

GENDER AUTONOMY, TRANSGENDER IDENTITY AND SUBSTANTIVE DUE  
 PROCESS: FINDING A RATIONAL BASIS FOR *LAWRENCE V. TEXAS*

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**Introduction**

In a 2001 law review article, I suggested that there is a fundamental right to “gender autonomy” that protects people with transgender and transsexual identity.<sup>1</sup> I grounded this in what was then called the “right to privacy,” an outgrowth of substantive due process.<sup>2</sup> There have been significant developments in the law since then, and many commentators have discussed the possibility of a right to gender autonomy.

This article looks to review the work that has been done since that time on the issue of substantive due process as it has been discussed in regard to the right of gender autonomy, and also to focus specifically on how the groundbreaking, but widely misunderstood, 2003 decision in *Lawrence v. Texas*<sup>3</sup> impacts this putative right to gender autonomy. I suggest that my 2001 argument in favor of gender autonomy as a fundamental right, while potentially valid, has been devitalized by *Lawrence*. Instead, *Lawrence* has made a “rational basis” standard of review not only possible for the right of gender autonomy, but much stronger than an argument in favor of a “fundamental right” approach, or any attempt to mix the two. This “heightened” rational basis, an approach that has previously been seen in equal protection jurisprudence as “minimal scrutiny with bite,” clarifies the ambiguities and opacity that have plagued interpretation of *Lawrence*. It sidesteps the problems created by a judiciary that is looking to avoid recognition of new “fundamental rights.” If this is correct, then the emphasis of advocates of gender autonomy should not be on trying to prove the existence of a “fundamental right,” but on trying to identify the putative state interests that can be asserted in favor of gender regulations that refuse to recognize sex reassignment, and explaining how they are either illegitimate or have insufficient rational nexus to the law. Legal and social advocates for a right of gender autonomy should further pursue detailing the factual record and historical analysis that demonstrates the long history of legal and social gender autonomy.

**Defining Gender Autonomy**

In order to posit a right to gender autonomy, one must begin by understanding that the legal system creates a gender “caste” system that infringes the liberty of transgender and transsexual people and exposes them to myriad forms of discrimination.<sup>4</sup>

<sup>1</sup> Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy and Heteronormativity*, 10 LAW & SEXUALITY 123 (2001) [hereinafter *Gender Caste System*].

<sup>2</sup> *Id.* at 133.

<sup>3</sup> 539 U.S. 558 (2003).

<sup>4</sup> Professor Cass R. Sunstein first referred to a “gender caste” system in *Words, Conduct, Caste*, 60 U. CHI.

This hegemonic system emanates from the concept and practices of state-enforced heteronormativity – social notions about sex, sexuality and gender. It marks transgender persons with the brand of Cain – permanent gender markers on government identification that do not match their gender identity.<sup>5</sup> Even in jurisdictions where some legal authorities permit changes in gender markers on birth certificates and other legal documentation, the legal recognition of a change in sex is not always given *effect* by other legal authorities.<sup>6</sup> The law also intrudes on the privacy of transgender people in many other ways large and small, from getting a library card to obtaining employment and appropriate medical care.<sup>7</sup>

Legal gender regulation takes many forms. It is beyond the scope of this article to give a thorough discussion of these, but I think it useful to note eight categories of legal gender regulation that would be affected by substantive due process review: 1) laws regarding sex designation on government-issued identification, such as birth certificates and driver licenses,<sup>8</sup> 2) name change laws that restrict a person's right to use a name stereotypically considered of the opposite sex,<sup>9</sup> 3) laws requiring or permitting sex segregation in public facilities, such as bathrooms and dressing rooms, educational settings, youth facilities, homeless shelters, drug treatment centers, foster care group

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L. REV. 795 (1993). He suggested that social norms are similar to a caste system on the basis of race and sex and are an obstacle to human autonomy, in the sense that there are signals given by skin color and gender that are associated with prescribed social roles. *See also* Cass R. Sunstein, *The Theodore I. Koskoff Lecture Series: Social Norms and Big Government*, 15 QUINNIPIAC L. REV. 147, 151 (1995).

<sup>5</sup> *Gender Caste System*, *supra* note 1, at 123-26.

<sup>6</sup> *Id.* at 127.

<sup>7</sup> *Id.* at 132-34.

<sup>8</sup> *See, e.g.*, Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008); Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169 (2008); Stephanie Markowitz, Note, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705 (2008); Alison Newlin, *Should a Trip From Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461 (2008); Kristin Wenstrom, Comment, *"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEXUALITY 131 (2008); A. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675 (2008); Harper Jean Tobin, Note, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393 (2006-07); Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213 (2005); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002).

<sup>9</sup> *See, e.g.*, Dean Spade, *Transformation Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies That Adversely Affect Transgender People*, L.A. LAW., Oct. 2008, at 34; Christi Jo Benson, *Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society*, 30 WHITTIER L. REV. 41, 62 (2008); *see also*, *Turner v. White*, summary of case available at <http://www.lambdalegal.org/our-work/publications/general/access-fair-courts.html> (writ of mandamus filed on behalf of Turner in response to Court's denial of in forma pauperis application for name change); *In re Golden*, 867 N.Y.S.2d 767 (N.Y. App. Div. 2008) (reversing denial of name change); *In re Rockefeller*, No. 2005-12940, (N.Y. Sup. Ct. Monroe County Dec. 13, 2005) (denying name change); *In re Guido*, 771 N.Y.S.2d 789 (N.Y. Civ. Ct. 2003) (reversing denial of name change).

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homes, domestic violence shelters and prisons,<sup>10</sup> 4) laws requiring or permitting sex discrimination in private settings, such as employment, sports and assisted reproductive technologies,<sup>11</sup> 5) policies imposing restrictions or negative consequences on the right to transition or cross-dress, such as those imposed on youth, on divorced transgender parents, on adoptive parents, in workplaces, educational institutions and prisons,<sup>12</sup> 6)

<sup>10</sup> See, e.g., Cathy Perifimos, Note, *The Changing Faces of Women's Colleges: Striking a Balance Between Transgender Rights and Women's Colleges' Right to Exclude*, 15 CARDOZO J.L. & GENDER 141 (2008); Heather Squatriglia, Note, *Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 CARDOZO J.L. & GENDER 793 (2008); Ernst Hunter, Note, *What's Good for the Gays is Good for the Gander: Making Homeless Youth Housing Safer for Lesbian, Gay, Bisexual, and Transgender Youth*, 46 FAM. CT. REV. 543 (2008); Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007); Nikko Harada, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M. L. REV. 627 (2006); Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006); Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem -- Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91 (2006); see also Lisa Mottet & John M. Ohle, The Nat'l Coal. for the Homeless and the Nat'l Gay and Lesbian Task Force Policy Inst., *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People*, (2003), available at <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf> (last visited Nov. 8, 2009); *Opilla v. Parker*, No. L-3749-03, 2006 WL 2787047 (N.J. Super. Ct. App. Div. 2006) (dressing room case).

<sup>11</sup> See, e.g., Sheelagh McGuinness & Amel Alghrani, *Gender and Parenthood: The Case for Realignment*, 16 MED. L. REV. 261 (2008); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83 (2008); Samuel E. Bartos, Note, *Letting "Privates" Be Private: Toward a Right of Gender Self-Determination*, 15 CARDOZO J.L. & GENDER 67 (2008); Amanda S. Eno, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765 (2008); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243 (2008); Shannon H. Tan, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579 (2008); Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007); Leah Shams-Molkara, Note, *Crossing the Great Sexual Divide: Transsexuals Seeking Redress Under Title VII of the Civil Rights Act of 1964*, 81 ST. JOHN'S L. REV. 399 (2007); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007); Yael Lee Aura Shy, *"Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports*, 14 SPORTS LAW. J. 95 (2007); Betsy Lamm, Comment, *Unprotected Sex: the Arizona Civil Rights Act's Exclusion of Sexual Minorities*, 38 ARIZ. ST. L.J. 1139 (2006); Damon Martichuski, *Employment Law Chapter: Sexuality and Transgender Issues in Employment*, 7 GEO. J. GENDER & L. 953 (2006); Francine Tilewick Bazluke & Jeffrey J. Nolan, *"Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361 (2006).

<sup>12</sup> See, e.g., Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281 (2008); Bergstedt, *supra* note 8, at 694-7 (discussing divorce custody cases); Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243 (2007); Friedman, *supra* note 11; Deborah Zalesne, *Lessons From Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535 (2007); Flyn L. Flesher, Note, *Cross-Gender Supervision*

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exclusions for transgender persons in private and government health care,<sup>13</sup> 7) laws that restrict marriage and/or civil unions based on gender, including rights contingent on the validity of marriage, such as intestate inheritance, right to sue for torts to a domestic partner, alimony, child custody, visitation and support, and insurance coverage<sup>14</sup> and 8) military service laws based on gender and transgender identity.<sup>15</sup> The laws, rights and state interests involved in each of these settings can be quite different and require separate discussion. I will not try to review them all here. However, I believe that, in order to set the stage for substantive due process review of any of these, it is important to understand the jurisprudential theory under which that review would occur.

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*in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841 (2007); Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 220-23 (2006); Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361 (2007); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J. L. & GENDER 51, 55-60 (2006) (discussing Medicaid coverage); Marika E. Kitamura, *Once a Woman, Always a Man? What Happens to the Children of Transsexual Marriages and Divorces? The Effects of a Transsexual Marriage on Child Custody and Support Proceedings*, 5 WHITTIER J. CHILD. & FAM. ADVOC. 227, 240-50 (2005); Darren Rosenblum, "Trapped" in Sing Sing: *Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000); Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133 (2000).

<sup>13</sup> See, e.g., Dana O'Day-Senior, Note, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453 (2008); Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008); J. Denise Diskin, Note, *Taking it to the Bank: Actualizing Health Care Equality for San Francisco's Transgender City and County Employees*, 5 HASTINGS RACE & POVERTY L.J. 129 (2008); Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 LAW & SEXUALITY 123 (2007); Linda Chin, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks v. Berg*, 11 CARDOZO WOMEN'S L.J. 151 (2004); Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738 (2002); Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You To Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119 (1998).

<sup>14</sup> See, e.g., Bailey Dirmann Morse, Comment, *Comparing Civilian Treatment of Transsexual Marriage: Why Louisiana Should Implement the French Approach*, 54 LOY. L. REV. 235 (2008); Aleks Kajstura, Note, *Sex Required: The Impact of Massachusetts' Same-Sex Marriage Cases on Marriages with Intersex and Transsexual Partners*, 14 CARDOZO J.L. & GENDER 161 (2007); Justin L. Haines, *Fear of the Queer Marriage: The Nexus of Transsexual Marriages and U.S. Immigration Law*, 9 N.Y. CITY L. REV. 209 (2005); Kitamura, *supra* note 12; Helen Y. Chang, *My Father Is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649 (2003); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: on DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL'Y 301 (2003); Melissa Aubin, Comment, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155 (2003); Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001).

<sup>15</sup> See, e.g., *Weaver v. Tennessee Army Nat. Guard*, 2002 WL 358776 (6th Cir. 2002); *DeGroat v. Townsend*, 495 F.Supp. 2d 845 (S.D. Ohio 2007); *Doe v. Alexander*, 510 F.Supp. 900 (D. Minn. 1981)

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Using an approach grounded in critical legal theory,<sup>16</sup> in my 2001 article, I examined the nature of human gender variance, its various types, the myths surrounding it, and the medical view of its causes and treatment.<sup>17</sup> I documented the effect of the heteronormative system on the legal framework of identity in day-to-day life, through troubling narratives of transgender and transsexual people attempting to change the gender marker on government identification.<sup>18</sup> A discussion of gender theory showed that the legal framework of identity inappropriately conflates sex and gender. I argued that the legal framework should acknowledge the scientific evidence that the two are different.<sup>19</sup> Turning to legal argument, I then discussed cases suggesting that the right to privacy provides a legal basis allowing individuals to distinguish the two, and to live their lives accordingly, free of government interference and burden, regardless of state insistence on a simple binary system of sex.<sup>20</sup>

My description of the right to privacy was based on the formulation championed by Laurence Tribe in 1978: “the single core common to all of what passes under the privacy label [is] autonomy with respect to the most personal of life choices.”<sup>21</sup> Since it is beyond cavil that one’s gender is among the most personal and private of matters, and state interference in gender self-determination perpetuates the most egregious discrimination, I argued that the right to privacy entitles persons, including transgender and transsexual persons, to carry on their lives in the gender of their choice. I also identified a second strain of the right to privacy that attaches to gender: the right of an individual not to have his or her private affairs made public by the government.<sup>22</sup> This right arises from the existence of state records with a permanent gender marker, the disclosure of which is compelled whenever such records are required for identification, creating a risk of discrimination, harassment, and physical danger, as well as a chilling effect on self-identification, the free expression of private, individual, selves, and gender identity.

