

Tulsa Law Review

Volume 46
Number 1 *Symposium: Catharine MacKinnon* Volume 46 | Number 1

Fall 2010

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Recommended Citation

Marc Spindelman, *Gay Men and Sex Equality*, 46 *Tulsa L. Rev.* 123 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol46/iss1/12>

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GAY MEN AND SEX EQUALITY†

Marc Spindelman*

A critical theory of the existing conditions of the social world written not simply to document but in order to change them, sex equality theory's power derives from its apprehension of social reality, including its facts and truths, among them, sexuality's role in producing the sex-based inequalities that pervasively define social life.

For those unfamiliar with this theory despite its prominence, including its impact on law, for thirty years on, the guiding insight from which its theoretical structure grows is that, under existing social conditions of sex inequality, sexuality, when practiced as inequality, produces gender, men and women, in their conventional forms, as their relations shape society in hierarchical terms.¹ In Catharine MacKinnon's words from over a generation ago:

[T]he molding, direction, and expression of sexuality organizes society into two sexes — women and men — which division underlies the totality of social relations. Sexuality is that social process which creates, organizes, expresses and directs desire, creating the social beings we know as women and men, as their relations create society.²

Neither the passage of time nor the magnitude of the intervening events that this insight has helped bring about has rendered its meaning fully self-evident to everyone at first glance. Sexuality is a social process that, practiced as inequality, “creates the social beings we know as women and men”? How could sexuality, itself still widely supposed to be either natural, hence unconstructed, or entirely private, hence an asocial affair, possibly be thought to do that? How could it create gender, itself still widely thought of as a biologically-fixed condition of birth or otherwise one of life's most essential and

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* Professor of Law at The Ohio State University Moritz College of Law. Thanks to Dean Janet Levit, Tamara Piety, Jared Burden, Bryce Harp, and Jason McVicker for the occasion, to conference participants for generous feedback, and to Mary Louise Fellows, Brookes Hammock, and Adam Thorburn for thoughtful reactions on earlier drafts. Thanks, too, to Susan Edwards for editorial support, to Kathy Hall, of the Moritz Law Library, for various sorts of assistance with sources, to Richard Muniz for fantastic copyediting, and to Joseph Wenger for amazingly helpful research assistance.

1. Sex equality theory is an outgrowth of radical feminism and often goes by that name. Some suggestions for the reasons can be found in Catharine A. MacKinnon, *Liberalism and the Death of Feminism*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 3* (Dorchen Leidholdt & Janice G. Raymond eds., 1990). More recent thoughts on the “feminist” label — both in relation to sex equality theory and more generally — are in Marc Spindelman, *Feminism Without Feminism*, 9 *ISSUES IN LEGAL SCHOLARSHIP*, Dec. 2011, art. 8.

2. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS: J. WOMEN CULTURE & SOC'Y* 515, 516 (1982) [hereinafter MacKinnon, *Feminism, Marxism, Method, and the State*] (footnote omitted).

unchangeable facts?

Without suggesting undue equations, an illuminating homology may be found in the role of lynching in our domestic system of inequality by race.³ Neither natural nor private in any meaningful sense, lynching, in excess of its significance as isolated and individual acts, is a social practice that actively constructs and constitutes social beings known by unequal racial terms, as their relations likewise pervasively create and organize society.⁴ Operating against a background of racial difference and the hierarchy built upon it, lynching instantiates and furthers them both, affirming perpetrator and victim in their relative positions within a race-based system of caste. Where White Supremacy supplies racism's governing ideological rule,⁵ white and non-white beings are created by who does what to whom on which side of the lash. More than merely reflecting pre-existing inequalities, lynching is a dynamic practice of violence and abuse through which race is actively constructed and by which it is ascribed to, and inscribed on, individual bodies and lives, as well as, more generally, society itself. As a social practice, lynching has been integral to how race, including racial difference and dominance, is socially made and made to mean.

Stripped of the mystifications surrounding it and seen for what it socially is, hierarchical sexuality, sex equality theory maintains, is to gender in a system of sex inequality as lynching is to race in a system of racial oppression: specifically, it's a dynamic that crystallizes and furthers social hierarchy in interpersonal and structural terms. Against the social backdrop of sex difference and the hierarchy built upon it, sexuality manifests and furthers them both when practiced as dominance and

