

The Aesthetics of *Lawrence v. Texas*' Moral Vision

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Abstract

This Article clarifies a doctrinal issue that has remained open to debate by both legal scholars and lower courts since the Supreme Court's 2003 decision in *Lawrence v. Texas*—namely, whether the Court repudiated morality as a legitimate state interest for lawmaking—by approaching that opinion as a poetic conflict or dialectic between two aesthetic modes, the line and unbounded space or transcendence. Unlike conventional legal analysis, which focuses on what the text of an opinion explicitly says—what it holds and how it gets there—an interpretive strategy that approaches *Lawrence* in poetic terms and that pays close attention to the stylistic interplay of competing (and conflicting) metaphors and tropes reveals what is implicit in the opinion—the persistence of moral line drawing—and what has otherwise been overlooked by commentators and lower courts alike. This Article contends that, while *Lawrence* casts doubt on the line that *Bowers v. Hardwick* drew specifically and on morality's line-drawing more generally, it, too, draws a line between conduct and status that is unstable and susceptible to critique. Although the Court criticizes its predecessor for drawing an unprincipled, arbitrary, and ultimately untenable distinction between normative and non-normative sexuality, the line that it draws in *Lawrence* is no less so—particularly given the extent to which same-sex conduct continues to be used after *Lawrence* to deny access to marriage, just as it was before that case, as well as the extent to which the status of marriage itself might be viewed as a form of private conduct.

Morality, like art, means drawing a line someplace.

Oscar Wilde

Art, like morality, consists in drawing the line somewhere.

Gilbert K. Chesterton

Whether or not *Lawrence v. Texas*² represents a truly radical break with the past that it repudiates—*Bowers v. Hardwick*³—has been an issue of considerable debate among legal scholars since the decision came down in 2003. Whereas some commentators maintain that the *Lawrence* majority went too far, others contend that it likely did not go far enough.⁴ This Article aligns itself with neither position exclusively, but rather offers an interpretation of *Lawrence* as a text that repeats history even as it presses to supersede it. On one level, the *Lawrence* Court attempts to move beyond *Bowers* and the quintessential “act of line-drawing”⁵ which that case has

² 539 U.S. 558 (2003).

³ 478 U.S. 186 (1986).

⁴ See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) (arguing that “in *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed”); Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 55 SUP. CT. REV. 75 (2003) (“Now the Court has taken gay rights a step—perhaps a giant step—forward. But, though *Lawrence* and *Garner* prevailed, it remains to be seen how far into the public sphere and out of the now protected confines of their individual homes the *Lawrence* case, and the Court, will take them and others”); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW 2002-2003* 21, 43 (James L. Swanson ed., 2003) (“If the Court is serious in its ruling, Justice Scalia is right to contend that the shift from privacy to liberty, and away from the New Deal-induced tension between the presumption of constitutionality and fundamental rights, ‘will have far-reaching implications beyond [*Lawrence*]’”); Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

⁵ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747 (1989) (“the Court in *Hardwick* necessarily drew a line: the right to privacy stops here. That act of line-drawing was a quintessentially normative judgment. Unless and until the Court repudiates the

come to represent. If the *Bowers* majority embraced an aesthetic of line-drawing when establishing a boundary between normative and non-normative sexuality, then the *Lawrence* majority offers a new aesthetic of space, transcendence, and the movement beyond boundaries. On another level, however, traces of *Bowers*'s aesthetic appear in the opinion when the majority engages in its own act of boundary creation by drawing a line between private intimate conduct and public marital status. Indeed, where *Lawrence* criticizes its predecessor for drawing a line that cannot hold, the oppositional logic that *Lawrence* itself adopts is vulnerable to the same criticism.

One way to view *Lawrence*, and its engagement with the past that it attempts to move beyond, is as a literary text—a poem—that stages a conflict between the aesthetics of line and unmediated space and between the temporal dimensions that those aesthetics signify, history and modernity.⁶ In an essay written more than twenty years ago, James Boyd

privacy doctrine altogether, which it did not do in *Hardwick*, a decision to draw the line here is nothing more than a judgment that this particular activity is either less fundamental or more unsavory than the activities protected in prior cases"); see also Matthew Coles, *Lawrence v. Texas and the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 44 (2005) ("But unlike the rest of modern substantive due process cases, *Bowers* did draw a line and say that a right fundamental to some Americans was unavailable to others"); Christopher J. Keller, *Divining the Priest: A Case Comment on Baehr v. Lewin*, 12 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 483, 506-07 (1994) ("The majority in *Bowers* arbitrarily drew the line of personal privacy at the boundary of intimate homosexual relations and, in a manner unprecedented in a privacy case, narrowly limited previous privacy rules to their specific facts").

⁶ That is, whereas we might think about the "line" as demarcating points along a temporal continuum—*e.g.*, a line of cases, an historical timeline—we might think about "unbounded space" in the sense that Pierre Schlag describes the energy aesthetic in the law, which

White invited the legal community to think seriously about the connections between these two seemingly dichotomous acts of interpretation: reading a judicial opinion and reading a poem.⁷ Just as the poem constitutes a privileged form of literary language in the canon of literature, so, too, does the case constitute an “archetypal occasion for speech” and “the judicial opinion deciding the case . . . [an] archetypal form” in the canon of law.⁸ If we think about *Lawrence* as one such poem in the Supreme Court’s vast “lyric” canon, then one of its organizational leitmotifs is this dialectic between line and unmediated space, that is, the dialectic between the institution of limits and the movement beyond them that uniformly structures the majority opinion—and, not surprisingly, that constitutes the basis for Justice Scalia’s dissent. The first paragraph of the majority opinion alone, notable for its rhetorical flourishes, stages a number of moments where liberty, or unbounded space, conflicts with governmental

“leaves the stasis of the grid behind” and where “[l]aw is pictured as an arrow pointed to the future.” Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002). In other words, the transcendence of history, or the line, signals an attempt to claim a new moment in time.

⁷ James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984), reprinted in JAMES BOYD WHITE, *HERCULES’ BOW: ESSAYS IN THE RHETORIC AND POETICS OF THE LAW* (1985). For criticisms of the poem/opinion comparison, see Gerald Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1564 (1990) (stating that “[n]o one will be surprised to hear that judicial decisions are different from lyric poems . . . If the purpose of a judicial decision is to close what has been open, the motive behind literature is likely to be the desire to open what has been closed”); Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986).

⁸ White, *supra* note _____ at 1672.

attempts to draw, and transgress, both physical and metaphysical boundaries.

The dialectic between the tropes of line and unbounded space that organizes *Lawrence*'s inaugural paragraph recurs throughout the majority opinion and forms the basis of Justice Scalia's dissent—the first paragraph of which quite self-consciously opens with “liberty” and closes with “barrier.”⁹ In this sense, *Lawrence* dramatizes a conflict between what Pierre Schlag has called the “grid” and the “energy” aesthetics that “help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law.”¹⁰ Specifically, Schlag describes the grid aesthetic as one in which “law is stabilized and objectified into an orderly field of clearly delineated, neatly bounded, perfectly contiguous legal conceptions and propositions.”¹¹ A constituent feature of the grid aesthetic is that of the line – “[w]here do we draw the line?” “[w]ill the line hold” – which permits judges to “police the boundaries of the grid” and to engage in

⁹ *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

¹⁰ Schlag, *supra* note ____, at 1050. Schlag's aesthetic taxonomy includes two additional legal aesthetics that will not be discussed here, the perspectivism and the dissociative aesthetics. Schlag notes that while all four legal aesthetics conflict—what he calls “the battle of the aesthetics”—the “most developed, entrenched, and important” battles occur between the grid versus energy, and the grid and energy versus perspectivism, aesthetics. *Id.* at 1104-06.

¹¹ *Id.* at 1055. Schlag maintains that the advantage or appeal of the grid aesthetic is that it “promises an enduring and definitive charting of the legal world. Every legal concept has its own distinct and bounded space, and every place is occupied by a distinct and bounded legal concept.” *Id.*

their “border-control jurisprudence.”¹² In contrast to the well-defined linearity and predictability of the grid aesthetic, the energy aesthetic “leaves the stasis of the grid behind.”¹³ Under this aesthetic, energy figures as “the dominant metaphor and image of law. Energy and its manifestations – ‘change,’ ‘transformative change,’ ‘reform,’ ‘progress,’ ‘progressive legal change,’ – become the ruling motifs. The implicit premise is that the law and the legal profession are on the move. Law is pictured as an arrow pointed to the future.”¹⁴ Whereas the grid and energy aesthetics can “meld into hybrids,” they can—and often do—conflict.¹⁵

This Article proposes an interpretation of *Lawrence v. Texas* as a conflict between the grid and the energy aesthetics—or, to modify Schlag’s aesthetic taxonomy just slightly, a conflict between the line/boundary and space/transcendence aesthetics.¹⁶ Although a few commentators have observed that *Lawrence* realigned liberty’s “boundaries,”¹⁷ this Article offers a novel interpretation of the majority’s opinion as a text that narratively mimics—through the consistent invocation of images and metaphors of lines/boundaries and unbounded space—what the Court

¹² *Id.* at 1059.

¹³ *Id.* at 1070.

¹⁴ *Id.*

¹⁵ *Id.* at 1104 (“Whether conducting in the realm of facts or law, these aesthetic conflicts are negotiated in stylized and highly elaborated (though often arrested) disputes”).

¹⁶ The line, of course, is a constitutive feature of Schlag’s grid aesthetic.

¹⁷ *See, e.g.,* David D. Meyer, *Domesticating Lawrence*, 2004 UNIVERSITY OF CHICAGO LEGAL FORUM 453, 454 (stating that “*Lawrence* is best understood as expanding the boundaries of the fundamental right of privacy”).

attempts to achieve on a doctrinal level: The transcendence of the line that *Bowers* drew and of the boundaries that morality routinely draws. Indeed, the line (or grid) aesthetic that characterizes what judges do in the law, namely, border control jurisprudence, similarly characterizes what individuals do when making moral judgments, that is, they draw a line “someplace” between acceptable and unacceptable behavior.¹⁸ In repudiating morality as even a legitimate state interest for certain laws,¹⁹ however, and emphasizing instead freedom of movement and progress “beyond spatial bounds” into “more transcendent dimensions,” the *Lawrence* majority appears to privilege one aesthetic over another—as

¹⁸ See *infra* Part I, *passim*.

¹⁹ Whether or not the *Lawrence* majority repudiated morality as a *legitimate* or *compelling* state interest depends on whether or not the majority subjected the Texas sodomy law at issue in that case to strict or rational basis scrutiny. This Article does not take a position on this issue, but rather places more importance on the Court’s explicit dismissal of morality as a valid basis for law-making. As Nan Hunter has remarked, “[a]lthough it requires some effort to articulate precisely what standard of review the Court deployed in its analysis, there is no question that, whatever test it used, the Court eradicated the last vestiges of state power to criminalize private consensual adult sexual behavior solely on the basis of morality, without any showing of harm either to persons or to legally protected institutions.” Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1530 (2004). For critics who have argued that the Court subjected Texas’ criminal statute to strict scrutiny even though it states that “[t]he Texas statute furthers no legitimate state interest,” see Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1158 (2004) (stating that “under my reading, *Lawrence* is an application of the old rule that morals justifications for regulation do not count as a state interest sufficient to trump a fundamental right”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004) (stating that “the strictness of the Court’s standard in *Lawrence*, however articulated, could hardly have been more obvious”). For an opposing view, see Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PENN. J. CONST’L L. 954, 958-59 (2004) (“Despite the Court’s eloquent endorsement of the presumptive liberty of competent adults voluntarily to enter into personal relationships that involve sexual intimacy without criminal punishment, the Court did not apply strict scrutiny”).

energy, unmediated space, and transcendence come to replace morality's constitutive lines and prescribed boundaries.

At the same time that the *Lawrence* majority engages these two aesthetics and appears to supplant one with the other, however, it also participates in a border control jurisprudence of its own. Not only does the majority retreat from spatial freedom into bounded space in the opinion's closing moments when it emphatically states what its holding is *not*, but it also engages in line drawing by setting up a series of binary oppositions throughout the opinion. Specifically, the majority implicitly as well as explicitly draws a number of normative distinctions between the criminal law (sodomy prohibitions) and the civil law (marriage), the private and the public spheres, and the conduct that should not be subject to majoritarian moral disapproval and the state-recognized status that might be. The binary logic that underlies the majority's opinion suggests that *Lawrence's* repudiation of history—its overruling of *Bowers*—in search of a new moment that transcends spatial, temporal, and certain moral limits is incomplete.