I labeled this constellation of issues *the right to gender autonomy*,<sup>23</sup> identifying two strands of constitutional jurisprudence: the first a right of self-determination of gender, based on privacy cases that promoted self-determination of private decision-making of important life choices,<sup>24</sup> and the other a right of self-identification of gender, based on other privacy cases that promoted privacy protection of sensitive information.<sup>25</sup> “The right to gender autonomy” may therefore be defined as the right of self-

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<sup>16</sup> *Gender Caste System*, *supra* note 1, at 134-38.

<sup>17</sup> *Id.* at 138-46.

<sup>18</sup> *Id.* at 146-55.

<sup>19</sup> *Id.* at 155-67.

<sup>20</sup> *Id.*

<sup>21</sup> Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 887 (1978); *See also Gender Caste System*, *supra* note 1, at 168 (citing Tribe, *AMERICAN CONSTITUTIONAL LAW* 1302 (2d. Ed. 1988)).

<sup>22</sup> *Gender Caste System*, *supra* note 1, at 171-73.

<sup>23</sup> *Id.* at 153-54.

<sup>24</sup> *Id.* at 167.

<sup>25</sup> *Id.* at 171.

determination of one's gender, free from state control, and the right to self-identify as that gender, free from state contradiction. While the label may have been new, the idea of a right to change sex had been posited in U.S. courts starting in the 1960's,<sup>26</sup> and had been grounded in constitutional privacy analysis since the 1970's.<sup>27</sup> In the United States, laws had been put in place in various states since the 1970's to allow changes in the sex marker on birth certificates and driver's licenses.<sup>28</sup> However, there was no recognition that such laws were anything more than a mere legislative prerogative, and they were often ignored by the courts. I argued that the failure to recognize sex reassignment, and the failure of courts to give legal effect to it, invades the constitutional right to privacy.

### The Issue of "Choice"

In labeling this right "gender autonomy," it is important not to confuse "autonomy" with "choice," as they are not synonyms. The term "lifestyle choice" is often used to disparage non-traditional gender identity or expression, implying that it is volitional behavior, and therefore not entitled to respect as an identity. Autonomy, however, refers to independent self-governance,<sup>29</sup> whereas "choice" refers to preference.<sup>30</sup>

As previously noted, my use of the term "autonomy" is based on the formulation championed by Laurence Tribe in 1978: "the single core common to all of what passes under the privacy label [is] autonomy with respect to the most personal of life choices."<sup>31</sup> This same term was later used by the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*<sup>32</sup> and *Lawrence v. Texas*.<sup>33</sup> Transgender identity is a choice only in the sense of "Hobson's choice," the option of taking the one thing offered or nothing. As I explained in detail in my 2001 article, the fact that "gender" is a social and cultural phenomenon, and that it may take non-traditional forms, does not mean that it is

<sup>26</sup> See, e.g., *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

<sup>27</sup> Laura Richards Craft & Matthew A. Hodel, *City of Chicago v. Wilson and Constitutional Protection for Personal Appearance: Cross Dressing as an Element of Sexual Identity*, 30 HASTINGS L.J. 1151 (1979); Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979).

<sup>28</sup> See Dunlap, *supra* note 27, at n.7 (citing CAL. HEALTH & SAFETY CODE, §§ 10475-10478 (West Supp. 1978); Stuart A. Wein & Cynthia Lark Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075 (1979).

<sup>29</sup> "Autonomy" is defined as "1. The condition or quality of being autonomous; independence. 2. a. Self-government or the right of self-government; self-determination. b. Self-government with respect to local or internal affairs: *granted autonomy to a national minority*. A self-governing state, community, or group.: [Greek *autonomiā*, from *autonomos*, *self-ruling*; . . .]" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006).

<sup>30</sup> "Choose" is defined as 1. To select from a number of possible alternatives; decide on and pick out; 2. a. To prefer above others: *chooses the supermarket over the neighborhood grocery store*; b. To determine or decide: *chose to fly rather than drive*." *Id.*

<sup>31</sup> Tribe, *supra* note 21

<sup>32</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>33</sup> 539 U.S. 558.

therefore fluid and changeable at will, like clothing.<sup>34</sup> The idea that we as individuals can choose or change our gender fails to take into account that it is gender, as given to us by the cultural conversation, which determines the nature of our experience, and not vice versa. Essentially, gender chooses us, and not the other way around. The fact that one's gender is not traditionally related to one's physical sex does not imply "lifestyle preference."<sup>35</sup>

An example often given in this area is the quality of left-handedness, which is defined as "Having the left hand more serviceable than the right; using the left hand by preference."<sup>36</sup> It is possible for a left-handed person to use their right hand for writing and other physical acts, and generations of children have done so, some more willingly than others. But it is not a "choice" whether to be left-handed; the "preference" is innate. Similarly, gender identity is not a "choice" because the "preference" is innate. While a transgender person can stifle their gender identity, just as a left-handed person can, there is no "choice" in the sense of complete discretion.

### **Stumbling Block: *Bowers v. Hardwick***

At the time that I first suggested a constitutional right to gender autonomy in 2001, there was a major problem with the argument. The Supreme Court had halted the steady spread of constitutional privacy rights fifteen years earlier in *Bowers v. Hardwick*.<sup>37</sup> Professor Laurence Tribe, upon whose formulation of the right to privacy I had relied, had argued the case for respondent Hardwick,<sup>38</sup> and lost.

In the *Bowers* opinion, the Court held that the right to privacy required a finding that the subject matter is a "fundamental right" as determined by reference to legal history and tradition. Under its prior substantive due process case law, if the law is found to impinge on a "fundamental right," then any law restricting that right would be subjected to "strict scrutiny." The "strict scrutiny" standard of review means that the law is presumptively unconstitutional, unless the state can demonstrate that the law is "narrowly tailored to meet a compelling state interest."<sup>39</sup> If, on the other hand, the law is found to impinge on no "fundamental right," then the standard of review by the Court is "rational basis" review.<sup>40</sup> This means the law is presumptively constitutional, unless the citizen can demonstrate that the law is not rationally related to a legitimate state interest. It is rare that statutes reviewed under the "rational basis" standard of review are found unconstitutional.

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<sup>34</sup> *Gender Caste System*, supra note 1, at 158.

<sup>35</sup> *Id.* at 159-67.

<sup>36</sup> OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>37</sup> 478 U.S. 186 (1986).

<sup>38</sup> *Id.* at 187.

<sup>39</sup> *Id.* at 189.

<sup>40</sup> *Id.* at 196.

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The Court rejected Hardwick's claim that the Georgia statute that made same-sex sexual relations a crime was violative of the right to privacy. It held that, because of a long history of prohibition, there was no fundamental right to "homosexual sodomy."<sup>41</sup> Although the Court had previously held that heterosexual sexual relationships had historically been considered a fundamental right, it decided that the same did not extend to gay sexual relationships. The Court characterized its prior case law on the right to privacy as extending to "family, marriage or procreation,"<sup>42</sup> refusing to recognize a gay relationship as family or marriage. It cited its prior restrictions of the right to privacy to "fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' . . . and that are 'deeply rooted in this Nation's history and tradition.'"<sup>43</sup> The Court then determined that a right to homosexual sodomy was not implicit in the concept of liberty or deeply rooted in the Nation's history because, to the contrary, "proscriptions against that conduct have ancient roots," detailing a long history of laws against sodomy,<sup>44</sup> and because all 50 states prohibited sodomy until 1961, with 24 still prohibiting it at the time of their decision.<sup>45</sup> Because it found no "fundamental right," the Court used a "rational basis" standard of review. It determined that the Texas statute was rationally related to a legitimate state interest in moral protection. Clearly, the Court was deciding more than the case before it and intended to halt the spread of protected privacy rights, stating "[t]he case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."<sup>46</sup>

I attempted to place gender autonomy outside of the *Bowers* decision by asserting that the system of state gender regulation creates harm to transsexuals that invokes fundamental rights different from homosexual sodomy, and that transsexuality does not raise the state interest in moral regulation of sexual activity.<sup>47</sup> Nonetheless, because the Court was so clearly trying to limit the right to privacy, and because gender identity is so firmly linked in the public mind to sexual orientation, and nescient judges were likely to interpret *Bowers* as applicable to transgender individuals by analogy, the post-*Bowers* legal landscape was bleak for this kind of argument.<sup>48</sup>

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<sup>41</sup> *Bowers v. Hardwick*, 478 U.S. at 191.

<sup>42</sup> *Id.*, at 190-91.

<sup>43</sup> *Id.* at 191-92.

<sup>44</sup> *Id.* at 192.

<sup>45</sup> *Bowers*, 478 U.S. at 193-94.

<sup>46</sup> *Id.* at 190.

<sup>47</sup> *The Gender Caste System*, *supra* note 1, at 170.

<sup>48</sup> This problem is clearly illustrated by *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446 (D.D.C. 1985), involving a right to privacy claim by a transsexual employee terminated by the U.S. Postal Service. The court dismissed the privacy claim, relying on *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), a homosexual military discharge case, which had concluded that 'only rights that are 'fundamental' or 'implicit in the concept of ordered liberty' are included in the right of privacy.' The *Doe* Court said "[w]hile it could be argued that the personal decision to undergo a socially controversial surgical procedure ought to be protected against government reprisal, we have no legal basis, especially in light of the *Dronenburg* opinion, for holding that there is a constitutional right to privacy which protects persons in the plaintiff's situation. We shall therefore dismiss this claim." *Lawrence* obviously has an impact on both *Dronenburg*



In following years, a number of commentators agreed that, despite *Bowers*, the right to privacy might be applicable to gender autonomy. In a Comment published the following year in the *University of Pennsylvania Journal of Constitutional Law*<sup>49</sup> on the issue of protecting transsexuals' interests in legal determination of sex, the author discussed the idea of a right to privacy applicable to transgender individuals. She agreed that, despite *Bowers*, there was still "considerable wiggle room" to articulate a constitutional privacy right of gender autonomy.<sup>50</sup> "*Bowers* does not speak to whether transsexuals have a privacy right to self-identify their legal sex as it addresses a specific sexual practice in the context of a homosexual sexual orientation, not sex or gender as fundamental characteristics of personhood."<sup>51</sup>

The Comment's author displays a nuanced understanding of the theoretical underpinnings of gender theory. She clearly and concisely explains the grounding for the important concept that gender identity is a distinct component of sex.<sup>52</sup> This theoretical position that avoids the conceptual and practical mess that results when sex and gender are conflated. It also avoids the similar problems that result from their total disaggregation, which would give credence to arguments that sex discrimination and gender discrimination are entirely unrelated, and that the right to gender autonomy cannot protect intersex infants from genital surgery because this involves *sex* and not *gender*. She also explains well the work of theorists who have debunked false ideals of scientific objectivity in both gender and law.<sup>53</sup> She concludes that, given the state of privacy jurisprudence after *Bowers*, the right to privacy would not be the most effective means of "articulating a right for transsexuals to self-identify their legal sex"<sup>54</sup> and explored the possibility of applying principles of equal protection. Ultimately, however, she takes a position contrary to her own brilliant explication of gender theory. She decides that a liberty interest in gender autonomy should be accorded only to post-operative transsexuals, because extending such a right to pre-operative transsexuals and others who are gender variant would allegedly be a subjective decision.<sup>55</sup> Unlike her clear explanation of the problematic notion of objectivity, she provides no explanation of the how the objective-subjective distinction operates in this context. She does not explain why the line should be drawn at post-operative persons, other than the surprising modernist notion that the medical doctors who operate on transsexuals are scientifically objective. She does not say what makes the gender identity of post-operative persons

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and *Doe*. Interestingly, though it is beyond the scope of this article, the court stated that "The complaint clearly states a claim for denial of equal protection."

