began as a literal investigation of the mechanics of male-female versus female-female intercourse, quickly developed into something else. Rather than focus on the mechanical possibilities of pleasure, I was forced to consider the social phenomenon of a pleasure hierarchy (e.g., Holden deeming an active lesbian a virgin because he ranks phallic penetration above digital or oral intercourse). This phenomenon, it turns out, has little to do with the *literal* location of pleasure or desire, and more to do with social attitudes toward the same.

Nevertheless, I am willing to admit that my argument too literally conceptualizes sources and varieties of pleasure and desire. And, as I've already noted, the argument centers on reciprocity to a somewhat depressing degree. I accept these objections, but still pursue the project because, too literal, or too consumed with reciprocity though it may be, it nevertheless addresses the reality of what Butler calls phallogentricism and takes seriously a woman's right to seek equal opportunities for sexual gratification. While mechanics, the literal loci of pleasure, and climactic reciprocity are not all there is to sexual gratification, they are part of it. The sex-discrimination_c argument seeks to recognize this in a new way.

C. The Sex-Discrimination_c Argument Is Not About Sex-Discrimination At All, It Is About *Lesbian-Discrimination*

Finally, one might respond that there remains a larger conceptual problem with my project—namely, that I take myself to be talking about sex-discrimination, when really I am talking about *lesbian-discrimination*. To put the objection simply: the so-called sex-discrimination_c argument does not discuss the subordination of women *as* women, but the denial that lesbians face as female homosexuals.

First, I take this to be a virtue of the sex-discrimination_c argument, not a vice. As Sylvia Law's argument against heterosexism brought together homosexuals and women *as groups in a political consciousness*, the sex-discrimination_c argument can bring together homosexuality and femaleness as *intersecting identities in a single person*. The argument is, I suggest, a way of experiencing the interaction between two identities together at once: the homosexual and the female (in any order).

Second, even if one interprets the sex-discrimination_c argument as a divisive force in feminism (since it affects homosexual women but not het-

erosexual women), unity may be overrated. Butler makes this sort of point by asking whether unity is necessary for political action, or rather whether the “premature insistence” on the goal of unity actually causes greater fragmentation. In answer to these questions, Butler suggests:

Without the compulsory expectation that feminist actions must be instituted from some stable, unified, and agreed-upon identity, [concrete actions that have purposes other than the articulation of identity] might well get a quicker start and seem more congenial to a number of “women” for whom the meaning of the category is permanently moot.

On this view, a lesbian need not be a feminist to want the right to have a female partner; a feminist need not be a lesbian to want women to be accorded the same rights as men. Thus, when “concrete actions” (e.g., changing or striking a law) are at stake, it might not matter much whether the sex-discrimination argument is about women or lesbians as such, and in fact packaging the argument for one identity or the other may only deepen differences.

Third, and finally, a particular form of discrimination need not affect all women to affect Women, or to constitute sex-discrimination. In *United States v. Virginia Military Institute* (“VMI”),⁸⁷ the Supreme Court held unconstitutional Virginia’s exclusion of women from its military college, the Virginia Military Institute. Was VMI about discrimination against (1) women, or about discrimination against (2) women who wanted an “adversative method” of military instruction that could leave them with a “heightened comprehension of their capacity to deal with duress and stress”?⁸⁸ What if we had a tidy name for (2)—something as tidy as “lesbian”—say, “militarafem”? Then would *VMI* be a militarafem-discrimination case rather than a sex-discrimination case? Is sexual gratification less important than military academies that employ the adversative method? The point is, an intersection of identities (e.g., homosexual/female, or military student/female) need not dilute any of the identities that intersect.

V. A CONCLUDING THOUGHT

Anti-homo laws constitute a form of sex-discrimination. Men enjoy a particular benefit from having female partners: their partner’s climax need not end their sexual encounter. Anti-homo laws systematically deny women this specific benefit—this advantage of having a female partner.