In addition, like the line drawn in *Bowers*; the lines drawn in *Lawrence* are unstable and susceptible to critique. That is, just as *Lawrence* found that the line that *Bowers* drew between normative and non-normative sexuality did not hold, the line that the *Lawrence* Court itself draws between

private intimate conduct and public marital status does not hold for two similar and interrelated reasons. First, private conduct remains central to determining access to the public institution (or status) of marriage. Second, the “public” institution of marriage has increasingly been viewed as a form of private²⁰ conduct.²¹ Conceptualizing marriage in the *Lawrence* Court’s terms thus overlooks the extent to which moral disapproval for certain conduct—namely, the ‘practice’ or ‘conduct’ of same-sex marriage—continues to deny access to a public institution. In this sense, then, *Lawrence* repeats history. Like *Bowers*, it draws boundaries, but only by constructing a line that ultimately cannot hold.

This Article will proceed as follows. Part I will develop the claim that morality is an act of line-drawing and boundary maintenance in order to highlight the line aesthetic that the *Lawrence* Court explicitly rejects when dismissing morality as a legitimate state interest. Part II will then offer a close textual interpretation of *Lawrence* as an incomplete attempt to replace the line aesthetic with the unbounded space aesthetic that is celebrated in the opinion’s prefatory remarks and their explicit focus on “liberty” and “transcendent dimensions.” Section A will argue that *Lawrence* represents

²⁰ See, e.g., Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1238 (1998) (stating that “[t]he move toward private ordering of marital relationships represents a major shift in the law’s stance toward intimate relations”); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444 (“In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior”).

²¹ See, e.g., Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000).

the transcendence (or, in negative terms, the dissolution) of boundaries on several levels, including moral and doctrinal boundaries. Section B will then show that the majority's privileging of the space aesthetic over the line aesthetic is only partial, and that traces of *Bowers* and its endorsement of moral line drawing reappear in the form of the binary distinctions—*e.g.*, between public and private, criminal and civil, inside and outside—that the majority sets up throughout the opinion. Part III will finally argue that, not unlike the line drawn in *Bowers*, the boundary that separates those binary oppositions is much less stable and warrants critique. Here, I will draw from several pre- and post-*Lawrence* cases that invite us to interrogate the stability of the distinctions that the majority posits between private conduct and public status.

I would like to return for a moment to the suggestion made at the outset of this Introduction that we approach *Lawrence* as a judicial poem. To be sure, poems and judicial decisions are different in a number of significant ways. Most notably, whereas the poem is (or might be) purely descriptive, the judicial decision is bounded or constrained by normative commitments. Notwithstanding such differences, I suggest that approaching *Lawrence* in poetic terms is a useful way to highlight what takes place in the opinion's dialectic between line and space, history and the movement beyond it. Paul de Man has observed that, in contrast to prose,

“lyric poetry remains the preferred topic of investigation for a definition of modernity,” which itself is forever in collision “with the demands of a historical consciousness.”²² Indeed, literary historians have traditionally approached the poetic form as that which best expresses the desire to transcend history and the simultaneous realization that complete transcendence is impossible. De Man in fact conceptualizes the lyric form as a bringing together of these “two incompatibles, history and modernity.”²³ Similarly, James Boyd White has commented that “[t]he idea of ‘comprehending contraries,’” that is, “a way of comprising into one thing elements that seem of necessity to belong apart,” characterizes the poem but perhaps the judicial opinion even more so, “for the very idea of legal hearing and of legal argument (of which the judicial opinion is intended to be a resolution) is that it works by opposition.”²⁴ Of course, as White also points out, “it is not always possible to include in a coherent structure points that are diametrically opposed, and something must be left out at last.”²⁵

I propose a reading of *Lawrence* as just such an attempt to “comprehend” the “two incompatibles” of history (*Bowers*) and modernity (its overruling) that ultimately leaves *in*—namely, the line-drawing aesthetic that the majority attempts to repudiate—more than it leaves *out*.

²² PAUL DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 143 (1971).

²³ *Id.*

²⁴ White, *supra* note ____, at 1678.

²⁵ *Id.* at 1679.

Indeed, more than conventional legal analysis, which focuses on what the text of an opinion explicitly says—what it holds and how it gets there—an interpretive strategy that approaches *Lawrence* in poetic terms and that pays close attention to the stylistic interplay of competing (and conflicting) metaphors and tropes, helps to reveal what is implicit in the opinion and what has otherwise been overlooked by commentators and lower courts alike.²⁶ Indeed, reading *Lawrence* as a dialectic or battle between two aesthetic modes helps to clarify a doctrinal issue that has remained open to debate—again, for both commentators and lower courts—after that case, namely, the extent to which the Court intended to banish morality from our constitutional landscape.²⁷

²⁶ For commentators who have proposed that we might better understand (at least certain) judicial opinions by subjecting them to a similarly ‘literary’ interpretative strategy, see, for example, David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986). In describing the benefits of this more textured interpretative approach, Cole remarks that

[b]y suggesting a new method of reading judicial opinions, this article seeks to highlight and reveal the rhetorical struggles that have always fueled jurisprudential development. The analysis focuses more than traditional legal scholarship on the use of linguistic conventions such as metaphor and tone, and on the internal and intertextual commentary that these rhetorical elements provide. Rhetorical analysis of a given text may reveal misreadings that, because of the law’s express requirement of precedential fidelity, cannot be acknowledged on the opinion’s surface. Attention to the repetition of particular metaphors may suggest how these rhetorical elements exert influence over time. Most importantly, because most of the opinions discussed do not carry the authority of a majority holding, rhetorical persuasion is their primary channel of influence.

Id. at 861.

²⁷ See *infra* note _____ and accompanying text.

Part I. Morality and the Line-Drawing Aesthetic

In a figurative sense, at least, morality and immorality meet at the public scaffold, and it is during this meeting that the line between them is drawn.

Kai Erikson, *The Wayward Pilgrim*²⁸

In order to understand the moral line-drawing aesthetic that the *Lawrence* majority nominally repudiates, it is first necessary to clarify the relationship among morality, boundary creation, and boundary maintenance. The trope or metaphor of the line not only figures prominently in political and legal discourse over the limits of acceptable behavior, but also underwrites the very idea of society and its inveterate need to classify and categorize. Indeed, “[f]or symbols of society, any human experience of structures, margins or boundaries is ready to hand.”²⁹

George Lakoff, cognitive linguist and author of *Moral Politics: How Liberals and Conservatives Think*,³⁰ has demonstrated the extent to which the moral boundaries metaphor structures the way in which we think about moral rectitude and deviations from it. In speaking more generally of the critical role that metaphor plays in organizing human experience, Lakoff

²⁸ KAI ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 12 (1966).

²⁹ MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* 58 (1966).

³⁰ GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002).

argues that “much of moral reasoning is metaphorical reasoning,”³¹ and that a conceptual metaphor, like that of moral boundaries, is a conventional way of “conceptualizing one domain of experience in terms of another, often unconsciously.”³² While metaphors are common poetic devices, “metaphorical thought need not be poetic or especially rhetorical. It is normal, everyday thought.”³³ Lakoff explains that morality is conceptualized in political discourse in terms of a range of metaphors, including the moral strength, moral essence, moral wholeness, moral purity, and moral boundaries metaphors.³⁴ Each of these metaphors, he argues, is used to signify “a set of moral priorities” which he labels the “Strict Father Morality,” whose model “takes as background the view that life is difficult and that the world is fundamentally dangerous.”³⁵ Under this model, the father has “primary responsibility for supporting and protecting the family as well as the authority to set overall family policy”; the mother “has day-to-day responsibility for the care of the house, raising the children, and upholding the father’s authority”; and the children “must respect and obey their parents, partly for their own safety and partly because by doing so they

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.*; see also GEORGE LAKOFF AND MARK JOHNSON, METAPHORS WE LIVE BY 3 (2d ed. 2003) (“metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature”). For a discussion of the role that metaphors play in legal reasoning that draws heavily from Lakoff and Johnson’s seminal work, see STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND (2001).

³⁴ LAKOFF, *supra* note _____, at 65-107, *passim*.

³⁵ *Id.* at 65.

build character, that is, self-discipline and self-reliance.”³⁶ While “there are variants of the model that can be used by a strict [single] mother as well,” the strict father model “is a cognitively real idealized model, that is, a model that Americans grow up knowing implicitly.”³⁷

The moral boundaries metaphor is an integral part of this conventional model of moral priority. Indeed, “strict father morality, with its sharp division between good and evil and its need for the setting of strict standard of behavior naturally gives priority to the metaphor of moral boundaries.”³⁸ Under this metaphor, “moral action is seen as bounded movement, movement in permissible areas and along permissible paths.”³⁹

Lakoff continues:

Given this, immoral action is seen as motion outside of the permissible range, as straying from a prescribed path or transgressing prescribed boundaries. To characterize permissible actions is to lay out paths and areas where one can move freely. To characterize immoral action is to limit one’s range of movement. In this metaphor, immoral behavior is “deviant” behavior, a form of metaphorical motion into unsanctioned areas, along unsanctioned paths, and toward unsanctioned destinations.⁴⁰

³⁶ *Id.* at 66.

³⁷ *Id.* at 67.

³⁸ *Id.* at 84.

³⁹ *Id.*

⁴⁰ *Id.*

Individuals who deviate from the “tried and true path arouse enormous anger” and “are seen as threats to the community.”⁴¹ Consequently, “[f]or the protection of the community, they need to be isolated and are made outcasts.”⁴² Lakoff’s description of the moral boundaries metaphor here coincides with Kai Erikson’s well-known account of the relationship among deviation, expulsion, and the institution of moral boundaries. Erikson explains that “[a] human community can be said to maintain boundaries . . . in the sense that its members tend to confine themselves to a particular radius of activity and to regard any conduct which drifts outside that radius as somehow inappropriate or immoral.”⁴³ While the deviant challenges boundaries by “ventur[ing] out to the edges of the group,”⁴⁴ she also allows the group or community to throw those same edges into focus, for “[e]ach time the community moves to censure some act of deviation . . . and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located.”⁴⁵

The moral boundaries metaphor is an integral part of political discourse and legal rhetoric. To be sure, one need not delve deeply into either the news media or legal reporters to find that metaphors of line

⁴¹ *Id.* at 85.

⁴² *Id.*

⁴³ ERIKSON, *supra* note _____, at 15.

⁴⁴ *Id.*

⁴⁵ *Id.* at 13.

drawing and boundary maintenance provide an organizational framework for public debate over any number of political and legal controversies. Pat Anderson, the Florida attorney who represented Terri Schiavo's parents in supporting "Terri's Law," publicly opined: "Where do we draw the line? Terri has shown us by her indomitable will to live for the last 14 and a half years, surviving crisis after crisis, that she wants to live."⁴⁶ Similarly, speaking before the United States Senate Judiciary Committee last year during a hearing on the necessity for a federal marriage amendment, Senator Orrin Hatch, in support of that amendment, declared that "I do draw the line when it comes to traditional marriage. Although I do not believe that it's fair to discriminate against anybody in our society, I do think that line needs to be drawn."⁴⁷ To be sure, the debate over marriage between same-sex partners has generated a wide range of line and boundary metaphors, from the now proverbial slippery slope metaphor—first same-sex marriage, then incest⁴⁸—to the question of how to maintain "the clearest boundary lines of our federalism,"⁴⁹ to the issue of how to 'hold the line' between religious morality and the law. During an earlier Senate Judiciary Hearing on same-sex marriage, United States Senator Richard Durbin, responding to the

⁴⁶ *Terry Schiavo Case Went to Florida Supreme Court*, THE CHRISTIAN POST (Sept. 3, 2004); <http://www.christianpost.com/article/society/959/full/terri.schiavo.case.com>.

⁴⁷ Senate Judiciary Committee Hearing (June 22, 2004) (remarks of Senator Orrin Hatch).

⁴⁸ Interview by the Associated Press with Sen. Rick Santorum (Apr. 7, 2003).