<sup>49</sup> Jody Lynee Madeira, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128 (2002).

<sup>50</sup> *Id.* at 161.

<sup>51</sup> *Id.* at 161-62.

<sup>52</sup> *Id.* at 138-39.

<sup>53</sup> *Id.* at 140-41.

<sup>54</sup> Madeira *supra* note 49 at 163.

<sup>55</sup> *Id.* at 171-72.

“objective” as compared to the gender identity of other gender variant persons. She implies, but does not demonstrate, that the greater degree of medical intervention in the case of post-operative transsexuals creates objectivity. She does not explain why sex reassignment surgery is the proper dividing line between those who receive protection and those who do not, nor does she address the practical problems or equal protection issues inherent in that judgment. She also argues that judges do not have sufficient education in semiotics to understand the gender identity of pre-operative transsexuals, and that it is better to accord the right to post-operative transsexuals, fairly or unfairly, than to no one. She also objects to the idea of allowing pre-operative transsexuals who change their gender to marry, arguing that it would violate the Defense of Marriage Act<sup>56</sup> by permitting a kind of “same-sex” marriage. In doing so, she ignores the distinction between a constitutional right and a mere statute. She argues for a focus on the medical nature of the problem as a means of more closely analogizing the asserted right to abortion rights, for which the Court had relied heavily on medical knowledge, though the historical context of sex reassignment is very different from his historical context of abortion.<sup>57</sup>

The nature of the argument in this Comment is clearly distorted to a great extent by the pre-*Lawrence* environment, in which the idea of personal autonomy is severely constrained. Despite her brilliant theoretical explanation, which should rightly lead to an expansion of transgender rights, the author somewhat defeatedly turns to a reliance on “objective” medical standards that reduce personal autonomy rather than enhance it. She does not give a convincing explanation of why only post-operative transsexuals have a right to gender autonomy, and assumes without explanation that allowing gender autonomy in other cases would result in “same-sex” marriage, contrary to the holding in most cases on the subject.<sup>58</sup> This appears to be an apparently pragmatic attempt to retain half-a-loaf of rights, rather than none, based on the notion that judges cannot be trusted to understand gender properly. The assumption that judges can never understand a more nuanced explanation of gender is a false one, and clearly undercut by many court opinions demonstrating to the contrary.<sup>59</sup>

<sup>56</sup> Defense of Marriage Act 1 U.S.C. § 7 (2000).

<sup>57</sup> *Id.* at 163.

<sup>58</sup> See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *review denied*, 898 So. 2d 80 (Fla. 2005) (invalidating transsexual marriage); *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (invalidating transsexual marriage); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000) (invalidating transsexual marriage).

<sup>59</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); see *Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (Marriage held invalid, reversing trial court ruling recognizing that Michael John Kantaras, a female to male postoperative transsexual was male at time of marriage to a female and thus marriage was valid); see *In re Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001), *aff'd in part, rev'd in part*, 42 P.3d 120 (Kan. 2002); see *Smith v. City of Salem*, 278 F.3d 566 (6th Cir. 2004); See also, *In re Kevin*, [2001] 28 Fam. L. R. 158 (Can.) (holding female to male postoperative transsexual was male at time of marriage to a female and thus marriage was valid) and *Attorney General v. Otahuhu Family Court*, [1995] 1 N.Z.L.R. 603 (Austl.) (holding post-operative transsexual women was female at time of marriage to a male, and thus marriage was valid.)

Another student commentator in 2003, apparently right before the *Lawrence* decision came down, discussed the idea of a constitutional requirement that states must recognize “post-operative transsexuals’ acquired sex.”<sup>60</sup> The author reviewed rulings issued by courts in New Zealand, Australia, and Europe giving legal effect to sex reassignment, and suggested that there is a U.S. constitutional requirement to the same effect based on the right to marry, which the U.S. Supreme Court has declared a fundamental right.<sup>61</sup> She argued that failure to allow post-operative transsexuals to marry someone of the opposite sex (opposite to their acquired sex) would impinge on this right. She also argued that it would affect the right to travel because of the inconsistency in marriage recognition among the states.<sup>62</sup> It is an interesting argument, but, like the previous student author, the commentator does not indicate why the right would be extended only to post-operative transsexuals, and, surprisingly, makes no mention of the concepts of privacy or liberty.

### **Understanding *Lawrence*: A Simple Reading**

In 2003, *Bowers* was overruled in *Lawrence v. Texas*,<sup>63</sup> holding that the Texas statute prohibiting homosexual sodomy violated the due process clause of the U.S. Constitution. In so doing, it seems to have struck down the *Bowers* formulation of the right to privacy – “family, marriage, procreation” – and to have opened up the right to a much broader range of rights. This seems to have, needless to say, great implications for the right of gender autonomy. I use the word “seems” here because a simple reading of *Lawrence* reveals much ambiguity.<sup>64</sup> Unfortunately for those of us trying to figure out how the ruling applies to other situations, more than that is difficult to pin down. The opinion is remarkably opaque.<sup>65</sup> Nonetheless, it is impossible to convincingly posit a right of gender autonomy without understanding *Lawrence* properly.

*Lawrence* has been repeatedly parsed in hundreds of law review articles, many of which are cited herein. Despite this thorough analysis, however, many seem to emerge with a simple reading of *Lawrence* as a tale of potentially unlimited rights, which either creates a libertarian revolution and must be applied to everything and anything classifiable as liberty, or, conversely, creates jurisprudential anarchy and must be cabined and confined to its facts. Some courts have read it very broadly, and others have ignored it. I believe that both results are based on a misunderstanding of the text of *Lawrence*, and propose the idea that the *Lawrence* opinion is not a new formulation of substantive due process. Rather, it is classic substantive due process analysis, but one that relies on

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<sup>60</sup> Leslie I. Lax, *Is The United States Falling Behind? The Legal Recognition of Post-Operative Transsexuals’ Acquired Sex in the United States and Abroad*, 7 QUINNIPIAC HEALTH L.J. 123 (2003).

<sup>61</sup> *Id.* at 168.

<sup>62</sup> *Id.* at 171-72.

<sup>63</sup> 539 U.S. 558.

<sup>64</sup> See, e.g., Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 55 SUP. CT. REV. 75, (2003); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, (2003).

<sup>65</sup> Sunstein, *supra* note 64, at 28.

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one of the more underutilized legs of the due process triangle. To my mind, the best reading of *Lawrence* has been hiding in plain sight.

Here is the simple reading of *Lawrence*. The *Lawrence* opinion places gay relationships into the category of a “liberty”<sup>66</sup> protected by the Due Process Clause, against which the state can have no legitimate state interest, in five logical moves.

1) It suggests that the right to privacy is a right to engage in a “personal relationship,” rather than protection of particular acts, and that the Texas statute impinges on the petitioner’s right to engage in such a personal relationship.<sup>67</sup>

2) It uses a historical analysis to show that gay sex acts have long been allowed, disputing the accuracy of the *Bowers* Court’s assertions that laws against the act of consensual sodomy have ancient roots,<sup>68</sup> and distinguishes away a long history of U.S. laws prohibiting sodomy by noting that these prohibited both heterosexual and homosexual sodomy and were not enforced against consenting adults in private. It traces U.S. laws against specifically homosexual conduct to the recent past of the 1970s, and questions their vitality due to desuetude and statutory repeals.

3) It changes the focus of the historical analysis from the ancient past to the recent past half century, and finds an “emerging awareness” that liberty includes sexual activity between consenting adults.<sup>69</sup> This awareness is located in a diminishing number of prosecutions, statutory repeals in the U.S. and Europe, and calls by noted authorities for abolition of penalties.

4) It redefines a gay personal relationship as a liberty protected by the due process clause by recasting of the right to privacy as the right to engage in a personal relationship, citing the broad 1992 “personal dignity and autonomy” formulation (sometimes disparagingly called the “mystery passage”) from the majority opinion in *Planned Parenthood of Southeastern Pa. v. Casey*:<sup>70</sup>

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<sup>66</sup> The opinion states the question before the Court as whether the statute violates their interests in “liberty and privacy,” *Lawrence*, 539 U.S. at 564, so references to “liberty”, which appears in the due process clause, may be read as references to the right to privacy emanating from the due process clause. Professor Randy Barnett, however, contends that *Lawrence* creates a “libertarian revolution” by means of a crucial switch from “privacy” jurisprudence back to a *Lochner*-era “liberty” jurisprudence. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 33 (2003). Others have also commented that the switch from privacy to liberty is of great significance. James W. Paulsen, *The Significance of Lawrence v. Texas*, HOUSTON LAW., Jan./Feb. 2004, at 32.

<sup>67</sup> *Lawrence*, 539 U.S. at 564-67. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904-05 (2004).

<sup>68</sup> *Lawrence*, 539 U.S. at 567-71.

<sup>69</sup> *Id.* at 571-72; for a thorough discussion of the background of this idea, See Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 68 (2003).

<sup>70</sup> 505 U.S. at 851.

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These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>71</sup>

It analogizes heterosexual and homosexual personal relationships, saying that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>72</sup>

5) It holds that the state interest in moral protection against homosexual sodomy is illegitimate, citing *Romer v. Evans*<sup>73</sup> to the effect that the hetero/homo distinction is “born of animosity.”

This simple reading of *Lawrence* suggests that personal relationships are a fundamental right, though the Court never explicitly says so. More broadly read, *Lawrence* represents a libertarian revolution, under which anything that is a matter of personal autonomy under an emerging social consensus is a fundamental liberty. In addition, under this broad reading, there is no legitimate state interest in regulating anything unless it does demonstrable harm to third parties.<sup>74</sup>

The *Lawrence* formulation of “personal dignity and autonomy” is similar to the 1978 formulation of Professor Tribe, “autonomy with respect to the most personal of life choices,” upon which I had relied in my previous article outlining a right of gender autonomy.<sup>75</sup> This formulation is extremely broad, encompassing both private life-choices and beliefs that define one’s concepts of existence and personhood. Certainly, one’s choice of gender would appear to fit this definition of personal autonomy, since it both a highly intimate life choice and one central to personal dignity and autonomy. A simple reading of *Lawrence* leads to a simple declaration of victory for the cause of gender autonomy. Indeed, a number of commentators have rightly suggested that *Lawrence* is clearly connected to gender autonomy. Unfortunately, the simple reading of *Lawrence* has some major problems, and the commentators do not address them, though they raise some interesting and useful arguments.

The most difficult problem is understanding the standard of review employed in

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<sup>71</sup> *Id.*

<sup>72</sup> *Lawrence*, 539 U.S. at 574.

<sup>73</sup> 517 U.S. 620 (1996).

<sup>74</sup> See Barnett, *supra* note 66; Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004).

<sup>75</sup> Tribe, *supra* note 21.

the case. The *Lawrence* opinion seems to be saying that history and tradition show that gay relationships have long been allowed, suggesting that such relationships, similar to heterosexual relationships, are fundamental rights that require a “strict scrutiny” standard of review. In my previous article, I spent much time discussing the harm caused to transgender persons by gender regulations, suggesting that such regulations impinge on a fundamental right of gender autonomy. But the *Lawrence* opinion never explicitly states that there is a fundamental right or that it is using a “strict scrutiny” standard of review. It could be understood to rely on a “rational basis” standard of review. Justice Scalia raised the issue in strong terms in his dissent:

Most of the rest of today's opinion has no relevance to its actual holding – that the Texas statute “furthers no legitimate state interest which can justify” its application to petitioners under rational-basis review. . . . Though there is discussion of “fundamental proposition[s],” . . . and “fundamental decisions,” . . . nowhere does the Court's opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a “fundamental right.” Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”<sup>76</sup>

If, as Justice Scalia suggests, the *Lawrence* opinion uses a “rational basis” standard of review, and relies mainly on its conclusions that an interest in “moral protection” is not a legitimate state interest, then the argument from *Lawrence* is not about whether gender autonomy is a fundamental right. In fact, if Justice Scalia is right, then *Bowers* is still good law to the extent that it holds that homosexual sodomy is not a fundamental right. In such a case, *Lawrence* provides no help to the argument that gender autonomy is a fundamental right. It may be one, but the argument cannot come from *Lawrence*. But is Justice Scalia right? The commentators discussing gender autonomy in light of *Lawrence* provide no insight into this important question.