This is not to suggest, of course, that anti-homo laws drive lesbians into mens' arms. But, borrowing from sex-discrimination_b proponents, it is important to see the relationship between seemingly disconnected forces of oppression. The adrocentric model of heterosexual intercourse, which leads to climax asymmetries between heterosexual men and women, only aggravates the injustice of anti-homo laws. For, under such laws, lesbians—the women most likely to avoid the mechanical problem of a temporal incongruity with their sex partners—are denied their chance to develop their opportunities for sexual satisfaction. To use Nussbaum's phrase, their "bodily integrity" is compromised.

Heterosexual women suffer a climax asymmetry essentially because they do not *have* a penis (consider Connie, blamed by Michaelis for "going for him"). Under anti-homo laws, homosexual women are denied their opportunities for sexual satisfaction essentially because they do not *want* a penis. Thus, anti-homo laws affect lesbians and women more generally. Sensitive to this, the sex-discrimination_c argument urges that women have the right to develop sexually, and to pursue sexual satisfaction—though they do not have penises, and may not want them either.

NOTES

- 1 D.H. LAWRENCE, *Lady Chatterley's Lover* (Bantam Books, 1983).
- 2 *Id.*
- 3 539 U.S. 558 (2003) (striking a Texas statute prohibiting intercourse between members of the same sex on substantive Due Process grounds).
- 4 *Id.*
- 5 RICHARD POSNER, *Sex and Reason* 311 (1992) (Posner make this point somewhat vaguely, perhaps as a reason to stop at decriminalization, and not, as I am suggesting, as a reason to press on for affirmative approval of homosexuality).
- 6 *Lawrence*, 539 U.S. at 578.
- 7 *Id.* at 562. See generally, Bernard E. Harcourt, Foreword: "You Are Entering a Gay and Lesbian-Free Zone": *On the Radical Dissent of Justice Scalia and Other (Post-)Queers*. [Raising Questions About *Lawrence*, Sex Wars, and the Criminal Law], 94 *J. Crim. L. and Criminology* 503 (2004).
- 8 *Id.* at 582 (O'Connor, J., concurring) (citations omitted).
- 9 I say that there is no "logical conflict" between the arguments, but there could very well be a political conflict between them. In this sense, proponents of the various arguments may be at odds with one another though they urge the same result.
- 10 *Id.* at 574.
- 11 *Id.* at 574-75.
- 12 *Id.* at 559-60 (Scalia, J., dissenting).
- 13 See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (holding that a California statutory rape law that made males but not females criminally liable for engaging in sexual intercourse with a female under the age of 18 years old was constitutionally permissible since it was a "sufficiently reasoned and constitutional effort to control at its inception the problem [of teenage pregnancies.]" *Id.* at 482.). Note, however, that this case came before gender classifications came to be analyzed with "intermediate scrutiny."
- 14 Consider, for example, health care allowances for pregnancy leave. A tricky question arises about whether a classification based on pregnancy is analytically identical to a classification based on sex, but assuming it is, it is probably desirable to treat pregnant women different than men, since they are, with respect to reproductive capabilities, not similarly situated.
- 15 *Lawrence*, 539 U.S. at 539.
- 16 388 U.S. 1 (1967).
- 17 *Lawrence* at 539-40 (Scalia, J., dissenting) (citations omitted) (emphasis in original).
- 18 *Id.* at 540.
- 19 Though Sunstein is talking about same-sex marriage, while I am talking about anti-homo laws, it is easy to see that the point still applies. Besides, at the time Sunstein wrote the paper from which I quote, *Lawrence* had not been decided, and Sunstein wrote about issues not squarely settled by *Bowers v. Hardwick* as a matter of constitutional law.
- 20 CASS SUNSTEIN, "Homosexuality and the Constitution", 70 *Ind. L. J.* 1, 16 (1994).
- 21 *Id.* at 21.
- 22 JUDITH BUTLER, *Gender Trouble* 10 (1990).
- 23 SUNSTEIN, *supra* note 20