⁴⁹ Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition and Same Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 213 (1998).

remarks of one religious leader who underscored the need to “define where the line really is,” stated that “[s]anctity is your business, Reverend. Legality is our business. And we better take care to make sure that we keep that bright line between the two.”⁵⁰ In reply, the minister merely reaffirmed what he regarded to be the permeable line between religion and the law: “[W]hen you get to the talking about the secular and crossing over into the religious, it was the religious institutions that started marriage way, way back . . . I’m not sure who crossed the line, but you can’t separate secular from religious.”⁵¹

While the moral boundaries metaphor figures quite prominently in the way that we *talk about* morality and the law, it also structures the way that we *think about* morality and its role in preserving identity. Specifically, the line-drawing metaphor speaks to a deep-seated “moral” need to maintain individual, community, and even national identity according to a system of well-delineated categories and classifications. Sociologists Michèle Lamont and Virag Molnar have demonstrated the extent to which “moral discourse” is used to draw, and maintain, both symbolic and social boundaries within and between groups.⁵² According to

⁵⁰ Senate Judiciary Committee Hearing (Mar. 3, 2004) (remarks of Senator Richard Durbin).

⁵¹ *Id.* (remarks of Reverend Richard Richardson).

⁵² Michèle Lamont & Virag Molnar, *The Study of Boundaries in the Social Sciences*, 28 ANN. REV. OF SOCIOLOGY 167, 170 (2002); *see also* SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY (Lamont & Fournier, eds 1992).

Lamont and Molnar, symbolic boundaries “are conceptual distinctions made by social actors to categorize objects, people, practices, and even time and space. They are tools by which individuals and groups struggle over and come to agree upon definitions of reality.”⁵³ These boundaries “separate people into groups and generate feelings of similarity and group membership;” indeed, “they are an essential medium through which people acquire status and monopolize resources.”⁵⁴ Symbolic boundaries, in turn, become social boundaries when they translate “into identifiable patterns of social exclusion.”⁵⁵ An example of this translation would be the tangible repercussions that employees “who violate gender boundaries, concerning appropriate norms for time management” might experience in the workplace.⁵⁶ In such instances, “symbolic boundaries [are] translated into social boundaries” when the violation of gender norms produces “punishment and stigmatization” in the form of withheld promotions or

⁵³ *Id.* at 171.

⁵⁴ *Id.*

⁵⁵ *Id.* Lamont and Molnar’s description of symbolic and social boundaries recalls Erikson’s description of the two senses in which communities are “boundary maintaining.” Erikson states that

communities are boundary maintaining: each has a specific territory in the world as a whole, not only in the sense that it occupies a defined region of geographical space but also in the sense that it takes over a particular niche in what might be called cultural space and develops its own ‘ethos’ or ‘way’ within that compass. Both of these dimensions of group space, the geographical and the cultural, set the community apart as a special place and provide an important point of reference for its members.

ERIKSON, *supra* note ____, at 9-10.

⁵⁶ Lamont & Molnar, *supra* note ____, at 175.

even termination.⁵⁷ Another example more germane to this Article would be the prohibition of same-sex marriage, a tangible form of social exclusion that results from the symbolic classification or categorization of sexuality into normative and non-normative domains. Lamont and Molnar emphasize that “symbolic and social boundaries should be viewed as equally real: The former exist at the intersubjective level whereas the latter manifest themselves as groupings of individuals. At the causal level, symbolic boundaries can be thought of as a necessary but insufficient condition for the existence of social boundaries.”⁵⁸

Lamont and Molnar’s concept of boundaries, and their role in underwriting moral discourse and in generating groupings, categories, and classifications, resonates with Pierre Schlag’s analysis of the figure of the line in the law’s grid aesthetic as well as Mary Douglas’ analysis of the relationship between morality and taboo. The line is a constitutive feature of Schlag’s grid aesthetic and its chief purpose, namely, the “proper location and maintenance of boundaries” and the “policing” of borders.⁵⁹ An inevitable by-product of the grid aesthetic is the multiplication of classification schemes; Schlag observes that “[t]he proliferation of sundry classification schemes in the early twentieth century was intense. In fact, ‘classification’ itself became a subject of inquiry, controversy, and of

⁵⁷ *Id.* at 176.

⁵⁸ *Id.*

⁵⁹ Schlag, *supra* note _____, at 1075.

course, ultimately classification itself.”⁶⁰ The grid and its classificatory schemes are “seductive,” in Schlag’s view, because they help to “clean up the dirt” and to confer order on the “untidiness” that lawyers, as society’s “refuse collectors” and “janitors,” know so well.⁶¹ Perhaps Schlag here had in mind Aldous Huxley, who wrote that “tidiness is undeniably good The good life can only be lived in a society in which tidiness is preached and practiced.”⁶² Douglas similarly characterizes these classifications or “schema” as a form of dirt management and an attempt to ‘tidy up’ the mess around us. She notes, for instance, that “[w]here there is dirt there is system. Dirt is the by-product of a systematic ordering and classification of matter.”⁶³ Furthermore, as with Schlag, Douglas identifies the pivotal role that the line plays in “our pollution behavior, [which] is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications.”⁶⁴ Commenting on the “relation between pollution and morals,”⁶⁵ she writes that

[i]t is my belief that people really do think of their own social environment as consisting of other people joined or separated by lines which must be protected . . . [W]herever the lines are precarious we find pollution ideas come to

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² ALDOUS HUXLEY, PRISONS: THE “CARCERI” ETCHINGS BY PIRANESI 13 (1949). Huxley warns, however, that “tidiness,” while a good, is one “of which it is easily possible to have too much and at too high a price.” *Id.* The true “good life,” he explains, is one where “efficiency is always haloed, as it were, by a tolerated margin of mess.” *Id.*

⁶³ DOUGLAS, *supra* note _____, at 139.

⁶⁴ *Id.* at 125.

⁶⁵ *Id.* at 139.

their support. Physical crossing of the social barrier is treated as a dangerous pollution. . . . The polluter becomes a doubly wicked object of reprobation, first because he crossed the line and second because he endangered others.⁶⁶

Douglas' description of the relationship between lines and pollution management calls to mind Lakoff's metaphor of "moral boundaries" and the stigma—here, "reprobation"—that attaches to the individual who deviates from the "moral way." Interestingly, it also calls to mind, as I will show in a moment, Justice O'Connor's description in her *Lawrence* concurrence of the role that law—and the "moral disapproval" from which it flows—plays in creating stigma when it draws certain kinds of legal "classifications" between otherwise "similarly situated" individuals.

While moral boundaries play an important role in regulating a broad swath of human conduct—work ethic, manners, personal hygiene—they are critical to a community's understanding and promotion of sexual morality. Lamont and Molnar note, for instance, that "sexual boundaries" in particular "are a fertile terrain for the study of boundary crossing and boundary shifting as well as the institutionalization and diffusion of boundaries—precisely because they have become highly contested."⁶⁷ They maintain that the contours of moral boundaries in the area of sexual morality are largely determined by factors such as economic class, gender,

⁶⁶ *Id.* at 140.

⁶⁷ Lamont & Molnar, *supra* note ____, at 180.

geography, and religion – all of which, they observe, are “likely to shape moral boundaries,” and all of which, it so happens, are shaped by their own set of oppositional logic.⁶⁸ I have argued elsewhere that disgust over non-traditional sexual practices and relationships represents a particularly extreme reaction to boundary violation and a particularly aggressive form of boundary maintenance.⁶⁹ Specifically, I have shown that the incest taboo functions in legal and political rhetoric as a metaphor of line drawing and of how *not* to act. An archetypal form of boundary violation, the incest taboo has been deployed over time to trigger disgust over otherwise consensual sexual relationships, including those between same-sex and interracial partners.⁷⁰ In this sense, I agree with Cass Sunstein’s assertion that the “incest taboo” functions as a kind of “moral heuristic” in legal and ethical debates over such seemingly varied issues as cloning and same-sex marriage.⁷¹ Since I have already addressed the relationship between disgust

⁶⁸ *Id.*

⁶⁹ Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. L. REV. (2005, forthcoming).

⁷⁰ *Id.*

⁷¹ Moral heuristics are rules of thumb that give rise to moral judgments. As Sunstein has queried, “[i]t is natural to wonder whether the rules of morality also have heuristics (isn’t that inevitable?), and whether the normative judgments involved in law and politics are also prone to heuristics. . . .” Cass Sunstein, *Moral Heuristics*, in BEHAVIORAL AND BRAIN SCIENCES (forthcoming). In a recent article, Sunstein provides some examples of moral heuristics—that might often produce moral mistakes—in order to probe “the relationship between moral heuristics and questions of law and policy.” For example, noting that “[i]ssues of reproduction and sexuality are prime candidates for the operation of moral heuristics,” he identifies a “do not tamper with nature” heuristic that has fueled anti-cloning rhetoric as well as the more general “nature” or “what is natural” heuristic that determines our moral disposition toward “unnatural” sexual conduct like incest. He claims that the

and boundary maintenance at length, I will not elaborate on it here. Suffice it to note that disgust, a way of building “moral and social community” and identity,⁷² “seems always to be a question of boundaries”⁷³ and of guaranteeing “demarcation and distance.”⁷⁴ As Lakoff points out, morality is “conceptualized as purity and immorality as impurity, as something disgusting or dirty.”⁷⁵ The moral purity metaphor thus works together with the moral boundaries metaphor, for the “morally impure individual must be isolated and removed from the rest of society so that their [*sic*] corrupting effect can be nullified”⁷⁶ and the “moral health”⁷⁷ of the community can be restored.

I would like to conclude here by turning briefly to Justice O’Connor’s *Lawrence* concurrence, which highlights the relationship among morality, law, and the line aesthetic—but which, unlike the majority opinion, does not embrace unbounded space or transcendence as a counter aesthetic. Deciding the case on equal protection rather than due process grounds, Justice O’Connor holds that moral disapproval, like animus, constitutes an illegitimate state interest for the purpose of equal protection review. She attacks the legitimacy of Texas’ sodomy law by invoking the

incest taboo itself functions as a moral heuristic insofar as it is used to trigger an intuitive sense of repugnance against non-traditional sexual practices.

⁷² WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997).

⁷³ ROBERT RAWDON WILSON, *THE HYDRA’S TALE: IMAGINING DISGUST* (2002).

⁷⁴ AUREL KOLNAI, *ON DISGUST* 86 (2004).

⁷⁵ LAKOFF, *supra* note ____, at 75.

⁷⁶ *Id.*

⁷⁷ *Id.*

line of equal protection cases, from *Moreno* through *Romer*, where the Court applied a “more searching form of rational basis review” to laws that impermissibly evince a “bare desire to harm a politically unpopular group.”⁷⁸ Indeed, a unifying theme throughout her concurrence is the idea that legislation based exclusively on moral disapproval, such as the Texas sodomy law, “brands” or stigmatizes lesbians and gays. She says, for instance, that “Texas’ sodomy law brands all homosexuals as criminals,”⁷⁹ that the law “subjects homosexuals to a ‘lifelong penalty and stigma,’”⁸⁰ and that “[a] law branding one class of persons as criminal based solely on the State’s moral disapproval of that class and conduct associated with it runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.”⁸¹

Most interesting, though, are the connections Justice O’Connor makes between moral disapproval and animus and between moral disapproval and the line aesthetic. Not only does she suggest that moral disapproval is tantamount to animus, a doctrinal issue that was left open after *Romer v. Evans*,⁸² but she also underscores the extent to which moral

⁷⁸ 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

⁷⁹ 539 U.S. at 581.

⁸⁰ *Id.* at 584 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

⁸¹ *Id.* at 585.

⁸² 517 U.S. 620 (1996). As some legal commentators have pointed out, whether a moral purpose alone could satisfy rational basis review remained an open question after *Romer*, where the Court “identifi[ed] (impermissible) ‘animus,’ rather than (arguably permissible) moral disapproval, as the motivating force behind Amendment 2. Prior to *Lawrence*, some commentators maintained that because “the distinction between moral disapproval and

disapprobation gives rise to line-drawing in the form of legal classifications.