### **Commentators Connect *Lawrence* to Gender Autonomy**

After *Lawrence*, other commentators began to realize that substantive due process could be used to advocate for a right to gender autonomy. Professor Taylor Flynn suggested at a symposium in 2004 that *Lawrence* meant that a court could not decide that a transsexual man’s marriage to a woman was invalid because, under *Lawrence*, the

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<sup>76</sup> *Lawrence*, 539 U.S. at 586 (citations omitted) (emphasis added).

court's refusal to accept his gender identity violated the due process clause.<sup>77</sup> In that same year, there were several commentators who discussed the privacy connection to gender identity. A Note in the *Louisiana Law Review*<sup>78</sup> briefly suggested that transsexual litigants should consider the right to privacy as a viable tool based on an analogy between the *Lawrence* opinion and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>79</sup> Article 8 states:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>80</sup>

Using this right to privacy, the European Court of Human Rights (“ECHR”) overturned criminal sodomy statutes in the 1981 case of *Dudgeon v. United Kingdom*.<sup>81</sup> The *Lawrence* opinion took explicit note of *Dudgeon* as expressive of “values we share with a wider civilization,”<sup>82</sup> that are “accepted as an integral part of human freedom in many other countries.”<sup>83</sup> The Note discussed in detail cases decided in 2002 by that same ECHR, holding that failure to accord legal recognition to transsexual sex reassignment violated the right to privacy.<sup>84</sup> This argument that foreign law provides support for a right to gender autonomy located in the U.S. Constitution is an important one and needs further development. This is a two step analysis: 1) *Lawrence* specifically validates the

<sup>77</sup> Taylor Flynn, *Sex and (Sexed By) the State*, 25 WOMEN'S RTS. L. REP. 217 (2004).

<sup>78</sup> Betty C. Burke, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform*, 64 LA. L. REV. 643 (2004).

<sup>79</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, April 11, 1950, E.T.S. No. 5 (hereinafter referred to as the “European Convention”). This was adopted under the auspices of the Council of Europe in 1950. The Council of Europe, founded in 1949, is not related to the more recent European Union (“EU”), which began operations in 1993, or the EU’s political bodies, the European Council and the Council of the EU. The EU is not a party to the Convention. The purpose of the Council of Europe is to further European cooperation on legal standards. It has 47 member states with some 800 million citizens. See THE EUROPEAN UNION ENCYCLOPEDIA AND DIRECTORY 29 (1999) available at <http://books.google.com/books?id=NU07cD6NEJQC>.

<sup>80</sup> *Id.* art. 8.

<sup>81</sup> *Dudgeon v. United Kingdom*, 3 Eur. Ct. H.R. 40 (1981).

<sup>82</sup> *Lawrence*, 539 U.S. at 576; See also Burke, *supra* note 78, at 664-65 (The Note refers to several other cases in which the U.S. Supreme Court recognized that the experience of foreign courts was valuable to U.S. courts).

<sup>83</sup> *Lawrence*, 539 U.S. at 577.

<sup>84</sup> Burke, *supra* note 78 (discussing *Goodwin v. United Kingdom*, Eur. Ct. H.R.2002 WL 1311121 and its companion case, *I v. United Kingdom*, Eur. Ct. H.R., 2002 WL 1311123).

use of foreign law, and specifically an ECHR ruling, in the substantive due process determination and 2) the ECHR cases on gender identity, *Goodwin v. United Kingdom*<sup>85</sup> and *I v. United Kingdom*,<sup>86</sup> provide a detailed legal argument specifically connecting the right to privacy to gender autonomy. However, there is no guidance in the Note as to whether gender autonomy could be considered a fundamental right, or, conversely, whether the state interest in gender regulation would be considered illegitimate.

In 2005, several commentators stepped forward to discuss the interaction of privacy rights and gender identity. Professors Julie A. Greenberg and Marybeth Herald wrote *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*,<sup>87</sup> generally addressing a number of constitutional provisions that impact gender autonomy. The authors specifically discuss the effect of the *Lawrence* opinion on the right of transgender persons to self-determine their gender identity. Rather than attempting to find that gender autonomy is a “fundamental right” that triggers “strict scrutiny”, they suggest that *Lawrence* mandates a “rational basis” standard of review, or perhaps a somewhat “heightened” rational basis review, though exactly how that works is not specified. They conclude that *Lawrence* supports a finding of a protected liberty interest in a person’s gender identity by means of a three-step analysis:

First, the right to gender self-identity must be compared with the right to engage in private sexual acts. Second, the state's interest in criminalizing sexual conduct must be compared to the state's interest in limiting a person's right to be recognized legally as the sex that comports with her gender self-identity. Finally, the *Lawrence* Court's explicit statements regarding the limitations of its decision need to be examined to determine whether these limitations would apply to a state's power to dictate a person's legal sex.<sup>88</sup>

The first step is a bit surprising, given that the authors are suggesting a “rational basis” review, which requires no finding about the nature of the right asserted. A “rational basis” review traditionally focuses only on the relation of the law to some legitimate state interest. An analogy to another “right” suggest a heightened scrutiny analysis. Nonetheless, they argue that the right to personal relationship in *Lawrence* and the right to gender autonomy is comparable based on the so-called “mystery passage” of *Lawrence*,<sup>89</sup> on the grounds that there is an intuitive analogy between sexual orientation and gender identity: “If the choice of one's sexual partner is considered one of the most intimate and personal choices a person can make, then a person's choice to live in the sex

<sup>85</sup> *Goodwin*, Eur. Ct. H.R., 2002 WL 1311121.

<sup>86</sup> *I v. United Kingdom*, Eur. Ct. H.R., 2002 WL 1311123.

<sup>87</sup> Julie Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 877 (2005).

<sup>88</sup> *Id.* at 881.

<sup>89</sup> *Lawrence*, 539 U.S. at 562.



role that matches her self-identity must also be included.”<sup>90</sup>

In regard to the second step, the comparison of state interests, they identify several potential state justifications:

(1) the state's interest in banning same-sex marriage; (2) the inability of post-operative transsex persons to reproduce; (3) the inability of a state to change the sex fixed by God; (4) the need to protect the public from fraud; and (5) the desire to discourage “psychologically ill persons” from engaging in sex changes. [They argue that, f]or the same reasons that these state interests do not justify differential treatment under the Equal Protection Clause, they cannot be used to support an infringement of a person's right to substantive due process[] . . . [under either] a heightened scrutiny standard . . . [or] a rational basis review.<sup>91</sup>

This discussion is very important because it specifically addresses the legitimacy of these putative state interests, unlike most of the other discussions, which spend a lot of time and effort trying to determine whether gender autonomy is a fundamental right triggering strict scrutiny.

At the same time, however, the authors surprisingly set up two straw horse arguments that find little justification in the text of *Lawrence*. They first suggest that some may argue that the substantive due process review used in *Lawrence* is not applicable to gender autonomy because gender autonomy is similar to public sex acts.<sup>92</sup> The fact that one’s gender is public does not equate it to sex in public, which is a criminal act. This straw horse argument is difficult to fathom, and there is no reason to make such an analogy, other than a specious association in the public mind between transgender identity and sexuality. My rebuttal to such an argument would discuss the fact that such an association is specious, and to do otherwise seems, though I am sure no such idea was intended, to lend credence to this derogatory idea. In any event, *Lawrence* never suggests that all public acts are denied due process rights, but merely suggests that public *sex acts* invoke a different set of state interest from private *sex acts*.<sup>93</sup>

The authors also set up another straw horse argument based on a surprising analogy between birth certificates and marriage certificates. They note that *Lawrence* explicitly excludes its holding from the matter of same-sex marriage, and that, as both

<sup>90</sup> Greenberg & Herald, *supra* note 87, at 881.

<sup>91</sup> *Id.* at 882.

<sup>92</sup> *Id.* at 882-83.

<sup>93</sup> *Id.* at 883-84 (explaining that gender identity is different from public sex acts only because a person's gender identity permeates their existence, is generally on public display, and “is not a coat that can be taken off as people cross their front door”).

gender regulation and same-sex marriage involve state-controlled certificates (i.e., birth certificates and marriage certificates), one could suppose that birth certificates are equally excluded by *Lawrence* from substantive due process protection.<sup>94</sup> The analogy between a birth certificate and a marriage certificate are completely inapposite here. *Lawrence* excludes same-sex marriage not because it involves a state-controlled certificate, but because the state interests in controlling gay sex are different from those regulating same-sex marriage, and would require a different analysis. There is nothing in the *Lawrence* opinion to justify the idea that the state intends to exclude all matters involving state-controlled certificates from substantive due process. Professors Greenberg and Herald, however, instead of noting this, argue that due process covers gender regulations because they create a stigma against transsexuals just as the criminal regulations in *Lawrence* created a stigma against homosexuals. This argument seems to validate the idea that *Lawrence* excludes a right to gender autonomy because it involves a state-controlled birth certificate, an idea that I am not ready to admit.

The article also contains important discussions of other constitutional arguments that may affect the right to gender autonomy, including principles of full faith and credit, the right to travel under the Dormant Commerce Clause, and equal protection.

Also in 2005, Professor Sara R. Benson published *Hacking The Gender Binary Myth: Recognizing Fundamental Rights For The Intersexed*,<sup>95</sup> which mostly addresses the right of intersex children to avoid genital surgery. Her discussion includes the idea of a fundamental right to gender identity as found in the line of cases from *Griswold*<sup>96</sup> to *Lawrence*.<sup>97</sup> Unlike some of the previous commentators, she specifically embraces the idea that such a right would not be tied to biological makeup. She goes even further, suggesting that gender is a spectrum beyond male and female, and that the law should defer to the individual's gender categorization because “[t]he most accurate way to define a child's gender is to allow them to assert it.”<sup>98</sup> She does not, however, address the specific holdings of *Lawrence* or how they would apply to gender autonomy.

The same year, Franklin H. Romeo wrote *Beyond A Medical Model: Advocating For A New Conception Of Gender Identity In The Law*,<sup>99</sup> which clearly and thoroughly debunks the notion, espoused in the 2002 and 2003 student articles discussed above, that only post-operative transsexuals who submit to medicalization deserve a right to gender autonomy. As he amply explains, while use of the medical model has helped some transgender people whose experiences comport with the diagnostic criteria of “gender identity disorder”, it inappropriately “sets up the medical establishment as a gatekeeping

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<sup>94</sup> *Id.* at 882-83.

<sup>95</sup> Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31 (2005).

<sup>96</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>97</sup> *Lawrence*, 539 U.S. at 558.

<sup>98</sup> Benson, *supra* note 95, at 59.