- 24 *Id.*
- 25 *Id.*
- 26 RICHARD POSNER, "Wedding Bell Blues", *The New Republic*, December 22, 2003, at 33 (reviewing Evan Gerstmann's book, *Same-Sex Marriage and the Constitution*).
- 27 POSNER seems to agree with this criticism of the sex-discrimination_g argument. See *id.*
- 28 SYLVIA LAW, "Homosexuality and the Social Meaning of Gender", 1988 *Wis. L. Rev.* 187, 195-96 (1988).
- 29 *Id.*
- 30 GAYLE RUBIN, *The Traffic of Women: The 'Political Economy' of Sex* (1975).
- 31 *Id.* at 180.
- 32 It is along these lines that Butler refuses to model oppression at all—since doing so wrongly suggests that "oppressions can be summarily ranked, causally related, distributed among planes of 'originality' and 'derivativeness.'" BUTLER, *supra* note 22, at 19 (citation omitted). For precisely this reason, it would be a mistake to view the oppression of women and homosexuals as disconnected phenomena, the victims of which would be antagonistically positioned against one another. Never mind the case of lesbians, for example, who have intersecting identities (female and gay) and who, under the discrete model, would be in the awkward position of ranking their identities.
- 33 LAWRENCE, *supra* note 1.
- 34 *Id.*
- 35 Incidentally, this passage also demonstrates the sense in which opposite-sex love-making seems unnatural. Opponent's of homosexuality often point to the "fit" between a penis and vagina to demonstrate that opposite-sex love making is natural, and same-sex love-making unnatural. See, e.g., DR. DAVID REUBEN, *Everything You Always Wanted to Know About Sex (But Were Afraid to Ask)* (1969) ("Like their male counterparts, lesbians are handicapped by having only half the pieces of the anatomical jigsaw puzzle. Just as one penis plus one penis equals nothing, one vagina plus one vagina still equals zero."). But, if natural sex couplings are to be identified by fit and harmony, then perhaps the temporal asymmetry between male and female climaxes described by Lawrence makes opposite-sex couplings seem unnatural.
- 36 See PAUL H. GEBHARD, *The Kinsey Data: Marginal Tabulations of the 1938-1963 Interviews Conducted by the Institute for Sex Research*. Philadelphia: Saunders, 1979 (quoting Kinsey as saying that the two minute period to ejaculation though normal "may be most unsatisfactory to a wife who is inhibited or natively low in response.")
- 37 LAWRENCE, *supra* note 1.
- 38 There is a certain sense in which *Lady Chatterley's Lover* is the *worst* book I could cite in this paper. After all, the majority of the book focuses on Connie's incredible sexual connection with the lover she takes after Michaelis, Oliver Mellors. In the end, this is not incompatible with my paper because I do not argue that men cannot sexually satisfy women. I readily admit that that it may be the case that no woman in the world could sexually satisfy Connie, regardless of whether she can continue love-making even after having climaxed once. Maybe nobody in the world other than Mellors can sexually satisfy Connie. This paper is not about sexual orientation, and it is not about love. Therefore, the ways in which these phenomena might impact sexual gratification are beyond the scope of this paper. In any event, I certainly do not argue that a deficiency in males exists that will doom all opposite-sex love-making. I limit my discussion to a specific advantage of having a female partner.