She continues:

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating a classification of persons undertaken for its own sake. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.⁸³

By attacking Texas' sodomy law as a form of line-drawing and legal classifying that demarcates a pariah class or caste, Justice O'Connor adheres to the Court's longstanding "prohibition of class legislation" as one of "the central tenet[s] of equal protection."⁸⁴ Moreover, she speaks to the critical role that law—Erikson's "public scaffold"—plays in policing the

animus goes solely to intent, and not to effects," governmental purposes "ostensibly based exclusively on moral disapproval, like rationales that reflect hostility, ought never to withstand equal protection scrutiny, even under the rational basis standard." Barbara J. Flagg, "Animus" and Moral Disapproval: A Comment on *Romer v. Evans*, 82 MINN. L. REV. 833, 850 (1998). Note, however, that in her concurring opinion Justice O'Connor states that moral disapproval alone has never constituted a legitimate state interest for equal protection purposes. 539 U.S. at 581 ("Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons"). For the question of whether morality should, and will, drive lawmaking both before and after *Lawrence*, see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

⁸³ 539 U.S. at 583 (internal quotations omitted).

⁸⁴ Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 530 (2004).

“line” between morally permissible and morally impermissible behavior when it produces “legal classifications” that, in Lamont’s words, create tangible social boundaries.

While moral disapproval might no longer constitute a legitimate state interest for rational basis review under Justice O’Connor’s doctrinal analysis, morality and its constitutive lines and legal classifications are, as I have shown, an ineradicable part of personal and community identity. Indeed, moral disapproval and the boundaries it draws are coexistent with the very idea of community. Erikson explains that when the community draws a line between morality and immorality and expels those who fall on the wrong side of the line, “[i]t is declaring how much variability and diversity can be tolerated within the group before it begins to lose its distinctive shape, its unique identity.”⁸⁵ Given the importance of morality in shaping the contours of community and group identity, it is unlikely that moral disapproval will no longer drive legislation—notwithstanding the Supreme Court’s mandate otherwise. As the next Part will demonstrate, the majority’s incomplete attempt to supplant morality’s line aesthetic with a new aesthetic, that of liberty’s unbounded space and transcendence, plainly reveals both the persistence, and the shortcomings, of the law’s line-drawing.

⁸⁵ ERIKSON, *supra* note _____, at 12.

Part II. The Counter-Aesthetic: Transcendence

“This side” and “beyond” are faint repetitions of the dialectics of inside and outside: everything takes form, even infinity. We seek to determine being and, in so doing, transcend all situations, to give a situation of all situations.
Gaston Bachelard, *The Poetics of Space*⁸⁶

Having established the connection between morality and the line aesthetic, we can now turn to a closer look at the *Lawrence* majority’s opinion and the dialectic it stages between line-bounded and unmediated space. Section A will present a detailed textual reading of the opinion through its overruling of *Bowers* and its repudiation of morality as a legitimate state interest in Part II in order to highlight the transcendence (or dissolution) of boundaries—physical, doctrinal, and moral—that it entails. Justice Scalia’s dissent, whose preface explicitly invokes the line/space dichotomy that later resurfaces in the form of the slippery slope metaphor, characterizes the Court’s opinion as just such an instance of boundary dissolution. Section B will then turn to the majority’s reinscription of boundaries and reliance on the line aesthetic particularly at the end of the opinion—although to some degree throughout it—when it draws a series of binary oppositions between inside and outside, personal conduct and state-recognized status, the private and the public realms.

⁸⁶ GASTON BACHELARD, *THE POETICS OF SPACE* 212 (trans. Maria Jolas 1994).

A. *Transcending Boundaries*

The *Lawrence* majority sets the tone for its opinion in the first paragraph, where it stages a conflict between line and liberty in words that have been characterized as “high-flown, and empty”⁸⁷ and “rhetorically vacuous” on the one hand, and “elegant,”⁸⁸ celebratory and “moving” on the other.⁸⁹ On the most literal level, liberty acts to bar governmental actors, presumably absent exigent circumstances, from physically “intrud[ing] into a dwelling or other private place.”⁹⁰ Here, liberty protects against governmental infringements of one’s actual, physical space—the apartment where John Geddes Lawrence resided. On a more abstract level, however, liberty acts to constrain the government from imposing its own moral boundaries—through the operation of the criminal law—on “an autonomy of self” whose “[f]reedom extends beyond spatial bounds”⁹¹ and which is conceptualized in the first paragraph’s closing sentence in terms of its “spatial and more transcendent dimensions.”⁹² Here, liberty protects against the governmental imposition of boundaries that curb “freedom of thought,

⁸⁷ Lund & McGinnis, *supra* note _____, at 1576.

⁸⁸ Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, CATO SUP. REV., 2002-2003, at 21.

⁸⁹ Franke, *supra* note _____, at 1401.

⁹⁰ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁹¹ *Id.*

⁹² *Id.*

belief, expression, and certain intimate conduct”⁹³ in the first instance. In this passage, the majority deploys dialectics of inside/outside and line/unbounded space in language that will recur throughout its opinion to describe the extension of both selfhood and due process jurisprudence “beyond spatial” and doctrinal boundaries, respectively.⁹⁴

From the grandiloquence of the opening passage the majority moves next to the comparatively more mundane issue before it, namely, “the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”⁹⁵ Here, too, the figure of the line or boundary appears in the form of the threshold that the officers of the law unjustifiably transgressed in the eyes of the Court, and in the form of the physical and moral boundary that Lawrence and Garner unjustifiably transgressed in the eyes of Texas’ lawmakers. The Court notes that officers from the Harris County Police Department “entered” Lawrence’s apartment “in response to a reported weapons disturbance” and that “[t]he right of the

⁹³ *Id.*

⁹⁴ Lund and McGinnis criticize the majority’s “stirring introduction” as one that leaves the reader “more bewildered than enlightened.” Lund and McGinnis, *supra* note ____, at 1575. For instance, they contend that “[s]entence [2] is . . . high flown, and empty. Does saying that ‘the State is not omnipresent in the home’ mean that the State dwells in some rooms of the house but not others?” *Id.* at 1575-76. Similarly, they argue that “[s]entence [4] creates more mysteries. Is freedom different from liberty? How exactly does freedom extend beyond spatial bounds? By spreading through space despite some kind of physical obstacles?” *Id.* Finally, they observe that “[w]ith respect to sentence [6], we will confine ourselves to noting first, that while ‘transcendent dimensions’ has a splendiferous ring to it, the term has no obvious determinate meaning at all in this context; and second, that this difficulty is aggravated by the author’s assumption that there are degrees of transcendence among these dimensions.” *Id.*

⁹⁵ 539 U.S. 558, 562 (2003).

police to enter does not seem to have been questioned.”⁹⁶ Under Texas’ same-sex sodomy law, however, Lawrence and his companion also violated limits—literal and metaphorical limits, alike. First, the men physically transgressed corporeal limits by engaging in “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).”⁹⁷ Second, the men figuratively transgressed the state’s moral limits by violating the sodomy law specifically and normative sexuality—that is, heterosexual sex that does not involve “any contact between any part of the genitals of one person and the mouth or anus of another person” or “the penetration of the genitals or the anus of another person with an object”⁹⁸—more generally. Physical and moral boundaries thus here converge—the former a symbol of, and analogue for, the latter. As Douglas explains, the “symbolism of the body’s boundaries is used . . . to express danger to community boundaries.”⁹⁹ She maintains that this sort of “ritual protection of bodily orifices is treated as a symbol of social preoccupations about exits and entrances.”¹⁰⁰ In engaging in “deviate” penetrative sex, then, Lawrence and Garner threatened the integrity of not only of the physical body but its social counterpart—namely, the community—as well. However, in finding that the Harris County Police Department also violated a boundary by intruding “into a

⁹⁶ *Id.* at 562-63.

⁹⁷ *Id.* at 563.

⁹⁸ *Id.*

⁹⁹ DOUGLAS, *supra* note ____, at 124.

¹⁰⁰ *Id.* at 127.

dwelling” and subjecting those who engage in “certain intimate conduct” to criminal penalties, the Court places constitutional (substantive due process) constraints around, and thereby sets its own limit to, the community’s “preoccupations about exits and entrances.” In this sense, liberty is both expansive—extending centrifugally out into “more transcendent dimensions”—and restrictive, insofar as it constrains the authority of the government to place limits or boundaries around “an autonomy of self.”

The idea that liberty functions as a boundary that demarcates the point beyond which the state may not intrude on certain private domains presents an interesting parallel to the theory, set forth in Part I of this Article, that morality operates as a boundary that demarcates the point beyond which an individual may not deviate without incurring the community’s stigma. Whereas we typically conceptualize liberty—and the unbounded space aesthetic through which it naturally finds expression—as the absence of boundaries, liberty also, as the Court suggests, engages in a line-drawing aesthetic of its own. John Stuart Mill, whom the majority no doubt invokes in the opinion’s first word, similarly conceptualizes liberty in *On Liberty* as that which establishes a “limitation . . . of the power of government over individuals.”¹⁰¹ Indeed, he notes that “[t]he aim . . . of patriots was to set limits to the power which the ruler should be suffered to

¹⁰¹ JOHN STUART MILL, *ON LIBERTY* 5 (1859).

exercise over the community; and this limitation was what they meant by liberty.”¹⁰² In other words, for Mill, the question of “where to place the limit”¹⁰³ is considered out of a concern for the individual with respect to governmental infringements of her liberty rather than out of a concern for the community (or state) with respect to the individual’s deviation from moral norms.

The majority’s denunciation of certain governmental line-drawing, the transgression of certain intimate spaces, and the constraints on freedom that both entail continues throughout Part II of its opinion, where it traces the historical trajectory of the “substantive reach of liberty under the Due Process Clause”¹⁰⁴ from *Griswold v. Connecticut*¹⁰⁵ through *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰⁶—and, of course, where it overrules *Bowers v. Hardwick*¹⁰⁷ in the process. Here, the Court structures the historical movement of its substantive due process line of cases in a way that mimics the movement of freedom itself “beyond” spatial boundaries and into “more transcendent dimensions.” In fact, the Court uses the same language of ‘extending beyond’ to describe the expansion of doctrinal boundaries that it used in the opinion’s first passage to describe

¹⁰² *Id.* at 2.

¹⁰³ *Id.*

¹⁰⁴ 539 U.S. 558, 564 (2003).

¹⁰⁵ 381 U.S. 479 (1965).

¹⁰⁶ 505 U.S. 833 (1992).

¹⁰⁷ 478 U.S. 186 (1986).

the process by which freedom or liberty “extends beyond” certain governmental attempts to constrain it.

The majority cites *Griswold* as “the most pertinent beginning point” in charting the “substantive reach of liberty under the Due Process Clause.” In *Griswold*, of course, the Court found that Connecticut’s birth control law violated a protective “zone” of marital privacy “created by several fundamental constitutional guarantees”¹⁰⁸ explicitly set forth in the Bill of Rights, including the First, Third, and Fourth Amendments, and applicable to the states through incorporation by the Fourteenth Amendment. Recognizing that the Court in that case “placed emphasis on the marriage relation and the protected space of the marital bedroom,”¹⁰⁹ the *Lawrence* majority begins to chart the centrifugal movement of liberty’s reach. It notes, for instance, that “the right to make certain decisions regarding sexual conduct *extends beyond* the marital relationship,”¹¹⁰ and that *Eisenstadt v. Baird*,¹¹¹ while decided on equal protection grounds, nevertheless “went on to state the fundamental proposition that the law impaired the exercise of [an unmarried couple’s] personal rights.”¹¹² Further, as with the “unwarranted intrusion” of the state into a private dwelling at issue in *Lawrence*, *Eisenstadt* similarly found that the individual

¹⁰⁸ 381 U.S. 479 (1965).

¹⁰⁹ 539 U.S. at 565.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ 405 U.S. 438 (1972).

¹¹² 539 U.S. at 565.

has a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹³ In tracing the expansion of this liberty right from *Griswold* to *Eisenstadt*—and later through *Roe v. Wade*¹¹⁴ and *Carey v. Population Services International*¹¹⁵—the Court embraces the unbounded space aesthetic that appeared in the opening passage. Just as “freedom [of self] extends beyond spatial bounds,”¹¹⁶ so, too, has the doctrine protecting that freedom extended beyond the core protective zone of the marital relationship.