<sup>99</sup> Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005).

institution that regulates gender [identity] and predicates legal rights on access to a certain type of health care.”<sup>100</sup> The many transgender people who are unable to find or afford trans-friendly healthcare, or who are gender variant but do not fall within the unduly narrow criteria and invasive screenings prescribed by the medical establishment, have no legal protection in courts or government bureaucracies such as welfare agencies and prisons.<sup>101</sup> The diagnostic criteria do not further gender autonomy as much as they provide a way to substitute gender norms of one sex for another.<sup>102</sup> This is based on sexist and heterosexist norms that have no place in constitutional jurisprudence.<sup>103</sup> He discusses two types of cases in which a model of gender self-determination might be used, sex discrimination cases and Fourteenth Amendment cases. He argues that an analogy to reproductive freedom might be useful for the Fourteenth Amendment argument, similar to the analogy made in the 2002 article above, but without the implication of forced medicalization.<sup>104</sup> It is interesting that his argument proceeds entirely without reference to *Lawrence v. Texas*. However, he also states his concern that the right to gender autonomy under the Fourteenth Amendment, being construed as a “negative right” to be let alone, would not encompass the needs of low-income gender variants persons to access appropriate health care.<sup>105</sup>

In 2006, Professor Chai R. Feldblum, recently nominated by President Obama to be the head of the Equal Employment Opportunity Commission, published an article explicitly arguing that *Lawrence* creates a right to define one’s own concept of gender.<sup>106</sup>

[T]he liberty interest recognized by the court in *Lawrence* -- the right “to define one’s own concept of existence” -- is an interest that speaks directly . . . to the efforts of transgender people to define their gender identity and expression. Moreover, I argue that the state’s obligation -- either under its guarantee to provide “equal protection” to its citizens or under its obligation to protect an individual’s fundamental rights as a matter of substantive due process -- requires the state to provide intersex and transgender people with the affirmative protection and social structures necessary for them to realize their efforts towards self-definition.<sup>107</sup>

The article does not address how gender autonomy becomes a liberty interest under *Lawrence*, or the standard of review for regulations impinging on this putative liberty

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<sup>100</sup> *Id.* at 730.

<sup>101</sup> *Id.* at 730-31.

<sup>102</sup> *Id.* at 731.

<sup>103</sup> Romeo, *supra* note 99 at 731-32.

<sup>104</sup> *Id.* at 739-47.

<sup>105</sup> *Id.* at 752-53.

<sup>106</sup> Chai R. Feldblum, *The Right to Define One’s Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115 (2006).

<sup>107</sup> *Id.* at 116 (quoting *Lawrence*, 559 U.S. at 574 (2003)).

interest. Rather, it addresses an interesting threshold question about substantive due process doctrine. The doctrine has largely been concerned with removing state intrusion, but assuming it applies to gender autonomy, is that sufficient to protect transgender persons from the negative social effects that emanate from state regulation of gender? She argues that there is no state compulsion involved in gender regulation – these are simply social customs that act without state regulations.

No state law criminalizes the act of transitioning from one gender to another. Indeed, most states affirmatively permit an individual who has undergone such a transition to change his or her original birth certificate. And it is certainly not the state that requires employers or businesses to use fitting rooms and bathrooms that are segregated by gender.<sup>108</sup>

This leaves out some of the most objectionable gender regulations, such as birth certificates, driver licenses and insurance restrictions. She bypasses these, and suggests that it is necessary to posit the liberty interest explicated by the Court in *Lawrence* as a positive right in order to provide relief from gender regulations.<sup>109</sup> While no court has explicated the doctrine in this way, she quotes a number of commentators who make the case.<sup>110</sup> This would, in her terms, require the state “to ensure that those who have made such a choice are not punished for that decision through the loss of a job, the denial of housing, or the denial of good and services.”<sup>111</sup> This would require “that government make discrimination on the grounds of transgender status illegal”, and to enact legislation to modify social norms that tilt the playing field – “rectify the tilt . . . so that everyone can stand upright . . . or . . . ensure that the tilt underneath that particular, individual transgender person is rectified.”<sup>112</sup> This would include requiring gender-neutral bathrooms in every location, and allowing transgender persons to change their sex on official documents and records without a surgical requirement.

The question of whether a substantive due process analysis of gender autonomy requires that the Due Process Clause be reconceived as a positive right, requiring affirmative government engagement to rectify social norms, remains an open question. While I laud the idea, it has been addressed and rejected by federal courts in the past. In *Holloway v. Arthur Andersen & Co.*,<sup>113</sup> for example, the transgender plaintiff, who sued her private sector employer for Title VII sex discrimination, argued that an interpretation that failed to include discrimination based on transsexual status would violate the doctrines of equal protection and due process. She argued that the government had an affirmative obligation to include transsexuals in Title VII. The Ninth Circuit rejected this

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<sup>108</sup> *Id.* at 126-127.

<sup>109</sup> *Id.* at 127.

<sup>110</sup> *Id.* at 127-28.

<sup>111</sup> *Id.* at 137.

<sup>112</sup> *Id.*

<sup>113</sup> *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

argument in a much-cited opinion, stating that “it can be said without question that the prohibition of employment discrimination between males and females and on the basis of race, religion or national origin is rationally related to a legitimate governmental interest,” and implying that the use of a male/female binary distinction that excludes transsexuals is rationally related to a legitimate governmental interest.<sup>114</sup> The Tenth Circuit has more recently upheld this holding, though it indicated that *Holloway* should be re-evaluated.<sup>115</sup> *Lawrence* may impact it, but exactly what impact there is requires more explanation.

The theory of affirmative obligation is not a necessary component of the substantive due process argument, and its novelty and uncertainty make it questionable as an effective approach at the current time to creating an enforceable right to gender autonomy. Particularly with regard to state determination of gender, and state regulation of gender markers on government identity documents, and use of those by courts to deny rights to transgender persons – these are, contrary to the assertion in the article, all matters of state intrusion. It is not necessary to ask the state to undertake an affirmative obligation to do anything additional in order to rectify these problems. It *is* state action causing the problem, and even a belief in a negative substantive due process right would imply that the state is required to stop the state action causing the problem. It would be laudatory to require the state to prohibit gender identity discrimination and legislate gender neutral bathrooms, but whether or not there is a positive obligation on government to do so under the substantive due process doctrine is an additional step beyond my argument in this article.

In 2007, Laura Langley wrote a full-length student note specifically devoted “to build[ing] a foundation for positing a right to gender self-determination rooted in the Due Process Clause of the Fourteenth Amendment.”<sup>116</sup> She starts by positing a broad understanding of the term “transgender” as “all people who challenge traditional notions of how women and men should appear and behave, whether or not they self-identify as trans.”<sup>117</sup> She acknowledges the problems inherent in medicalization, but suggests that “under the current paradigm, understanding, manipulating and exploding these regulatory

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<sup>114</sup> *Id.* at 663-64.

<sup>115</sup> *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (denying claim that equal protection requires medical administration of hormones to transgender prisoner. However, the court, after noting that many courts have followed *Holloway*, specifically discussed the argument that *Holloway* should be re-evaluated. “Recent research concluding that sexual identity may be biological suggests reevaluating *Holloway*.” *Equality Found. v. City of Cincinnati*, 860 F.Supp. 417, 437 (S.D. Ohio 1994) (concluding that sexual orientation is an issue beyond individual control), *aff’d in part and vacated in part*, 54 F.3d 261 (6th Cir.1995); *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319, 1324 n. 5 (E.D. Cal.1993) (collecting research suggesting that sexual identity is biological). However, we decline to make such an evaluation in this case . . . ”); *Doe v. U.S. Postal Serv.*, No. 84-3296,1985 WL 9446 at 4, (suggesting that equal protection prohibits discrimination based on gender identity), *but cf. Gomez v. Maass*, No. 90-35390, 1990 WL 17776, at \*2 (9th Cir. 1990).

<sup>116</sup> Laura K. Langley, Note, *Self-Determination In a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. ON C.L. & C.R. 101 (2006).

<sup>117</sup> *Id.* at 103.

entities is prerequisite to obtaining the maximum gender self-determining agency possible for any transgender individual” because courts often rely on medical experts in this area.<sup>118</sup> This seems to be a call for using medical knowledge in order to explain concepts of gender autonomy, but not falling into the trap of assuming that only post-operative transsexuals are entitled to it. Interestingly, she cites *Lawrence* for the proposition that “notions of liberty are temporally contingent.”<sup>119</sup> In this, she must be adverting to the Court’s reference to “emerging awareness” of liberty, though she does not explain her basis for the supposition that *Lawrence* justifies the idea outside of the context of gay relationships.

In a very interesting discussion, the author suggests that the right should be framed very broadly in order to maximize due process protection, rather than very narrowly in an attempt to proceed too carefully.<sup>120</sup> This seems to assume that the right is a “fundamental right” that triggers the “strict scrutiny” standard of review. She cautions against framing it only in terms of a right to “‘change’ genders, or use the restrooms of one’s choice or dress in accordance with one’s gender identity.” According to her, these “den[y] the breadth of harm caused by gendered regulations and “fails to appreciate the extent of the liberty at stake”, demeaning the claim.”<sup>121</sup> She does not explicate what harm there is, or how it impinges on a specific fundamental right. In other words, the broader the right, the more it is likely to be considered a viable candidate for due process protection. She cites to a highly-regarded article by Professor Randy Barnett, who calls *Lawrence* a “libertarian revolution,” a view mostly rejected by courts and commentators. She quotes Professor Barnett’s *dictum*: “The more specifically you define the liberty at issue . . . the more difficult a burden this is to meet - and the more easily the rights claim can be ridiculed.”<sup>122</sup> Langley therefore suggests that an assertion of broader rights to full deregulation of gender has a better chance of success than a narrower formulation limited to post-operative transsexuals.<sup>123</sup>

She then turns to *Lawrence*, and points to the “emerging awareness” doctrine, noting that it encourages an evaluation of the social and legal gains made by transgender people over the last half century.<sup>124</sup> She lists some of the gains that should be included in making a claim of emerging awareness, including the social understanding of the complexity of gender identities, the proliferation of terms employed to describe these identities, medical recognition that more than two sexes exist and that gender identity is the primary determinant of one’s sex, and the law’s cognizance of gender non-conforming people, specifically transsexual individuals.<sup>125</sup> She points to the United Kingdom’s Gender Recognition Act 2004, which permits transsexual people to obtain a “gender

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<sup>118</sup> *Id.* at 106.

<sup>119</sup> *Id.* at 114.

<sup>120</sup> Langley, *supra* note 116 at 115-16.

<sup>121</sup> *Id.* at 117 (quoting *Lawrence*, 539 U.S. at 567).

<sup>122</sup> *Id.* at 115, 131 n.75 (citing Barnett, *supra* note 66, at 32).

<sup>123</sup> *Id.* at 118.

<sup>124</sup> *Id.* at 119.

<sup>125</sup> Langley, *supra* note 116 at 121-22.

recognition certificate”, and the recognition of two-spirit, bi-gendered, and other people who are understood as not simply male or female in some indigenous cultures.<sup>126</sup> Other factors include developments in transgender non-discrimination law, and court rulings on gender discrimination and same-sex marriage that challenge gender norms.<sup>127</sup> Her discussion seems to imply that gender autonomy is a “fundamental right” that triggers “strict scrutiny.” She does not explain why this is the case.

The author also discusses some state interests that may be raised in defense of gender regulations, such as interests in identifying people, maintaining records, and remedying gender discrimination, as well as moral concerns about allowing self-identification of gender categories. She argues not argue that these interests are illegitimate and irrational. With regard to moral concerns, she suggest that *Lawrence* holds that “morality alone is an insufficient state interest to justify existence of a . . . statute[.]”<sup>128</sup> She also argues that state interests do not necessitate “definitional and categorizing powers.”<sup>129</sup> Rather, such state regulation increases inaccuracy, rather than decreasing it, because gender nonconforming people pose visual identification challenges.<sup>130</sup> She also points to the existence of scientific evidence regarding the relationship between gender identity and gender, though she does not specify what it is or how it would rebut putative state interests.<sup>131</sup>

This argument feels like an important one, but there seems to be a contradiction between this argument and the previous section, in which she implies that gender autonomy is a fundamental right. If gender autonomy is a fundamental right, then the state must show that laws regulating gender are narrowly tailored to compelling state interests. There is, however, no discussion here whether the state interests are compelling. The discussion about whether the putative state interests are rationally related to gender regulations is also a bit thin, with little evidentiary backing other than the general idea that gender nonconforming people pose visual identification challenges and there is some scientific evidence that relates gender identity to gender.