- 39 LAUMANN ET AL, *The Social Organization of Sexuality: Sexual Practices in the United States* (1994) (also reported in the companion volume, MICHAEL ET AL, *Sex in America: A Definitive Survey* (1994)).
- 40 ELISABETH A. LLOYD, *The Case of the Female Orgasm: Bias in the Science of Evolution* (2005).
- 41 *Id.* at 224.
- 42 See *id.* at 229.
- 43 See *id.* at 233.
- 44 See, e.g., PETER MURPHY, Review Essay: “Toward A Feminist Masculinity”, *Feminist Studies* 15.2 (Summer 1989) at 356 (arguing that in the twentieth century the focus on male sexuality has rested on *penis’s* sexual prowess, rather than that of the man’s more generally).
- 45 See, e.g., REUBEN, *supra* note 35, at pp. 64-65 (In answer to the question “Is there anything wrong with fellatio and cunnilingus?” Reuben writes, “As a form of heterosexual activity incidental to penis-vagina intercourse, mouth-genital stimulation is not only perfectly alright to practice, but in many situations desirable...”).
- 46 LLOYD, *supra* note 40, at 225 (citing Gallup and Suarez (1983)).
- 47 *Id.* at 226 (emphasis added).
- 48 SIGMUND FREUD, *Three Essays on the Theory of Sexuality* (1905).
- 49 GLEN FREYER, “What Do Men Know, or Think They Know, about the Female Orgasm?” *Glamour* 93, no. 4 at 128 (1995).
- 50 KEVIN SMITH, *Chasing Amy* (View Askew Productions, 1997).
- 51 KEVIN SMITH, *Chasing Amy* (script available on line <http://www.hundland.com/scripts/ChasingAmy.txt>).
- 52 *Id.*
- 53 *Id.*
- 54 SALMAN RUSHDIE, *Fury* (2001).
- 55 *Id.* at 137.
- 56 ALEX COMFORT, *The Joy of Sex* 124 (1972).
- 57 See LLOYD, *supra* note 40, at 25 (citing Gebhard (1970), KINSEY ET AL. (1953), HITE (1976)).
- 58 SHERE HITE, *The Hite Report: A Nationwide Survey of Female Sexuality* 411 (1976).
- 59 KINSEY ET AL, *Sexual Behavior in the Human Female* 163 (1953).
- 60 HITE, *supra* note 58, at 59.
- 61 Kinsey found a much higher percentage of women who “always or almost always” experience orgasm from intercourse (39-47%) (Kinsey et al. (1953)), but as Elizabeth Lloyd points out, Kinsey “self-consciously used figures for orgasm frequency during intercourse *that included orgasm reached through direct manipulation of the clitoris.*” (LLOYD, *supra* note 40, at 26 (emphasis added)). Thus, Kinsey’s data on orgasm frequency during vaginal intercourse does not distinguish between vaginal and clitoral climax.
- 62 KINSEY, *supra* note 59, at 164.
- 63 *Id.* at 391.
- 64 ELIZABETH LAPOVSKY KENNEDY AND MADELINE D. DAVIS, *Boots of Leather, Slippers of Gold* (1993).

- 65 *Id.* at 154, 156.
- 66 *Id.* at 157.
- 67 *Id.* at 196.
- 68 *Id.* at 204.
- 69 *Id.* at 207.
- 70 *Id.* at 205.
- 71 *Id.*
- 72 *Id.*
- 73 *Id.* at 197 (noting that, “in the 1960s and 1970s more and more lesbians practiced mutual lovemaking.”).
- 74 See DAVID L. WEIS, *Interpersonal Heterosexual Behaviors* (United States), *International Encyclopedia of Sexology* (ROBERT T. FRANCOEUR ed., 1997), <http://www2.hu-berlin.de/sexology/> (citing Kinsey 1953).
- 75 For example, on February 24, 2004, when President George W. Bush’s delivered a speech pushing for a Federal Marriage Amendment—a constitutional amendment that would federalize the prohibition of same-sex marriage—he conveyed the idea that same-sex marriage would threaten society’s stability. President Bush said, “The union of a man and woman is the most enduring human institution, honoring-honored and encouraged in all cultures and by every religious faith. Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society.” (Text of speech available online at <http://www.family.org/cforum/extras/a0030913.cfm> (visited on May 9, 2005).)
- 76 478 U.S. 186 (1986).
- 77 *Id.* at 190.
- 78 *Lawrence*, 539 U.S. at 567 (emphasis added).
- 79 See, e.g., MARTHA NUSSBAUM, *Women and Human Development: The Capabilities Approach* (2000).
- 80 *Id.*
- 81 *Id.* at 78 (emphasis added).
- 82 *Id.* at 83.
- 83 Incidentally, Nussbaum herself has a more direct way to oppose anti-homo laws: number seven on her list—affiliation—includes subpart (B), which entails, “protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.” (*Id.* at 79.) While the Supreme Court has yet to call homosexuals a suspect class, Nussbaum seems prepared to place homosexuals on par with other historically subordinated groups.
- 84 BUTLER, *supra* note 22, at 90-91.
- 85 See *id.* at 89-90.
- 86 *Id.*
- 87 518 U.S. 515 (1996).
- 88 *Id.* at 520.