As the *Lawrence* majority moves from *Griswold* and *Eisenstadt* to *Roe* and *Carey*, liberty’s substantive ‘reaching’ or ‘extending beyond’ the marital bedroom converges with the transcendent reach of doctrine itself. By time we get to *Roe*, freedom entails not simply the right to make “certain decisions regarding sexual conduct” but “the right of a woman to make certain fundamental decisions affecting her destiny.”¹¹⁷ At this point, the Court has moved outward into space—an individual’s very “destiny”—in a way that intimates the “more transcendent dimensions” of liberty that *Lawrence* celebrates. In addition, the expanded liberty right once again moves in sync with expanding doctrine. The majority notes that the *Roe*

¹¹³ *Id.* (quoting 405 U.S. at 453).

¹¹⁴ 410 U.S. 113 (1973).

¹¹⁵ 431 U.S. 678 (1977).

¹¹⁶ 539 U.S. at 562.

¹¹⁷ *Id.* at 565.

Court, in holding that a woman “did have real and substantial protection as an exercise of her liberty under the Due Process Clause,” drew from a line of “cases that protect spatial freedom and cases that *go well beyond it*.”¹¹⁸ The repetition of the adverbial language of “beyond” has become nearly anaphoric¹¹⁹—only that instead of appearing at the beginning of sentences in the opinion it closes them in a way that signals the transcendence of boundaries as well as the privileging of spatial freedom and the doctrine that both preserves and protects it. In finally considering the position of *Carey* on this centrifugal trajectory, the Court observes that “[b]oth *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults.”¹²⁰ Here, the “reasoning” supporting constitutional doctrine is subject to no more confinement than are the individuals whose destinies that same doctrine controls.

The transcendence of *Bower*’s line -drawing aesthetic becomes complete once the Court, after tracing the trajectory of liberty’s ever-expanding scope, overrules its predecessor. While observing the factual similarities between the cases—just as “[t]he right of the police to enter” in

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ Anaphora is the deliberate repetition of a word or phrase at the beginning of several successive verses, clauses, or paragraphs; for example, “We shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills” (Winston S. Churchill).

¹²⁰ 539 U.S. 558, 566 (2003) (emphasis added).

Lawrence “does not seem to have been questioned,” so, too, did *Bowers* involve “[a] police officer, whose right to enter seems not to have been in question”¹²¹—the Court also underscores the one obvious difference, namely, that whereas “the Georgia statute prohibited the conduct whether or not the participants were of the same sex,” the “Texas statute . . . applies only to participants of the same sex.”¹²² Turning to the *Bowers*’ opinion, the majority criticizes that Court for failing “to appreciate the extent of the liberty at stake.”¹²³ Specifically, *Bowers* neglected to take seriously not only the “far-reaching consequences”¹²⁴ of the statute at issue in that case, but also the fact that sodomy statutes (whether they apply to same-sex or opposite-sex individuals) “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.”¹²⁵ In commenting more generally on the lines that the law draws (as well as those that it unjustifiably transgresses), the Court states that

[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries* absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose *to enter upon* this relationship *in the confines of their homes* and their own private lives and still retain their dignity as

¹²¹ *Id.* at 566.

¹²² *Id.*

¹²³ *Id.* at 567.

¹²⁴ *Id.*

¹²⁵ *Id.*

free persons.¹²⁶

The opinion's boundary transcendence here culminates in two opposing liminal images: the moral and legal boundaries that the law draws between permissible and impermissible sexual relationships on the one hand, and the physical and metaphysical boundaries that the law impermissibly transgresses on the other. Because "adults may choose to enter upon" certain relationships within "the confines of their homes," the law may not "enter" those same confines—the Harris County police that unjustifiably "entered" Lawrence's apartment—and attempt to control the liberty of the person ("in its spatial and more transcendent dimensions") who dwells therein "absent injury to a person or abuse of an institution the law protects." If Mill was an indirect presence in the opening passage, he directly figures here in the Court's appraisal of where governmental line-drawing (or boundaries) should be set, namely, at the point where conduct causes injury either to others or to "abuse of an institution the law protects."

In overruling *Bowers*, the Court quite literally transcends a line—the "rule" or *regula* established by its predecessor—and appears to replace "the act of line-drawing"¹²⁷ that *Bowers* represented with the act of "extend[ing] beyond" that figures throughout the majority's narrative of transcendence. When, later in Part II of the opinion, the majority dismisses morality as

¹²⁶ 539 U.S. 538, 567 (2003) (emphasis added).

¹²⁷ Rubinfeld, *supra* note _____, at 747.

even a legitimate state interest for certain laws, it continues to signal the repudiation of morality’s line-drawing aesthetic. While recognizing that individuals possess “deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives,”¹²⁸ the Court, quoting *Casey*, nevertheless declares that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”¹²⁹ Toward the end of the opinion, the majority again dismisses the role that morality and law play “in circumscribing personal choice”¹³⁰ when, quoting Justice Stevens’ *Bowers* dissent, it states that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹³¹ If, as Part I of this Article contended, morality is fundamentally an act of line drawing, then the Court here throws those lines—or at least certain of them—into question.

As noted in the Introduction, the critical response to *Lawrence* has been mixed, with some commentators arguing that the Court and its “vacuous rhetoric” went too far and others that it did not go far enough. Some critics, like Katherine Franke, contend that the majority, rather than going to such great lengths, “cabin[ed]” or contained the liberty right that it

¹²⁸ 539 U.S. at 571.

¹²⁹ *Id.*

¹³⁰ *Id.* at 576.

¹³¹ *Id.* at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

celebrates by mooring it to a conservative, normative vision of sexuality, one that “both echoes and reinforces a pull toward domesticity in current gay and lesbian organizing.”¹³² In the next Section, I will return to this claim that *Lawrence* in effect “cabins” or circumscribes the scope—or height—of its transcendence by reinscribing certain boundaries in the process of overcoming others.

Unlike Franke, other commentators contend that the *Lawrence* Court went too far in transcending prior doctrine as well as American law. For instance, Professors Lund and McGinnis characterize *Lawrence* by advertizing—quite appropriately for the purpose of this Article—to a poem, namely, *Prometheus Bound*, which they use to thematically organize their critique of what in their view represents an irresponsible act of “judicial improvisation”¹³³ and judicial “hubris.”¹³⁴ Like Aeschylus’¹³⁵ eponymous hero, *Lawrence* charts an “ascent into more transcendent dimensions”¹³⁶ that reveals a Court “freed from the chains even of rational argument”¹³⁷ and unmoored from the “promise of *Glucksberg*,”¹³⁸ where the Court was “inclin[ed] to go and sin no more” by limiting fundamental rights to those

¹³² Franke, *supra* note _____, at _____.

¹³³ Lund & McGinnis, *supra* note _____, at 1557.

¹³⁴ *Id.*

¹³⁵ Or that of Shelley, who presented his own version of the Prometheus myth in *Prometheus Unbound*.

¹³⁶ Lund & McGinnis, *supra* note _____, at 1575.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1572.

“objectively ‘deeply rooted’ in this Nation’s history and tradition.”¹³⁹ They contend that the majority’s flight into “more transcendent dimensions” signals a deracination of prior doctrine—specifically, *Bowers* and *Glucksberg* and their grounding in “ancient roots”¹⁴⁰—and, in light of the Court’s invocation of foreign precedent, a defiant surpassing of American law. In a similar vein, other commentators have argued that, along with *Grutter v. Bollinger*,¹⁴¹ *Lawrence* signals the end of the Court’s tripartite structure of judicial review. As one critic solemnly remarked in the wake of *Lawrence*, “[t]he venerable institution of tiered scrutiny is threatened with collapse.”¹⁴²

Not surprisingly, the sharpest criticism of the majority’s reputedly boundless flight of fancy comes from Justice Scalia, whose dissent self-consciously invokes the line/space dialectic that organizes the majority’s opinion. As mentioned above, the first paragraph of Justice Scalia’s dissent draws from the first paragraph of the majority opinion, where liberty and

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, 478 U.S. at 2844 (“Proscriptions against [homosexual conduct] have ancient roots”); *id.* at 2845 (“to claim that [a right to homosexual sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious”); *id.* at 2846 (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution”); *id.* at 2847 (“Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards”).

¹⁴¹ 123 S. Ct. 2325 (2003).

¹⁴² Massey, *supra* note _____, at 996. For a far less critical view of the “end” of the three tiers of judicial scrutiny and a recommendation that the Court adopt a single standard (or sliding scale) of judicial review under the Equal Protection Clause, see Goldberg, *supra* note _____, *passim*.

line conflict. Quite unlike the transcendent sweep of liberty in the majority's prefatory remarks, however, liberty here undermines "[t]he need for stability and certainty," neither of which present a "barrier" or boundary to the majority's free-wheeling constitutional jurisprudence, and, in Justice Scalia's view, "17-year crusade to overrule *Bowers v. Hardwick*."¹⁴³ Echoing the majority's declaration that the "penalties and purposes [of sodomy statutes] have . . . far-reaching consequences," Justice Scalia forewarns that the majority's "unheard-of form of rational-basis review . . . will have far-reaching implications beyond this case"¹⁴⁴—thus capturing the majority's language of expansion and transcendence ("far-reaching," "beyond") and highlighting instead their deleterious effects. He notes, in apocalyptic overtones, that the overruling of *Bowers* in such an unprincipled fashion involves not only "a massive disruption of the current social order"¹⁴⁵ but the very "dismantl[ing] [of] the structure of constitutional law."¹⁴⁶ On this view, the majority's aesthetic of unbounded space and transcendence has not only replaced morality's line-drawing aesthetic but eradicated it entirely, in effect "la[ying] waste [to] the foundations of our rational-basis jurisprudence,"¹⁴⁷ throwing into question the legitimacy of all

¹⁴³ 539 U.S. at 586 (Scalia, J., dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 591.

¹⁴⁶ *Id.* at 604.

¹⁴⁷ *Id.*

“traditional ‘morals’ offenses,”¹⁴⁸ and initiating an ineluctable fall down the slippery slope—which, of course, visually evokes the image of the line (or the lack thereof) and which appears in Justice Scalia’s dissent no less than three times.¹⁴⁹ Indeed, in Justice Scalia’s estimation, the majority’s abolition of morality (and its line aesthetic) as a valid basis for lawmaking will send the country straightaway down a gradient into such horrors as “adult incest, bestiality, and obscenity.” If, as Lund and McGinnis suggest, *Lawrence* violates *Glucksberg*’s and *Bowers*’s promise that the Court will “go and sin no more,”¹⁵⁰ then Justice Scalia’s warning of the ‘fall’ that will surely occur in a post-*Lawrence* world merely completes this biblical narrative of transgression and its aftermath.

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision”); *id.* at 599 (“The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable,’ *Bowers* *supra*, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review”); *id.* at 600 (“[Rational-basis] review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society’s belief that certain forms of sexual behavior are ‘immoral and unacceptable,’ 478 U.S. at 196. This is the same justification that supports many other laws. . . for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage”).

¹⁵⁰ Lund & McGinnis, *supra* note _____, at 1572.

B. Re-embracing the Boundary Trope

Justice Scalia’s portentous invocation of the slippery slope and of *Lawrence*’s slide down it is unwarranted given the extent to which the majority engages in its own act of line-drawing that would obviate such a precipitous plunge. If the anaphoric “going beyond” largely structured the majority’s narrative of transcendence, then the similarly repetitive appearance of the key qualifier “certain” signals its containment. In its opening paragraph, the majority limits the reach of transcendence when noting that “[l]iberty presumes an autonomy of self that includes . . . *certain* intimate conduct.”¹⁵¹ The adjectival qualification of liberty’s sweep reappears in the next paragraph, when the Court again characterizes the right at issue as a right “to engage in *certain* intimate sexual conduct,”¹⁵² as well as in the succeeding paragraphs, when the Court charts liberty’s doctrinal trajectory from the “marital bedroom” to “decisions affecting [a woman’s] destiny.” Just as *Griswold* merely “established that the right to make *certain* decisions regarding sexual conduct extends beyond the marital relationship,”¹⁵³ *Roe* merely “recognized the right of a woman to make *certain* fundamental decisions affecting her destiny.”¹⁵⁴ Indeed, the circumscription of liberty’s scope that is accomplished through the self-

¹⁵¹ 539 U.S. 558, 562 (2003) (emphasis added).