In 2008, Jennifer Rellis suggested that the right to privacy is positioned to challenge compulsory participation in the male-female binary, suggesting a statutory right to identify as a third gender, as is now permitted in India.<sup>132</sup> There is no discussion of *Lawrence* or substantive due process. In the same year, Amanda Kennedy argued for Professor Chai Feldblum’s 2006 formulation, and suggested that it should be applied

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<sup>126</sup> *Id.* at 121, 131 n.108.

<sup>127</sup> *Id.* at 121-22.

<sup>128</sup> *Id.* at 128.

<sup>129</sup> *Id.*

<sup>130</sup> Langley, *supra* note 116 at 129. It should be noted that many transgender people have a gender-conforming visual appearance.

<sup>131</sup> *Id.* at 128-29.

<sup>132</sup> Jennifer Rellis, “Please write” *E’ in this Box” Toward Self-Identification and Recognition Of a Third Gender: Approaches in the United States And India*, 14 MICH. J. GENDER & L. 223, 257 (2008).

equally to youth and adults.<sup>133</sup> The article does not add anything to Professor Feldblum's argument, and does not respond to the *Lawrence* court's specific injunction that it decided the case based on the fact that it did not involve minors.

In 2009, there were two relevant articles. The first, by Leslie Dubois-Need and Amber Kingery, suggest that no constitutional duty arises from *Lawrence* because the activity regulated "was unambiguously within the realm of private life. Transgender petitioners, on the other hand, seek to perform a more public act: changing the gender appearing on their official documents."<sup>134</sup> This echoes, without attribution, the argument in Greenberg and Herald's 2005 article, which is problematic for the same reasons as pointed out above.<sup>135</sup>

One issue that bears further reflection is the question of how sex classifications relate to racial classifications. If sex classifications are subject to a right to privacy, are racial classifications also subject to the same right?

Arguments that focus on privacy fail to appreciate the very visible nature of the characteristics which lead society to classify individuals by race or by sex. If transgender individuals are entitled to a right of privacy concerning their sex, then the scholars who argue for such privacy should be asked to answer questions regarding the application of the right of privacy to the context of race. Since race is a basis for discrimination, perhaps to a larger extent than sex, should individuals have a right of privacy regarding their race? In practical terms, how would this right be enforced, where physical characteristics are often so difficult to substantially alter? Scholars who argue against the binary and immutable characteristics of sex have made a compelling argument, but where the proposed solution is self-determination, that solution may fail to recognize the significant (and possibly prejudicial) effect that others' perceptions of an individual's sex will have, notwithstanding policies that allow self-classification.

This important issue calls the question of whether a constitutional right to gender autonomy suggests a corresponding constitutional right to self-identify one's race, with all the problems attendant to U.S. race relations. The author suggests that scholars, such as myself, who argue against the simple binary of sex, be called out on the question of

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<sup>133</sup> Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors*, 19 *Hastings Women's Law Journal* 281, 298 (2008).

<sup>134</sup> Leslie Dubois-Need and Amber Kingery, *Transgender in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 *Alaska L. Rev.* 239, 261 (2009).

<sup>135</sup> See, Greenberg & Herald, *supra* note 90 at 882-884.



whether we support a right of people to identify themselves as “black” or “white” or “multi-racial” or other categories. I could easily argue either way and still retain the ability to argue for a right to gender autonomy. While this argument about the relationship between race and sex is interesting, it fails to take into account that the U.S. legal history of racial classifications has taken a very different path in constitutional jurisprudence. Early challenges to Jim Crow laws did indeed attempt to raise the issue of whether a person could identify themselves in one racial classification in defiance of state laws that placed them in another racial classification.<sup>136</sup> But this argument was abandoned early in the fight for racial equality. It is now established beyond cavil that racial classifications are subject to strict scrutiny under the Equal Protection clause of the U.S. Constitution.<sup>137</sup> The same is not true of sex classifications, and even if it were, the understanding of “sex classification” has been restricted to an understanding of sex as a simple binary. If the courts were open to the argument that state sex classifications violated the equal protection of the laws for transgender people, I would be all in favor of taking that pathway, rather than depending on a somewhat unsteady and troubled notion of privacy. But, as noted previously, the courts have not permitted transgender persons to avail themselves of that protection.<sup>138</sup> While the relationship between sex and race is an interesting philosophical question, it is incorrect to assume that a right to gender autonomy raises the issue of a corresponding “right to racial autonomy”. Different historical conditions and differing legal treatment call for different legal solutions in the contemporary legal landscape.

These commentators raise the possibility that the doctrine of substantive due process, as articulated in *Lawrence*, implies a right of gender autonomy. These articles begin to suggest a pathway to creating an enforceable right. What evidence is required, beyond the argument that *Lawrence* valorizes “choices central to personal dignity and autonomy” and that one’s gender is such a choice?

### **Understanding *Lawrence***

While it is tempting to make a simple reading of *Lawrence*, looking to “emerging awareness” of gender autonomy as involving “personal dignity and autonomy,” and concluding that gender autonomy is a fundamental liberty, *Lawrence* is a very ambiguous opinion<sup>139</sup> with extremely broad rights talk that has been both praised and vilified.<sup>140</sup> Some limit the case to its facts,<sup>141</sup> but others construe it as a libertarian revolution.<sup>142</sup> The

<sup>136</sup> *The American ‘Legal’ Dilemma: Colorblind I/Colorblind II – The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 Virginia Journal of Social Policy and the Law 315, 383 n. 269 (2000).

<sup>137</sup> *Adarand Construction, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>138</sup> See, *supra* note 113-115.

<sup>139</sup> See, e.g., Case, *supra* note 64, at 76; Sunstein, *supra* note 64, at 29. See also David M. Wagner, *Hints, Not Holdings: Use of Precedent In Lawrence v. Texas*, 18 BYU J. PUB. L. 681 (2004).

<sup>140</sup> Clifford R. Goldstein, Liberty Online, A Magazine of Religious Freedom, July/Aug. 1997, available at <http://www.libertymagazine.org/article/articleview/68/1/52/> (last visited July 6, 2009).

<sup>141</sup> Trent L. Pepper, *The “Mystery of Life” In the Lower Courts: The Influence of the Mystery Passage on*

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law of substantive due process is itself somewhat chaotic and elusive,<sup>143</sup> making the scope of *Lawrence* difficult to ascertain. The opinion and the substantive due process doctrine on which it stands are both on shaky ground, and may be subject to change without notice.<sup>144</sup>

Many of the commentaries on *Lawrence* are devoted to understanding its standard of review. The opinion is very unclear whether the standard of review is strict scrutiny, rational basis, or something in between, and there are many mixed signals in the text.<sup>145</sup> This is of crucial importance to future substantive due process determinations, such as those that might be urged with regard to gender autonomy, because the arguments under each standard is very different. A reading of *Lawrence* that does not compellingly nail down the standard of review creates fatal ambiguity for any assertion of substantive due process rights. There are other issues in substantive due process that are important to making a case for gender autonomy, but we must first explain the standard of review in *Lawrence* before proceeding further. None of the commentaries and cases to date have made a convincing case for the reading of the standard of review in *Lawrence*. I shall attempt to do so here and, as we shall see, this explanation sidesteps some of the other thorny issues found in *Lawrence*.

One could simply argue in favor of not trying to understand the unfathomable opinion in *Lawrence*, and advise advocates of gender autonomy to use a two-pronged approach: 1) gender autonomy is a fundamental right, and 2) even if it is not a

*American Jurisprudence*, 51 HOW. L.J. 335 (2008); Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 412; John Tuskey, *What's A Lower Court To Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597 (2005); Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1152, 1160-1161 (2004); Sunstein, *supra* note 64, at 29-30; Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004).<sup>142</sup> Graglia, *supra* note 74.

<sup>143</sup> See, e.g., Deana Pollard Sacks, *Elements of Liberty*, 61 SMU. L. REV. 1557, 1557-58 (2008) (“Liberty analysis under the Due Process Clause of the Fourteenth Amendment has been enormously inconsistent throughout the history of constitutional jurisprudence. . . . The Supreme Court's liberty jurisprudence over the past century may fairly be called chaotic.”); Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483 (2007) (describing constitutional scholars’ views of unenumerated constitutional rights as “a quest for substances as elusive as manna, and they appear, on the whole, to have decided that the objects of their assigned search have an awkward attribute in common: they don't really exist.”); Andrew J. Selgisohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 411, 413 (2004) (“Substantive due process remains an incoherent doctrine, and, as Justice Scalia was eager to point out, the Court's application of the doctrine was itself open to question. The qualified equality of gays and lesbians achieved in *Lawrence* now relies on a fundamentally unstable doctrine of liberty. In light of what might have been in this case, this outcome represents a major failure by the Court.”).

<sup>144</sup> Sacks, *supra* note 137, at 1558; Tribe, *supra* note 137; Richard D. Mohr, *The Shag-A-Delic Supreme Court: “Anal Sex,” “Mystery,” “Destiny,” and the “Transcendent” in Lawrence V. Texas*, 10 CARDOZO WOMEN'S L.J. 365, 367 (2004); Selgisohn, *supra* note 137.

<sup>145</sup> *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); Greenberg & Herald, *supra* note 87; Case, *supra* note 64, at 83-85; Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 209-10 (2004) (suggesting sliding scale); Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1113-17 (2004) (sliding scale).

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fundamental right, the state interests in gender regulation are illegitimate. This would not only require a double effort, it would make it all too easy for a court to use a divide-and-conquer approach, improperly concentrating on the easier-to-deny “fundamental right” prong, and then slashing the rational basis review to ribbons in a one paragraph squib, as happened in the opinions in *Bowers* and *Washington v. Glucksberg*.<sup>146</sup> In fact, as demonstrated below, *Lawrence* greatly strengthens the generally weak “rational basis” review, what some have called “minimal scrutiny with bite.”<sup>147</sup> When I wrote my prior article in 2001, the “fundamental right” approach was much more likely to result in a win than a rational basis review. After *Lawrence*, a strong argument can be made that it is the reverse.

Let us first take a look at the comparative positions in which the two alternatives of substantive due process review would place advocates of gender autonomy. If the *Lawrence* opinion used a strict scrutiny standard of review, under which a law that regulates a fundamental right is unconstitutional unless the state shows a compelling state interest, this would put advocates of gender autonomy in a very good position. In such circumstances, *Lawrence* must have necessarily held that gay adult consensual sexual relationships are a fundamental right, and that laws impinging on this right are presumed to be unconstitutional. This would also allow an argument that *Lawrence* widened the *Bowers* formulation of the right to privacy from “family, marriage and procreation” to “personal dignity and autonomy.” This would give a lot of room to shoehorn gender autonomy into the right to privacy as a fundamental right, especially since gender regulation creates a great deal of stigma against transgender persons that is comparable to the stigma mentioned in *Lawrence*. Advocates would then be arguing about whether gender autonomy is a fundamental right, either based on history and tradition, or based on *Lawrence*’s “emerging awareness” doctrine. The presumption of unconstitutionality that attaches to a “strict scrutiny” review would require the state to show that its interests in gender regulation are “compelling.” This would be great for gender autonomy advocates. However, as discussed below, it is unlikely that courts will read *Lawrence* in this way.

On the other hand, if the *Lawrence* opinion used a rational basis review, this would present more difficulties to advocates of gender autonomy. First, it leaves in place the more restrictive *Bowers* formulation, under which only acts relating to “family, marriage and procreation” are considered fundamental. The case of gender autonomy would be hard to fit within this formulation. Unless advocates could persuade a court that gender autonomy is a fundamental right, it is presumed to be constitutional, unless the state interest is shown to be illegitimate. Advocates will find themselves involved in a

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<sup>146</sup> 521 U.S. 702.

<sup>147</sup> Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359 n. 26 (2008) (citing Jeffrey Shaman, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 104 (2001)); see also Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 361-63, 370 (1999) (discussing the concept); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

completely different dispute. They will find themselves arguing about whether the *Lawrence* Court understood the state interest in all moral regulation to be illegitimate (a difficult position to defend), or whether and where that illegitimacy exists outside the context of homosexuality. This would be a much more difficult argument for advocates of gender autonomy, making it less likely that courts would read such an argument in favor of gender autonomy.