¹⁵² 539 U.S. at 562 (emphasis added).

¹⁵³ *Id.* at 563 (emphasis added).

¹⁵⁴ *Id.* (emphasis added).

conscious insertion of “certain” is paralleled in a remarkable way in the opinion’s closing sentences. There, in commenting on the myopia that inevitably limits the writers of any text—including, of course, “those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment”—the Court notes that had the drafters “known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to *certain* truths”¹⁵⁵ Here, the “truth” of liberty’s “manifold possibilities” is restricted no less than the reach of liberty itself. Whereas the *Lawrence* Court criticizes *Bowers* for reducing the issue in that case as “simply the right to engage in *certain* sexual conduct,”¹⁵⁶ it somehow cannot escape that same act of qualification.

The rhetorical qualification of liberty’s expansive scope is matched by the limits that the Court places around this “liberty of the person both in its spatial and more transcendent dimensions.” Throughout the opinion, although particularly toward its conclusion, the majority sets up an opposition between private conduct and public status that rests on a binary logic similar to *Bowers*’ own “act of line drawing”¹⁵⁷ between normative and non-normative sexuality. For instance, while the Court initially suggests that as a general matter an individual’s “[f]reedom extends beyond

¹⁵⁵ *Id.* at 578-79 (emphasis added).

¹⁵⁶ *Id.* at 567.

¹⁵⁷ Rubinfeld, *supra* note ____, at 747.

spatial bounds” and that the specific issue in this case “involves liberty of the person” in its “more transcendent dimensions,” it contains that freedom or liberty in a “dwelling” or similar “private place[.]”¹⁵⁸ Although the opening paragraph makes grand gestures toward these definitionally ambiguous “transcendent dimensions,” Part I of the opinion, which immediately follows, interiorizes those dimensions by bringing us into Lawrence’s “private residence.” As noted above, the Court continues to interiorize the scope of liberty when declaring that the state may not set “boundaries” around “the relationship” that adults choose “to enter upon . . . in the confines of their homes and their own private lives.”¹⁵⁹ Whereas the reach of liberty cannot be “confined” to the protection of only “certain” (*i.e.*, heterosexual marital) relationships—recall the Court’s statement that “the reasoning of *Griswold* could not be confined to the protection of rights of married adults”¹⁶⁰—it *may* be confined to “certain” places, namely, the private domain.

Katherine Franke has observed that, in contrast to the Court’s opinion in *Casey*, which Justice Kennedy co-authored and where “liberty is likened to a thick form of autonomy,”¹⁶¹ in his *Lawrence* opinion Justice Kennedy cabins liberty “through its geographization” and privatization.

¹⁵⁸ 539 U.S. 558, 562 (2003).

¹⁵⁹ 539 U.S. at 567.

¹⁶⁰ *Id.* at 566.

¹⁶¹ Franke, *supra* note ____, at 1402.

Specifically, she notes that the *Lawrence* majority “relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed.” In her view, the liberty interest that the *Lawrence* majority protects, far from exploding out into “transcendent dimensions,” remains distinctly “domestinormative,” that is, tethered to “forms of social membership and, indeed, citizenship that are structurally identified with domesticated heterosexual marriage and intimacy.”¹⁶² I agree with Franke that the majority interiorizes or “geographizes” liberty for same-sex partners in a way that at least nominally grounds it to a doctrinally pre-existent heteronormative paradigm whose “most pertinent beginning point” is *Griswold*. Nevertheless, far from bringing same-sex intimacy within the same ambit as “domesticated heterosexual marriage and intimacy,” the Court draws a rather clear boundary between private (same-sex) conduct and public status—one that removes the liberty interest for same-sex intimacy from the public domain of marriage. As the Court made clear, while the state may not cross certain boundaries—the “confines” of one’s private space—it may set its own “boundaries” in order to preserve an “institution the law protects.”

¹⁶² *Id.*

The boundary that the Court draws between private conduct and public status is most evident in the opinion’s final lines. Here, after ostensibly moving beyond the “confines” of prior doctrine and “certain” intimate spaces, the Court contracts into confined space when it declares what its holding is *not*, namely, that “[t]he present case does not involve minors . . . [i]t does not involve public conduct or prostitution. . . [and] [i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹⁶³ If the majority at least nominally privileged the unbounded space or transcendence aesthetic throughout its opinion thus far, it here reinstates morality’s (and *Bowers*’s) line aesthetic by marking a boundary between “the personal and private life of the individual,”¹⁶⁴ into which the government “may *not* enter,” and formal public recognition of “any relationship that homosexual persons seek *to* enter.”¹⁶⁵ While morality might no longer constitute a legitimate state interest for criminalizing certain relationships that occur in private—as the Court earlier stated, “[t]he issue [here] is whether the majority may use the power of the State to enforce [ethical and moral principles] on the whole society through operation of the criminal law”¹⁶⁶—

¹⁶³ 539 U.S. at 578.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 571.

the Court in these closing passages no doubt preserves the moral boundaries that separate the private and the public spheres.

In the next Part, I will show that the boundary that the *Lawrence* Court draws between private conduct and public status cannot hold any more than the line that *Bowers* drew between normative and non-normative sexuality. Here, though, I would like to return for a moment to my suggestion that we approach *Lawrence* in poetic terms. As I noted earlier, part of the reason it is useful to think about *Lawrence* in such terms is the extent to which the case represents a dialectical struggle peculiar to the lyric form—a struggle, that is, between “two incompatibles, history and modernity,”¹⁶⁷ and the aesthetics of line and unbounded space, respectively, that each “incompatible” exemplifies. If the lyric form is the preferred literary mode for expressing the inescapability of a prior moment that the poet strives to overcome, then *Lawrence*’s confrontation with a prior constitutional moment—*Bowers v. Hardwick*—and incomplete transcendence of that moment might be viewed as its juridical equivalent.

In addition to the *Bowers* like line-drawing that the Court undertakes, *Lawrence* as a narrative is marked by halting and interrupted progress toward a new moment in time. While Part II of the opinion is arranged diachronically, starting with *Griswold* as “the most pertinent

¹⁶⁷ DE MAN, *supra* note ____, at 143.

beginning point” and tracing a doctrinal trajectory through *Romer v. Evans*, it is also characterized by repetition. For instance, after “beginning” with *Griswold* and moving through *Carey*, the Court effectively ‘begins again’ when it reaches *Bowers*, noting how the Court in that case “began its substantive discussion” by framing the liberty right in unduly narrow terms.¹⁶⁸ Just a few paragraphs later, the *Lawrence* Court begins anew when it attacks the “historical premises relied upon by the majority and concurring opinions in *Bowers*,” first remarking that “[a]t the outset it should be noted that there is no long-standing history in this country of laws directed at homosexual conduct as a distinct matter” and then moving back to yet another “[b]eginning” moment in “colonial times.”¹⁶⁹ The diachronic trajectory through time is therefore repeatedly punctured—and thus interrupted—by moments back in time. While moving through, and pressing to transcend, history to claim a new moment in time, the Court is nevertheless pulled back by history’s strong gravitational force. In this sense, then, *Lawrence* re-enacts on a narrative level the struggle between “two incompatibles, history and modernity,” as well as the limits of complete transcendence.

¹⁶⁸ 539 U.S. at 566.

¹⁶⁹ *Id.* at 568.

Part III. The Unstable Boundary

Just as *Bowers* drew an unstable —and ultimately unconstitutional— boundary between normative and non-normative sexuality, *Lawrence* also draws a line between private conduct and public status that is unstable and warrants critique. Section A will interrogate the boundary between private conduct and public status by demonstrating the extent to which private (same-sex) conduct is still being used after *Lawrence*, just as it was before that case, to deny access to the public institution of marriage. Section B will then interrogate that same boundary by demonstrating the extent to which marriage itself, unlike the public institution that the Court conceives it to be, constitutes a form of private conduct.

A. *Private Conduct & Marital Status*

Unlike Justice O'Connor, who makes clear in her concurrence that civil laws limiting marriage to opposite-sex partners could still pass rational basis review under the Equal Protection Clause even if criminal laws singling out same-sex sodomy do not, the *Lawrence* majority never explicitly refers to the effect its holding might have on same-sex “marriage” per se. Nevertheless, the majority undoubtedly gives nod to the validity of

civil laws that limit the institution of marriage to opposite-sex partners two times in its opinion, once when it avers that the state *may* set “boundaries” in order to preserve “an institution the law protects,” and again when it declares what its holding does *not* represent, namely, “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” The *Lawrence* majority thus draws a line or binary opposition between (certain) same-sex conduct, which lies beyond the reach of the law, and the “formal recognition” of same-sex relationships, which falls within its ambit.

Justice Scalia chides the Court for drawing what in his estimation represents an unprincipled—and ultimately untenable—distinction between conduct and status, and for thereby eliminating any and all toeholds on the slippery slope that leads—ineluctably, in his view—toward same-sex marriage. At the conclusion of his dissent, he warns that, if moral disapproval no longer constitutes even a legitimate state interest for lawmaking, then there no longer exists any “justification . . . for denying the benefits of marriage to homosexual couples.”¹⁷⁰ I would argue, however, that the line that the majority draws between conduct and status does not necessarily fail because morality can never constitute a legitimate state interest,¹⁷¹ but rather because states will continue—and have continued—

¹⁷⁰ 539 U.S. at 605 (Scalia, J., dissenting).

¹⁷¹ See *supra* note _____, and accompanying text.

after *Lawrence* to deny same-sex couples access to the civil institution of marriage on account of the ‘non-procreative’ conduct in which those couples engage. In other words, the boundary that the Court erects between certain conduct (which after *Lawrence* can no longer be subject to moral disapproval) and marital status (which might be) lacks stability in light of the extent to which courts after *Lawrence* have continued to advert to the “[s]tate’s interest in marital procreation” and “procreation by ‘natural’ reproduction”¹⁷² in order to justify limiting marriage to opposite-sex partners.

Peter Cicchino has observed that “[t]he argument from procreation, that same-sex relationships will bring about the decline of the nation through underpopulation, no longer seems to be either advanced seriously by states or taken seriously by courts.”¹⁷³ Specifically, he has argued that “[t]he logic of procreation arguments, if applied consistently, would also prohibit the use of contraception by heterosexuals. Moreover, it may be observed that population control has become a practical and moral imperative for most of the world’s societies, including the United States.”¹⁷⁴

Cicchino and others have contended that the argument that laws limiting marriage to opposite-sex partners could be supported by a legitimate state interest in “natural” procreation was widely accepted by

¹⁷² *Morrison v. Sadler*, 821 N.E.2d 15, 28 (Ind. App. 2005).

¹⁷³ Cicchino, *supra* note ____, at 151.

¹⁷⁴ *Id.*

courts hearing challenges to such laws from the 1970s into the 1990s.¹⁷⁵ For instance, in upholding a state statute limiting marriage to opposite-sex partners against a due process and equal protection challenge in *Baker v. Nelson*,¹⁷⁶ the Supreme Court of Minnesota relied on the procreation rationale, stating that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”¹⁷⁷ Similarly, in upholding an identical state statute in *Singer v. Hara*,¹⁷⁸ the Washington Court of Appeals reasoned that “it is apparent that the state’s refusal to grant a license allowing the appellants to marry one another is not based upon appellants’ status as males, but rather . . . upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married.”¹⁷⁹ More recently, in *Dean v. District of Columbia*,¹⁸⁰ the D.C.

¹⁷⁵ *Id.*; see also Suzanne Goldberg, *Marriage Equality in New Jersey?*, 233 N.J. LAW 35 (2005) (stating that “rulings . . . from the 1970s into the 1990s [] depended heavily on procreation as well as history to justify different marriage rules for same-sex and different-sex couples”).

¹⁷⁶ 191 N.W.2d 185 (Minn. 1971).

¹⁷⁷ *Id.* at 186.

¹⁷⁸ 522 P.2d 1187 (Wash. App. 1974).

¹⁷⁹ *Id.* at 1193.

¹⁸⁰ 652 A.2d 307 (D.C. 1995).