Courts and commentators have vacillated between these two poles of reading *Lawrence*. However, neither of these readings is satisfactory because both create fatal inconsistencies in the opinion, as well as in the doctrine of substantive due process. There is a third explanation, one that has, surprisingly, not yet been discussed by courts or commentators. This explanation arises from the seemingly overlooked fact that substantive due process contains three elements, not two. The first is the nature of the right (fundamental or not), the second is the nature of the state interest (compelling, legitimate or illegitimate), and the third is the relationship between the law and the state interest (narrowly tailored, rationally related, or not rationally related). No courts or commentators seem to have discussed this third issue, that of the relationship between the law and the asserted state interest. It is this third issue that makes sense of *Lawrence*, and which harmonizes it with other substantive due process cases. It may have been overlooked because it sounds like equal protection analysis, leading some commentators to call *Lawrence* a due process case that sounds in equal protection.

### **Standard of Review**

The *Lawrence* opinion nowhere indicates the standard of review used by the Court, and the opinion contains mixed signals on that score. There are some signals that suggest a strict scrutiny standard of review, and a number of commentators and courts have read it this way.<sup>148</sup> First among these is the fact that the *Lawrence* opinion contains six long pages of historical analysis near the beginning,<sup>149</sup> an analysis that is generally used in substantive due process cases to decide whether or not the subject matter is a “fundamental right.” The outcome of the historical analysis in *Lawrence* is that there is an emerging awareness that adult sexual relationships are within the realm of personal liberty. This positive outcome favors the petitioners, not the state, and is consistent with the strict scrutiny standard. In addition, the Court never says that rational basis review applies, nor does it explicitly use the rational basis standard (rationally related to a legitimate government interest).

On the other hand, since there was no finding of a “fundamental right” in *Lawrence*, however, and no reference to the strict scrutiny standard (“narrowly tailored to achieve a compelling state interest”), the Court could implicitly be using a rational basis standard of review. The *Lawrence* opinion never declares that gay personal relationships

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<sup>148</sup> David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 460 (2004); see also Witt v. Dep’t of Air Force, 527 F.3d 806 (9th Cir. 2008), *reh’g en banc denied*, 548 F.3d 1264 (9th Cir. 2008).

are now within the realm of fundamental liberty. The modern Court would have been expected to make an explicit declaration on this point before withholding the presumption of constitutionality from the statute.<sup>150</sup> Furthermore, the rational basis standard of review permits legal regulation of subjects so long as the law is rationally related to a legitimate state interest, whereas strict scrutiny requires “compelling” state interests. *Lawrence* refers only to “legitimate” state interests. In referring to cases outside the U.S. that have struck down laws against homosexuality, the Court says “[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more *legitimate* or urgent.”<sup>151</sup> At the end of the majority opinion, it says “[t]he Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual.”<sup>152</sup> These points suggest that the standard of review employed is rational basis review. There are, however, some problems with this viewpoint.

If *Lawrence* were a simple “rational basis” analysis, however, the historical analysis becomes mere surplusage. The Court could have skipped the six pages of history and simply ruled, as it did later in the opinion, that the state interest in moral condemnation of homosexuals is an illegitimate basis, citing the case of *Romer v. Evans*. Justice Scalia points this out at length, characterizing the Court’s legal stance as follows: “Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”<sup>153</sup> As Professor David Meyer says: “Indeed, if *Lawrence* considered it irrelevant to ascertain whether petitioners’ liberty interest ranked as ‘fundamental,’ it is difficult to imagine why the Court felt impelled to criticize the methodology that *Bowers* employed in rejecting such a claim.”<sup>154</sup>

The superfluity of the six-page historical analysis in *Lawrence* is heightened when one realizes that it is focused on a technical point that is apparently only of interest to historians: is the long history of laws prohibiting consensual sodomy focused on homosexual sodomy only, or on both heterosexual and homosexual sodomy? The *Lawrence* Court concluded that the *Bowers* majority opinion was in error in stating that the long history of laws against consensual sodomy were focused on homosexual sodomy, for not only was homosexual sodomy prohibited, but also heterosexual sodomy, both part of a crusade against non-procreative sex. This historical review raises an interesting academic point, but one which is of no practical value.

If *Lawrence* is decided under a rational basis review, there is even more

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<sup>150</sup> Barnett, *supra* note 66, at 21.

<sup>151</sup> *Lawrence*, 539 U.S. at 577 (emphasis added).

<sup>152</sup> *Id.* at 578 (emphasis added).

<sup>153</sup> *Id.* at 586 (citation omitted).

<sup>154</sup> Meyer, *supra* note 142, at 463, 480 (*Lawrence* as finding a fundamental right in what Meyer terms “family privacy”).

surplusage. The Court explicitly analogizes between heterosexual relationships, which are fundamental liberty interests, and homosexual relationships. “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>155</sup> In fact, the Court goes so far as to say of such laws that

[t]heir penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>156</sup>

This appears to be saying “just as heterosexual relationships are accorded the status of fundamental liberty, so too must homosexual relationships be accorded that status, for there is no legal distinction.” If the Court is operating under a rational basis review, however, then this language appears to add nothing; the language is again mere surplusage. Furthermore, if *Lawrence* was a “rational basis” analysis, the Court could have simply skipped to the later part of the opinion, where it states that the state interest in moral condemnation of homosexuals is an illegitimate basis, citing *Romer v. Evans*.<sup>157</sup>

Some argue that the purpose of the historical analysis is unrelated to the standard of review, thus eliminating the surplusage argument against rational basis review. Rather, according to one commentator, its purpose was to construe the original intent of the framers of the Fourteenth Amendment by showing that the Amendment was written in the context of a nineteenth-century history of sodomy nonenforcement.<sup>158</sup> That would, of course, require a belief in originalism as a doctrine, a view that is considered to be in opposition to gay rights because there were no gay rights in 1868. This argument also requires an explanation of the direct contradiction posed to originalism by the Court’s “emerging awareness” language, since originalism – interpretation of the Fourteenth Amendment based on the intent of its framers in 1868 – would seem to rule out emerging awarenesses arising in the late 20<sup>th</sup> century. These two problems leave the originalism argument on very shaky ground.

Another commentator argues that the historical analysis is a new deference to social consensus as a guide to morals as a state interest.<sup>159</sup> Courts will now evaluate statutes that limit people’s freedom to engage in conduct that they enjoy more leniently if it appears that most Americans still consider the regulated conduct morally harmful. Conversely, the same kind of statutes would fall if it appears that Americans no longer

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<sup>155</sup> *Lawrence*, 539 U.S. at 574.

<sup>156</sup> *Id.* at 567.

<sup>157</sup> *Id.* at 582-83.

<sup>158</sup> William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1056-57 (2004).

<sup>159</sup> *Id.* at 1087.

consider the regulated conduct morally harmful. Had the *Lawrence* Court intended to make deference to social consensus the new touchstone of substantive due process determinations, however, it would not have been necessary for the *Lawrence* Court to argue against the *Bowers* finding that prohibitions against sodomy have ancient roots, nor to discuss the distinction between heterosexual and homosexual sodomy laws. Furthermore, it would be tantamount to abandoning the tiered approach to fundamental rights, an argument that has been made by a number of libertarian commentators, but one that is hard to support at this point in our jurisprudence.

### **The Third Leg of the “Rational Basis” Standard of Review: The Rational Nexus Between Law and State Interests**

If the historical analysis in *Lawrence* plays some role in the substantive due process review, there is traction for the argument that *Lawrence* is using it on the *other* side of the substantive due process equation: not the issue of fundamentality, and not the issue of whether the state interest in moral protection is legitimate, but, rather, whether the law is “rationally related” to the state interest in moral protection. Given the fact that the Court never mentions strict scrutiny or fundamentality, nor does it say explicitly that moral protection is never an illegitimate state interest, the invalidation of the statute must rest, and the Court states that it does rest, on the rationality of the relationship between the Texas statute and the asserted state interest in moral protection. This is not a new concept, and has long been known in the law of equal protection as “means scrutiny,” in distinction to “ends scrutiny.”<sup>160</sup> In means scrutiny, the state interest is accepted as legitimate, but the law is struck down if the relationship between the interest and the law is missing, unclear or not even-handed.<sup>161</sup>

The Court’s authority for the illegitimacy is the *Romer* case, an equal protection case, but nonetheless one that stands for the proposition that state laws singling out homosexuals are invalid because they are “born of animosity”, i.e., that the laws are not rationally related to the asserted state purposes that are otherwise valid in themselves. As the Court noted of *Romer*, “[w]e concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose.”<sup>162</sup> Reading the *Romer* case, one finds that the specific ground for its holding is not that the state interests are deemed illegitimate, but that there is a lack of rational nexus between the law and those interests.

We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose,

<sup>160</sup> Robert C. Farrell, *Successful Rational Basis Claims In The Supreme Court From The 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 365 (1999).

<sup>161</sup> *Id.*

<sup>162</sup> *Lawrence*, 539 U.S. at 574.

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*Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 462, 108 S.Ct. 2481, 2489-2490, 101 L.Ed.2d 399 (1988), and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. *The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.*<sup>163</sup>

The *Romer* Court did not say that the state interest in respect for objections to homosexuality and freedom of association was illegitimate. Rather, the Court said that the amendment was not sufficiently related to those particular justifications.<sup>164</sup> It is this issue to which the *Lawrence* Court is advertent, and not the legitimacy of any and every interest in moral protection. Interestingly, the *Kadmas* decision cited in the passage above from *Romer* also specifically refers to the nexus issue, noting that a statute must fall when it “rests on grounds wholly irrelevant to the achievement of the State's objective.”<sup>165</sup> The *Lawrence* decision rests on the rational nexus between the law and the state interests. It does not rest on the legitimacy of moral protection.

Justice Scalia wrongly presumed that the *Lawrence* opinion was based on the proposition that Texas had no legitimate state interest in protection of morals, and completely missed the other possibility: that the Texas statute was not “rationally related” to that interest. He bitterly criticized the suggestion that moral protection is not a

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<sup>163</sup> *Romer*, 517 U.S. at 635 (emphasis added).

<sup>164</sup> *But cf.* Farrell, *supra* note 154, at 408-10, 415 & n.516, (reading *Romer* as an “ends analysis” case. This reading assumes that “impossible to credit them” means that the Court discredited the asserted state interests and substituted its own, finding the Court-substituted “state” interests to be illegitimate. I believe it is more likely that the Court was referring to the impossibility of crediting the asserted state interests as a justification for the statute, i.e., there was no rational nexus between the two).

<sup>165</sup> *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462-63 (1988) (citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (The choice of *Kadmas* is interesting because it was essentially a repudiation of the Court's surprising rationality review in *Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyer*, the Court invalidated a statute charging tuition for public education to undocumented aliens, holding that the state's means did not relate to the state's asserted ends in reducing illegal immigration, alleviating the special burden of illegal aliens on its schools, and recognizing that such students might not remain in the state for long. In *Kadmas*, by contrast, the Court applied a rationality review so deferential to the government that it essentially said that it could only invalidate statutes where the government is lying about its interests, or, as the Court said more nicely, the asserted state interests “could not reasonably be conceived to be true by the governmental decisionmaker.” As a result, the Court credited the state's asserted interests in allowing school bus fees for urban and suburban students, but not rural students); *See, also* Farrell, *supra* note 154, at 382-86 (It seems as if the *Romer* Court was essentially calling the Colorado Legislature a liar).



legitimate state interest. The Court was saying that moral protection is a legitimate state interest, but that criminalization of homosexual sodomy, or, as it reframed the issue, a homosexual relationship, is not properly considered a violation of moral standards, and therefore the Texas statute was not rationally related to the otherwise legitimate state interest in protection of morals. This is what led to the otherwise unexplainable historical analysis in *Lawrence*. Historical analysis had heretofore been used only to determine whether a right is fundamental. But the Court faced the problem of proving the proposition that a homosexual relationship is not a violation of moral standards, a particularly difficult challenge in light of the *Bowers* opinion, which found that homosexual sodomy is violative of moral standards, and has been so considered from ancient times to modern-day society. The *Bowers* opinion ends with the following conclusion about the basis of laws prohibiting gay sex:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate.<sup>166</sup>

The *Lawrence* Court picked up this thread, which essentially challenged advocates of gay rights to show how these rights could be legitimized without opening Pandora's box to let out every morality-based restriction. The *Lawrence* opinion accomplished this by means of a historical review that re-examines this finding in *Bowers*. Thus, the *Lawrence* opinion is not using the historical review to make any conclusions about the fundamental status of gay relationships, but to refute the finding that criminalization of gay relationships is rationally related to the proper regulation of morals.

In order to rule the Texas statute unconstitutional without declaring gay sex to be a fundamental liberty, the Court had to find a way to draw a line between gay sex and other laws "representing essentially moral choices," that list given by Justice Scalia in his *Lawrence* dissent, "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." It could have done so in the traditional way, by declaring gay sex a fundamental right, but it chose not to. Instead, it negated the relationship between the Texas statute and the state interest in moral protection asserted in the specific case of homosexuality. The historical argument allowed it to do so by showing that homosexual conduct is not widely considered immoral, silently leaving

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<sup>166</sup> *Bowers*, 478 U.S. at 196.

untouched the idea that moral condemnation can be a legitimate state interest in other cases. As it clearly was not used to find fundamental liberty status, the historical argument in *Lawrence* seems most likely to be functioning as a means to determining the strength of the relationship between the law and the asserted state interests in prohibiting gay sex. The Court found that there was no historical tradition of laws against gay sex, and that the laws of recent origin were subject to desuetude, were disfavored by important legal authorities, and were being repealed. In addition, the Court shifted the focus of the historical review from the founding of the U.S. or earlier to the past fifty years, using this recent window to demonstrate an emerging awareness of liberty. The purpose of this review was not to find a fundamental liberty, but to weaken the state's contention that the law had a rational basis in the universal moral condemnation of gay sex.

It has been presumed by many commentators that *Lawrence* runs counter to prior substantive due process cases,<sup>167</sup> such as *Washington v. Glucksberg*<sup>168</sup>. In *Glucksberg*, the Court upheld a law making physician-assisted suicide a felony, after a careful historical analysis that distinguished its prior case that struck down a law potentially prohibiting withdrawal of life-sustaining treatment for someone in a persistent vegetative coma. After finding that physician-assisted suicide was not a fundamental right, the Court spent several pages analyzing the state interests asserted in that case. In itself, this state interest analysis in *Glucksberg* was rather startling. Rather than citing the presumption of constitutionality and ending its involvement, the Court extensively reviewed the state interests, eventually concluding that the statute was rationally related to the state interests asserted. This is not very different from the process followed in *Lawrence*, except that *Lawrence* never specifically states that it is using rational basis review, and the *Lawrence* analysis does not focus on the state interest itself, but rather on the relationship between the law and the interest, concluding that the law is not rationally related to the otherwise valid state interest in moral protection.

Nonetheless, despite these similarities, commentators have assumed that *Lawrence* is opposed to *Glucksberg*. Yale Kamisar, for example, wrote an article entitled *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, and discussing *Glucksberg* and *Lawrence* as expressing inexorably opposed doctrines:

The principal reason *Glucksberg* stands on shaky ground is *Lawrence v. Texas*, which overruled *Bowers v. Hardwick* and held that “[t]he State cannot demean [the] existence [of homosexuals] or control their destiny by making their private sexual conduct a crime.” As Brian Hawkins has observed, “Although the *Lawrence* majority opinion never cited *Glucksberg*, the aspersions *Lawrence* cast on *Bowers* inevitably fell with equal force on *Glucksberg*” –

<sup>167</sup> See, e.g., Hawkins, *supra* note 135, at 412.

<sup>168</sup> *Glucksberg*, 521 U.S. 702.

especially the narrow view of substantive due process *Glucksberg* shared with *Bowers*.

Mr. Hawkins is not the only commentator to call attention to the fact that, despite the heavy damage *Lawrence* seems to have inflicted on *Glucksberg*, it failed to so much as cite the earlier case. Two of *Lawrence's* strongest critics have called this failure a “striking manifestation of *Lawrence's* haughtiness toward the kind of legal analysis that had become conventional in the case law.” “The rejection of the *Glucksberg* test,” they continue, “is not only unacknowledged and unexplained, but it is a total rejection.”

*Glucksberg* had insisted, as had *Bowers*, that in order for a right or liberty to come within the substantive reach of the Due Process Clauses it had to be (1) “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty” and (2) susceptible of a “careful description” (whatever that means). Although the *Lawrence* Court did conclude that the historical grounds relied on by the *Bowers* majority were somewhat doubtful, it could not, and did not, claim that the right or liberty at issue was “deeply rooted in this Nation's history and tradition.”<sup>169</sup>

This discussion assumes that *Lawrence's* discussion of history is similar to the *Glucksberg* discussion. But, as shown above, the discussion of history in *Lawrence* is aimed at determining the rationality of connecting gay relationships to an otherwise valid state interest in moral protection. *Glucksberg's* discussion of history, on the other hand, is aimed at the other side of the due process equation, and is designed to determine the existence of a fundamental right *vel non*.

The nature of the two historical arguments is quite different. *Glucksberg*, like all prior substantive due process cases, discussed whether history and tradition showed that the nation has been pro-physician-assisted suicide. *Lawrence's* discussion, on the other hand, never discussed that issue, as has been assumed by less than careful analysis. Rather, *Lawrence* discussed whether history and tradition shows that the nation has been anti-homosexuality. The discussion pro and the discussion con are quite different, with the first resulting in a determination *vel non* of fundamentality, and the second resulting in a determination of the rationality of the state interest. This is not to say that a state cannot have an interest if there is no history and tradition of antagonism towards the

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<sup>169</sup> Yale Kamisar, *Foreward: Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1455-57 (2008) (citations omitted) (contending that *Glucksberg* is in opposition to *Lawrence* and yet is unlikely to be overruled); see, also Diana Hassel, *Sex and Death: Lawrence's Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003 (2007) (suggesting that *Lawrence* overrules *Glucksberg*).

subject, and the social context can change quite rapidly. This, then, would explain why the historical analysis in *Lawrence* cites modern social context as important. This “emerging awareness” doctrine is not to allow the finding of a fundamental right in some new subject, but to explain the importance *vel non* of the law’s attachment to the state interests asserted in the modern social context.

Clearly, *Lawrence* is novel, but what exactly is novel about it has been misconstrued. The novelty of *Lawrence* is this: If one accepts that *Lawrence* did not find a fundamental liberty interest in gay sex or gay relationships, and if one accepts that the historical review has a purpose other than such a finding, then one must also accept the idea that such historical review is a part of any substantive due process analysis, even one conducted on the “rational basis” level of review. The historical review is equally useful for a determination of whether the challenged law has a rational connection to otherwise valid asserted state interests. In the case of *Lawrence*, the Court used the historical analysis to question the state’s contention that homosexuality equates with immorality. This was not intended to conclude that immorality is no longer a legitimate state interest, but that, at least in the specific case of homosexuality, it was not a legitimate connection.

Advocates of gender autonomy should make use of this understanding of historical analysis as a means of determining the legitimacy of state interests in gender regulation, and their rational nexus to the law. There is a long history of gender autonomy in society and the law,<sup>170</sup> though further research and writing is needed to bring out all of the factual and analytical supports for its specific facets so that it may be usable by legal advocates pursuing a due process claim.

Failure to understand *Lawrence* in this fashion leads to a discussion of substantive due process as if morality can no longer be a legitimate basis for state legislation, and either a declaration that nothing can now be forbidden, or a frantic attempt to detect third-party harm. Commentators have misused *Lawrence* to argue that the state cannot forbid cloning because the only state interest against it is “repugnance,”<sup>171</sup> that courts should

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<sup>170</sup> See, e.g., Mildred L. Brown & Chloe Anne Rounsley, TRUE SELVES: UNDERSTANDING TRANSEXUALISM-FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS 26-8 (1996) (referring to examples of gender variance in cultures throughout history); see generally Leslie Feinberg, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN (1996) (discussing the multinational and multicultural history of transgender persons); Heike Bodeker & Kiira Triea, *Native v. White Sex Cosmologies, Sex and Gender Variability v. Variance in Inter- vs. Intracultural Perspective* (1998), available at <http://web.archive.org/web/20040718154038/http://www.2tough.com/~kiira/cisae/yumtzilob.html> (last visited Aug. 29, 2009); Babylonian Talmud, Tractate Yevamot 64a (quoted in Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 294 (1999) (discussing intersex conditions); *Deuteronomy* 22:5 (mandating prohibition against cross-dressing); the first reported modern sex reassignment surgery took place in 1912. See Friedemann Pfafflin *Sex Reassignment, Harry Benjamin, and Some European Roots*, 1 INT’L J. TRANSGENDERISM 2 (1997), available at <http://74.125.155.132/scholar?q=cache:3LqLQmf6T5MJ:scholar.google.com/>.

<sup>171</sup> Steven Goldberg, Comment, *Cloning Matters: How Lawrence v. Texas Protects Therapeutic Research*, 4 YALE J. HEALTH POL’Y, L. & ETHICS 305, 315-17 (2004).

ignore *Lawrence* in cases involving adult incest,<sup>172</sup> and that there is a fundamental right to adultery<sup>173</sup> and statutory rape.<sup>174</sup> These commentators spent no time analyzing the relationship between their subject matter and state interests in moral protection, or other state interests that might be invoked. There are a few Notes on polygamy that move in the right direction. While their analysis is also woefully inadequate, the authors at least start down the road of analyzing the relationship between laws against polygamy and the state interests in moral protection. One cites a single study indicating that polygamy is bad for the mental health of children, and surmises that polygamy also generally contributes to the cultural subordination of women.<sup>175</sup> Laws against cloning, adult incest, adultery and statutory rape may or may not be vulnerable under a *Lawrence*-style substantive due process review, but not because morality is out as a legitimate state interest. Rather, post-*Lawrence* rational basis review requires discussing the history and social context of the connection between the subject matter and the state interest in moral protection so that it can be ascertained whether there is such a connection.

### **Conclusion: Using *Lawrence*-style “Minimal Scrutiny With Bite”**

As discussed above, attempting to argue both “strict scrutiny” and “rational basis” review at the same time is more likely to result in a losing argument than reliance upon the “minimal scrutiny with bite” approach. Because the courts seem intent on restricting new “fundamental rights,” the mixed approach leaves advocates vulnerable to a court rationale that focuses long on denying a fundamental right of gender autonomy, while giving short shrift to the alleged rational nexus between state interests and state refusal to recognize sex reassignment. If this strategic assessment is correct, then the key issue for advocates of gender autonomy is the purported rational nexus between those state interest and the laws that regulate gender in the eight categories referenced above.<sup>176</sup> In doing so, an historical analysis of the long social and legal traditions of gender autonomy will provide support to the analysis of whether that rational nexus is sufficient to withstand substantive due process review. Legal and social advocates for a right of gender autonomy should further pursue detailing the factual records and historical analysis that demonstrates the long history of legal and social gender autonomy.

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<sup>172</sup> Tuskey, *supra* note 136, at 597-600.

<sup>173</sup> Jennifer A. Herold, Statute Note, *A Breach Of Vows But Not Criminal: Does Lawrence v. Texas Invalidate Utah's Statute Criminalizing Adultery?* 7 J. L. & FAM. STUD. 253, 258-59 (2005).

<sup>174</sup> Arnold L. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 80-4 (2005).

<sup>175</sup> Joseph Bozzuti, Note, *The Constitutionality Of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 436-42 (2004) (The author also noted that polygamy may be prohibited because some polygamists have married teenage girls, evaded tax obligations and misused the welfare system); *see also* Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. OF WOMEN & L. 131, 145-50 (2004).

<sup>176</sup> *See, supra* notes 8-15.