Court of Appeals turned to the procreation justification in support of a marriage statute that denied that right to same-sex couples against a due process challenge on the grounds that “in recognizing a fundamental right to marry, the Court has only contemplated marriages between persons of opposite sexes—persons who had the possibility of having children with each other.”¹⁸¹

Critics of the procreationist argument, including Cicchino, have noted that while it enjoyed some currency among courts from the 1970s through the early 1990s, when *Dean* was decided, it has largely been discredited by courts in the past decade—at least before *Lawrence*.¹⁸² However, a survey of state and federal cases that have arisen *after Lawrence* reveals that procreation—or procreative conduct—is once again ascendant as a justification in support of both civil (marriage) and criminal laws that discriminate on the basis of sexual orientation.

For instance, in *Lewis v. Harris*,¹⁸³ decided this past summer, the Superior Court of New Jersey upheld that state’s statute limiting marriage to opposite-sex partners largely on the ground that same-sex couples simply could not engage in sexual conduct that would lead to ‘natural’ procreation.

¹⁸¹ *Id.* at 333; *see also* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 55 (1993).

¹⁸² Cicchino, *supra* note ____, at 151 (stating that “[t]he argument from procreation, that same-sex relationships will bring about the decline of the nation through underpopulation, no longer seems to be either advanced seriously by states or taken seriously by courts”). Cicchino notes that the state in *Romer v. Evans* attempted to rely on the procreation rationale in support of Amendment 2 but was unsuccessful. *Id.* at 151.

¹⁸³ 2005 WL 1388578 (N.J. Super. June 14, 2005).

Specifically, the court there reasoned that marriage plays a pivotal role “in procreation and in providing the optimal environment for child rearing” and that “our society considers marriage between a man and a woman to play a vital role in propagating the species and in providing the ideal environment for raising children.”¹⁸⁴ Indeed, the *Lewis* court deployed the same binary logic, and relied on the same line-drawing and boundary creation, that *Lawrence* both embraced and rejected, stating that “no one really disputes that the State is empowered to privilege marriage by restricting access to, or *drawing principled boundaries* around it” and that “a core feature of marriage is its binary, opposite-sex nature.”¹⁸⁵ In his dissent, Judge Collester noted that the weight that the majority gave to the procreation argument in that case was curious in light of the fact that “the Attorney General disclaim[ed] the promotion of procreation as a rationale for prohibiting same-sex marriage.”¹⁸⁶ Similarly, in *Morrison v. Sadler*,¹⁸⁷ the Indiana Court of Appeals upheld the constitutionality of that state’s Defense of Marriage Act almost exclusively on the legitimacy of the state’s alleged interest in “natural procreation,” reasoning that, unlike “assisted reproduction or adoption,”

procreation by “natural” reproduction may occur without any thought for the future. The State, first of all, may

¹⁸⁴ *Id.* at *11.

¹⁸⁵ *Id.* at *15 (Parrillo, J.A.D., concurring) (emphasis added).

¹⁸⁶ *Id.* at *22 (Collester, J.A.D., dissenting).

¹⁸⁷ 821 N.E.2d 15 (Ind. App. 2005).

legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse. . . . The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the “natural” procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a “change in plans.”¹⁸⁸

Although the same-sex couples challenging the constitutionality of Indiana’s DOMA contended that “it is irrational to justify opposite-sex only marriage on procreative grounds because there is no requirement that couples wishing to marry prove their fertility or willingness to procreate, and furthermore even definitely sterile persons, such as elderly women, are allowed to marry,”¹⁸⁹ the court responded that such “overbreadth argument[s]” are routinely dismissed under rational basis review, according to which “[a] legislative classification is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others.”¹⁹⁰

¹⁸⁸ *Id.* at 24-25.

¹⁸⁹ *Id.* at 27.

¹⁹⁰ *Id.* (internal quotations omitted); see also *Shields v. Madigan*, 783 N.Y.S.2d 270, 276 (2004) (stating that “[a]pplying the rational basis test, this court concludes that preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation”); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. App. Div. 1 2003). Indeed, states after *Lawrence* have turned to the procreation rationale to support not only civil laws that limit marriage to opposite-sex couples, but also criminal laws that provide for starkly disproportionate

Lower courts' reliance on the private, non-procreative "conduct" of same-sex couples as a means of denying access to the public institution of marriage after *Lawrence* invites us to interrogate the boundary that the Court in that case drew between (private) conduct and (public) status, insofar as the former is still being used to uphold the heterosexual basis of the latter. Indeed, while the *Lewis* court noted that *Lawrence* drew a clear line between laws that make "it a crime for two persons of the same sex to engage in certain types of intimate conduct" and laws that preserve the traditional institution of marriage, it nevertheless found that non-procreative conduct constituted a basis for denying access to the public institution of marriage, pointing to "the traditional and still prevailing religious and

penalties to gays and straights. Specifically, in *State v. Limon*, 83 P.3d 229 (Kan. App. 2004), the Kansas Court of Appeals considered the constitutionality of that state's Romeo and Juliet Law, which explicitly discriminates between heterosexual and same-sex sodomy between adults and children by imposing penalties on the latter in excess of 14 times those imposed on the former. In that case, the defendant, an 18-year old adult male, was prosecuted under Kansas' statute for engaging in sodomy with a 14-year old boy, both of whom were developmentally disabled, and sentenced to 206 months, or 18 years, incarceration. Had the boy been a girl, however, the defendant would have been sentenced only to 13-15 months. In considering the constitutionality of the statute in light of *Lawrence*, the court relied, among other rationales, on the ground that "sexual acts between same-sex couples do not lead to procreation on their own" and that "the family is commonly recognized as the unit for the procreation and the rearing of children." 83 P.3d at 237. While the Kansas statute thus categorically discourages—and, indeed, punishes—any sexual relations between adults and minors, it ironically awards those heterosexual defendants who *might* impregnate (and legally marry) their victims with a lesser penalty. As the *Limon* dissent pointed out, "it is incomprehensible that this law has anything to do with encouraging marriage and procreation between the victim and the assailant, or anyone else, as is apparently claimed by the State and approved by the majority." *Id.* at 247 (Pierron, J., dissenting).

societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species.”¹⁹¹

What is particularly noteworthy in these cases is the extent to which natural procreation, as a reason for denying access to marriage, is privileged even over and above adoption—the primary aim of which has been to “naturalize” the adopted child into the adoptive family.¹⁹² Perhaps most notable in this regard was the 11th Circuit’s opinion in *Lofton v. Secretary of the Department of Children and Family Services*,¹⁹³ also decided after *Lawrence*. There, lesbian and gay foster parents and guardians challenged the constitutionality of Florida’s adoption statute, which categorically prohibited lesbians and gays from adopting children. In upholding the statute against the lesbian and gay plaintiffs’ equal protection challenge, the court accepted the state’s justification that “the statute is rationally related to Florida’s interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers” *even though* the statute placed categorical restrictions around sexual orientation, *not* marital status.¹⁹⁴ When, again just this summer, a lesbian couple that had been legally married in Massachusetts and then later challenged the constitutionality of the federal DOMA statute after moving to Florida, the

¹⁹¹ 2005 WL 1388578, at *6.

¹⁹² See Naomi Cahn, *Perfect Substitutes for the Real Thing?*, 52 DUKE L.J. 1077, 1144 (2003).

¹⁹³ 377 F.3d 1275 (11th Cir. 2004).

¹⁹⁴ *Id.* at 1296.

Federal District Court for the Middle District of Florida in *Wilson v. Ake*¹⁹⁵ upheld DOMA partly on the ground that the United States government had asserted a legitimate state interest in natural procreation and the biological family:

First, the government argues that DOMA fosters the development of relationships that are optimal for procreation, thereby encouraging the “stable generational continuity of the United States.” DOMA allegedly furthers this interest by permitting the states to deny recognition to same-sex marriages performed elsewhere and by adopting the traditional definition of marriage for purposes of federal statutes. Second, DOMA “encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents.” The government argues that these stable relationships encourage the creation of stable families that are well suited to nurturing and raising children. Plaintiffs offer little to rebut the government’s argument that DOMA is rationally related to the government’s proffered legitimate interests.¹⁹⁶

In Florida, then, same-sex partners are placed in an ironic double-bind: They may not adopt children because they cannot marry, and they may not marry because they cannot have children through what courts deem to be “natural,” biological reproductive conduct. Whereas the *Lofton* court placed considerable emphasis on the fact that same-sex couples could not adopt because of their failure to “reproduce” the marital family unit, the *Ake* court, in explicitly privileging the “rearing of children by both of their

¹⁹⁵ 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

¹⁹⁶ *Id.* at 1309 (internal citations omitted).

biological parents,” appeared to discount the legitimacy of even the adoptive family unit.

While after *Lawrence* the government may no longer subject those who engage in same-sex conduct to criminal sanctions, it may, as these cases suggest, continue to rely on the non-procreative nature of that same conduct to deny same-sex couples access to the public institution of marriage. For this reason, the line or boundary that the *Lawrence* majority draws between conduct and status, and the role that morality might play in regulating each, is far less stable and far more permeable than the Court likely conceives it to be. Indeed, lower state and federal courts’ reliance on the procreation rationale after *Lawrence* is curious in light of the fact that the majority situates the issue in that case—the right to engage in same-sex conduct without facing criminal penalties—within a larger narrative about the right *not* to procreate, one that ‘begins’ with *Griswold* and continues through *Roe* and *Casey*. In *Bowers*, the Court refused to place same -sex conduct within the larger context of this same doctrinal narrative, stating that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.” Whereas *Lawrence* appears to depart from its predecessor by placing same-sex conduct on this doctrinal trajectory and by thereby suggesting a positive “connection” between

“marriage” and “homosexual activity,” it, too, attempts to sever this connection by drawing a clear line between status and conduct—a line whose stability has already been thrown into question by lower court rulings that advert to the latter (conduct) in order to deny same-sex couples the former (status).

B. Marital Status as Private Conduct

The line that *Lawrence* draws between private conduct and public status is problematic not only because of the extent to which such (non-procreative) conduct continues to figure in the denial of marital status, but also because of the extent to which the public status of marriage itself might be viewed as a form of conduct in general and private conduct in particular. Indeed, family law scholars have revealed the extent to which marriage has been “privatized” and subject to “private ordering” through the increased tendency of actors to rely on contract to order marital relations at both their inception and their dissolution. Beyond this, though, we might view marriage as private conduct—as opposed to public status—not only because it constitutes a form of “expressive conduct” that warrants First Amendment protection, but also because the law itself has viewed marriage in such conduct-based terms in both the criminal and the civil law contexts.

Jana Singer has thoroughly demonstrated the degree to which “family law has become increasingly privatized.”¹⁹⁷ As she comments, “[i]n virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior.”¹⁹⁸ For instance, she remarks that whereas the law traditionally “underscored the public nature of marriage by defining for all participants the salient aspects of the marriage bond, particularly the legal and economic relationship between spouses,”¹⁹⁹ over the past three decades state-control over the marital relationship has eroded in three interrelated ways:

First, the state-imposed marriage contract is a far less comprehensive or precise instrument than it was a generation or two ago. In particular, the reciprocal rights and obligations of spouses are both less well-defined and less extensive than they were in previous generations. Second, individual couples today have considerably more freedom than in the past to vary by private agreement what little remains of the state-imposed marriage contract. Third, the law increasingly treats marriage partners as individuals, rather than as a single merged unit, for purposes of doctrinal analysis.²⁰⁰

Similarly, as with the law surrounding marriage at its inception, the law covering divorce has experienced a shift away from state control and toward private ordering through both the creation of no-fault divorce and

¹⁹⁷ Singer, *supra* note _____, at 1444.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1456.

²⁰⁰ *Id.* at 1458.

the ceding of state management over the financial incidents of divorce to private actors. Indeed, “[w]ith the adoption of no-fault divorce, and the accompanying demise of the state-imposed marriage contract, the legitimacy of the state’s role in structuring a couple’s post divorce economic and parenting relationship has become increasingly problematic.”²⁰¹

Other commentators have noted the extent to which the law governing marriage has been subject to “private ordering”²⁰² that has notably transformed what was previously a public institution or ‘status’ over which the state exercised “paternalistic control,”²⁰³ to a predominantly private contractual arrangement between those actors most intimately involved. As Elizabeth Scott and Robert Scott have argued, “[n]o exhaustive survey of legal developments is required to demonstrate the pervasiveness of the trend from state control to private ordering within marriage. Currently, there are few state-prescribed obligations associated with marriage, and fewer still that cannot be altered by the parties.”²⁰⁴ The extent to which state power over the marital relationship—again, whether at its inception or at its dissolution—has been ceded to private parties should force us to reexamine, and interrogate, the boundary that the *Lawrence*

²⁰¹ *Id.* at 1474.

²⁰² Scott & Scott, *supra* note _____, at 1234.

²⁰³ *Id.*

²⁰⁴ *Id.*

majority draws between private (same-sex) conduct and public (marital) status.

When the majority writes that the law may not draw boundaries around certain private relationships although it may do so in order to preserve “an institution that the law protects”; and when it emphasizes that its holding is limited to private rather than “public” conduct and does not extend to “formal recognition [of] any relationship that homosexual persons seek to enter,” it underestimates the largely private and customizable character of that nominally “public” institution. Considering the privatization of marriage that has taken place over the last three decades, the Court’s insistence on maintaining the ‘line’ between private conduct and public status—and on using marriage as an example of the latter—is arguably no less arbitrary, and surely no more stable, than the line that *Bowers* drew between those sexual choices (and relationships) that receive robust constitutional protection and those that do not.

The line that *Lawrence* draws between private (same-sex) conduct and public (marital) status is unstable not only because of the increasingly private regulation of that status, but also because the status of marriage itself might be viewed as a form of conduct. Specifically, the *Lawrence* majority’s conceptualization of marriage as a formalistic, institutionalized, and status-based relationship (“an institution the law protects,” “formal

recognition to any relationship”) fails to capture the performative, expressive, and conduct-like aspects of marriage. David Cruz, for instance, has contended that marriage is an “expressive resource” that, as with myriad other forms of expression, warrants First Amendment protection.²⁰⁵ Analogizing (same-sex as well as opposite-sex) marriage to a form of expressive conduct, Cruz argues that

[t]he high expressivity, historical pedigree, and uniqueness of civil marriage should suffice to place it on the protected side of the line between “expressive conduct” and conduct that is “de minimis expressive.” Courts have already recognized that a number of actions can be engaged in for expressive purposes sufficient to claim the shelter of the First Amendment. Marriage, including civil marriage, is at least as effective for communicating some messages as is conduct such as making a donation to a political candidate; beating a drum during an anti-war demonstration also involving chanting; and allowing two court clerks to attend a training seminar in violation of their employer-judge’s instructions that only people who contributed to his reelection campaign can be allowed to attend. And although its contours have changed over time, civil marriage is a longstanding institution traditionally used by people to express themselves to each other and to society at large. Moreover, no other institution is very similar to marriage, and this uniqueness helps leave open the possibility of distinguishing marrying civilly from other actions people might try to bring within the scope of expressive conduct doctrine.²⁰⁶

²⁰⁵ David B. Cruz, “*Just Don’t Call it Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001); see also *id.* at 974 (stating that “civil marriage offers eligible couples far more than just money. It provides a web of legal entitlements . . . and responsibilities, an affiliation with a rich institutional tradition, and a uniquely potent expressive resource usable to communicate love and commitment to one another and to the world at large. It is this latter aspect that is crucially important to marriage as a social practice and that renders civil marriage properly subject to First Amendment scrutiny”).

²⁰⁶ *Id.* at 976-77.

Other commentators have underscored the importance of “expressive conduct” in defining either marital or marriage-“like” relationships. For instance, in tracing the demise of common law marriage during the early twentieth century through the lens of a celebrated New York trial, Ariela Dubler has shown that, while the law has traditionally looked upon the performative aspects (or conduct) of common law marriage with considerable disfavor and distrust,²⁰⁷ the law in some jurisdictions continues to grant rights to unmarried cohabitants who ‘act’ or ‘conduct themselves’ *like* a married couple. Perhaps most noteworthy in this respect is *Braschi v. Stahl Associates*,²⁰⁸ where the New York Court of Appeals found that because two men had “functioned” like a married couple during their ten-year relationship, one of the men qualified to inherit the other’s rent-controlled apartment under New York’s rent control statute. In that case, the conduct of the parties was not under review to determine whether a marriage existed—as the two men were ineligible to marry under New York’s opposite-sex marriage requirement—but rather whether they conducted themselves in the manner of a married couple so as to render the surviving spouse a beneficiary under the statute. In addition to espousing a functionalist perspective of the family, then, what *Braschi* reveals is the

²⁰⁷ Dubler, *supra* note _____, *passim*.

²⁰⁸ 543 N.E.2d 49 (N.Y. 1989).

assumption that underlies the law's understanding of *how* a married couple either does, or arguably should, act, as well as the simple fact that marriage implies conduct between the parties over and above the nominal status conferred by the state.

While the conduct elements of marriage might factor into the law's approach to determining whether a marriage (or an approximation thereof) exists in order to confer the rights that flow therefrom upon the parties, marriage is primarily conceptualized in conduct-based terms when individuals are either exiting, or being penalized for, it. Three examples in particular might here be offered to illustrate the private, conduct-based nature of a relationship that *Lawrence* largely views in public, status-based terms.

First, the conduct of the marital relationship is *most* at issue at the time of its dissolution, as the law in several states continues to scrutinize the conduct of the parties during marriage in order to determine the incidents of divorce, including spousal maintenance, property division, and any child custody issues should they exist. Second, the criminal law conceives of marriage as a form of conduct insofar as the parties involved might be subject to criminal sanctions should they violate any statute that prohibits marriage between certain individuals—as, for instance, in the case of criminal incest laws that prohibit marriage between specified family

members, or, at one time, of anti-miscegenation statutes that rendered marriage between whites and certain statutorily-defined “colored persons” a form of criminal conduct.²⁰⁹ Third, the Department of Defense’s policy of “don’t ask don’t tell” conceives of marriage in conduct-based terms insofar as marriage, or an attempted marriage, between same-sex individuals—either, or both, of whom are military personnel—constitutes a form of “homosexual conduct” that divulges one’s “homosexual” orientation and will therefore result in the dismissal of that member or members.²¹⁰ Perhaps ironically, the military’s policy of dismissing any member who either marries or attempts to marry an individual of the same sex because

²⁰⁹ For instance, the criminal statute at issue, and held unconstitutional, in *Loving v. Virginia*, 388 U.S. 1 (1967), provided that

[i]f any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Id. at 4 (citing CODE VA. 1950, § 20-58). As with the military’s policy of “don’t ask, don’t tell,” where the act or conduct of marrying reveals a sanctionable sexual orientation status (*see infra* note ____ and accompanying text), similarly here the act or conduct of cohabitation “as man and wife” reveals a criminally sanctionable marital status.

²¹⁰ 10 U.S.C.A. section 654 (commonly referred to as “don’t ask, don’t tell”) provides that “[a] member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if” (1) that member engages, or attempts to engage, in a “homosexual act or acts”; (2) that member states that he or she is “a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts”; and (3) that member “has married or attempted to marry a person known to be of the same biological sex.” 10 U.S.C.A. § 654 (2005).

such conduct would reveal that member's "homosexual" sexual orientation strongly supports Cruz's argument that marriage constitutes an "expressive resource" or "expressive conduct" that warrants First Amendment protection. Indeed, if marrying, or attempting to marry, a member of the same sex did *not* rise to the level of conduct that expresses a sexual orientation fundamentally incompatible with the military's objectives, then presumably the act or conduct of marrying would have little expressive value and would not necessarily result in the dismissal of the individual who married, or attempted to marry, a member of the same sex. "Don't ask, don't tell," however, not only recognizes the expressive (First Amendment) value of marriage, but paradoxically reinforces it.

Given the extent to which marriage might be viewed as a form of private conduct, as well as the extent to which private conduct is still being used to deny marital status, the line or binary opposition that the *Lawrence* majority draws between private (same-sex) conduct and public (marital) status is subject to the same criticisms—*e.g.*, it is arbitrary, unstable, and permeable—as is the line that *Bowers* drew and that the *Lawrence* Court transcended—and, of course, redrew. Ironically, in this sense, critics who have declaimed the majority's opinion as an exercise in judicial hubris and as an irresponsible instance of boundary transcendence (or dissolution) might well be right to point out that the majority drew a line between

private conduct and public status that logically cannot hold. To be sure, Justice Scalia himself calls attention to the weaknesses not only of the boundary that the majority drew but also of the procreation rationale that lower courts after *Lawrence* have adverted to in order to maintain that boundary. He says:

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, *ante*, at 2484; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” *ante*, at 2478; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.²¹¹

As Nan Hunter remarks, “Justice Scalia, whose gifts to gay rights advocates can include over-reading holdings with which he disagrees, declares that nothing stands between *Lawrence* and gay marriage, unless illogical distinctions are drawn.”²¹²

²¹¹ *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting).

²¹² Hunter, *supra* note _____, at 1131-32.

Part IV. Conclusion

When one first reads *Lawrence*, one is immediately struck by the effusiveness of some of the majority’s statements. I use this term here, “effusiveness,” deliberately—as the six sentences in the opening paragraph almost seem to spill over into each other in a way that one does (or might) not typically expect to occur in a legal opinion. Reading *Lawrence* as a poem that dramatizes a conflict of aesthetic modes is thus to some extent invited by the Court itself; this Article has accepted that invitation. Moreover, the poetic effusiveness of these, and other, remarks—including the statement, quoted above, which Justice Scalia wryly characterizes as “coo[ing],”²¹³—finds its counterpart, as I have contended, in the ‘effusion’ that occurs on a doctrinal level as the Court surpasses the boundaries not only of prior case law, but also of morality and the line-drawing aesthetic in which it naturally finds expression.

At the same time that *Lawrence* represents a narrative of unbounded space, transcendence, and effusion, however, it also represents a narrative of containment. While the *Lawrence* majority attempts to transcend the lines that morality—and its extreme form, disgust—routinely draws as well

²¹³ The statement that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” 539 U.S. at 567.

as the line that *Bowers* drew, it, too, engages in its own act of line drawing and containment. In this sense, then, *Lawrence* both resists and relies on a policy of containment. Indeed, containment, it seems, is an ongoing theme in both post-*Lawrence* theory and lower-court jurisprudence. Not only have lower courts attempted to contain or cabin the scope of the majority's holding by drawing lines between conduct and status and the private and the public spheres, but commentators have also called attention to the impulse to limit the reach of *Lawrence*'s holding on the part of policymakers. As Hunter has remarked, "deprived of criminal law as a tool, opponents of equality for lesbians and gay men are likely to concentrate increasingly on the strategy of containment."²¹⁴

By approaching *Lawrence* as a poetic text that ultimately participates in the same law-drawing aesthetic that on an explicit level it putatively transcends, I have provided an alternative to the more conventional readings of that text that have appeared in the legal literature.

²¹⁴ Hunter, *supra* note _____, at 1542. She continues:

The effort to contain homosexuality and even an explicit comparison to communicable disease is not new; even before AIDS, the metaphor of disease was used to defend sodomy laws. Containment now buttresses a kinder, gentler hierarchy, but one that courts nonetheless continuously modernize by refining the rationales for antigay bigotry. Much of the current debate about homosexuality appears grounded in beliefs in fair treatment for lesbian and gay Americans that co-exist with beliefs in the superiority of heterosexuality. In this atmosphere, public policy disputes are likely to center on the proper degree of containment necessary for what is perceived to be the homosexual menace to public culture.

Id.

In so doing, I have suggested that *Lawrence* contains on an implicit level the very same inclination to draw lines that on an explicit level it appears to reject when finding that morality no longer constitutes even a legitimate state interest for at least *certain* kinds of lawmaking. This more textured literary form of judicial interpretation thus tells us something that a more conventional form of judicial analysis would likely miss, namely, that morality and its governing aesthetic remain an integral part of our constitutional landscape—notwithstanding the *Lawrence* majority’s explicit disclaimers to the contrary and as clearly evidenced by lower courts that have interpreted that case. More than clarifying a vexed doctrinal issue, however, this poetic interpretation has offered an alternative way to read opinions that takes seriously the metaphors and tropes that the Court (or, for that matter, any court) deploys—in short, a reading that accepts the Court’s suggested invitation to treat the literary language that appears in legal texts as more than just rhetoric.