3. The structural parallels have been suggested elsewhere. *See, e.g.*, ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 60–61 (1988); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE]; CATHARINE A. MACKINNON, WOMEN'S LIVES — MEN'S LAWS 306, 324–25 (2005) [hereinafter MACKINNON, WOMEN'S LIVES]; Catharine A. MacKinnon, *Sex Equality Under Law*, 100 YALE L.J. 1281, 1303 (1991). Figuring the relation between hierarchical sex under conditions of sex inequality and lynching under conditions of race inequality is not to miss the ways in which lynching is cathected by sex inequality or hierarchical sex by race inequality. *See* DEBORAH CAMERON & DON KULICK, LANGUAGE AND SEXUALITY 146–48 (2003); JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING 130–57 (1993); TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORICAL AND LITERARY LYNCHING AND BURNING RITUALS 81–94 (1984); JENNIFER HARVEY, WHITENESS AND MORALITY: PURSUING RACIAL JUSTICE THROUGH REPARATIONS AND SOVEREIGNTY 95–139 (2007); JOHN HOWARD, CONCENTRATION CAMPS ON THE HOME FRONT: JAPANESE AMERICANS IN THE HOUSE OF JIM CROW 48–53 (2008); JAMES H. MADISON, A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA 13–16 (2001); DAVID MARRIOTT, ON BLACK MEN 15–21 (2000); LORI MERISH, SENTIMENTAL MATERIALISM: GENDER, COMMODITY CULTURE, AND NINETEENTH-CENTURY AMERICAN LITERATURE 278–81 (2000); MASON STOKES, THE COLOR OF SEX: WHITENESS, HETEROSEXUALITY, AND THE FICTIONS OF WHITE SUPREMACY 133–57 (2001); Clare Eby, *Slouching Toward Beastliness: Richard Wright's Anatomy of Thomas Dixon*, in RICHARD WRIGHT'S NATIVE SON 114, 125 (Andrew Warnes ed., 2007); Michael Hatt, *Race, Ritual and Responsibility: Performativity and Southern Lynching*, in PERFORMING THE BODY/PERFORMING THE PART 76–88 (Amelia Jones & Andrew Stephenson eds., 1999); Hazel Carby, *A Strange and Bitter Crop: The Spectacle of Torture*, OPENDEMOCRACY 2–4 (Oct. 11, 2004), http://www.opendemocracy.net/media-abu_ghraib/article_2149.jsp. Along differently inflected lines of sex and race, see also Andrea Dworkin, *Israel: Whose Country Is It Anyway?*, MS., Sept./Oct. 1990, at 69, 69–79; Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, § 6 (Magazine), at 24.

4. *See, e.g.*, CHARLES W. MILLS, THE RACIAL CONTRACT 86–88 (1997). *See also* Carole Pateman, *Race, Sex, and Indifference*, in CONTRACT AND DOMINATION 134, 144–47 (Carole Pateman & Charles W. Mills eds., 2007).

5. Other racist ideologies — like Anti-Semitism — sometimes do as well.

subordination, as, facts show, it regularly is.

In certain circles at least, the truth of this insight has at last become visible in relation to sex that happens without consent, along with sex that is unwanted by someone on whom it's imposed. In their paradigmatic, cross-sex forms, rape and sexual harassment, for instance, are now increasingly apprehended as sex equality theory has long perceived them. They are sexual practices of inequality that affirm perpetrator and victim in their relative positions in a social hierarchy defined by sex. Male supremacy supplying this system's governing ideological rule, rape and sexual harassment produce gender — “men” and “women” — in unmistakably unequal relational terms. One becomes gendered through these sexual relations, gender being a product, hence a function, of one's relation to sex: whether as a man, because of what one does as a sexual subject to someone else as a sexual object in unequal acts of sex, or as a woman, because of what's done to oneself as the object of, and in, these acts. Nobody acculturated to this system can fail to recognize the logic of its sexual grammar on hearing it spelled out. In vivid Technicolor, MacKinnon famously gave it voice: “Man fucks woman; subject verb object.”⁶ In translation: One isn't born, but becomes a man by doing what men are supposed to do to those who become women by having what men are supposed to do, be done to them. Nothing is essential, essentialized or essentializing about these forms of sexual subjectivity and objecthood in this account.⁷ They are thoroughly social achievements, at once effects and causes of sexuality and gender, neither of which reduces to inalterable, pre-social facts.

More controversially, even for some who agree to this point, is sex equality theory's position on hierarchical sex that, unlike rape and sexual harassment, is consensual and wanted.⁸ Sex equality theory maintains that, as hierarchical sex, it too can create gender, hence unequal, sex-based, hence unequal social relations. This is in stark contrast to other theories of sexuality, particularly liberal individualist ones, that see sex like this, because autonomous, as utterly incapable of generating individual, interpersonal harm, a fact widely taken to mean it is harm-free across the sexual and social board. For its part, sex equality theory recognizes that structural social relations — including gender relations — can be generated through acts that, in conventional terms, are chosen and desired. Classically, this understanding has been articulated by questioning the meaningfulness of decision-making under conditions of sex inequality that themselves have the power to shape, control, and define both what individuals

6. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 3, at 124.

7. On the “essentialism” charge, see, for example, Catharine A. MacKinnon, *Keeping It Real: On Anti-Essentialism*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71 (Francisco Valdes et al. eds., 2002); Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 697–98 (2000).

8. See, e.g., Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 444–51 (2005) [hereinafter West, *Law's Nobility*]. See also, e.g., Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 2 n.13 (2006); Robin L. West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81, 118–39 (1987); Robin L. West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 703–05, 707–09; Robin West, *Pornography as a Legal Text: Comments from a Legal Perspective*, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 108, 109–10 (Susan Gubar & Joan Hoff eds., 1989).

choose in sex and also what they like.⁹ But however the formal account proceeds, its result on the bottom line is the conceptual equivalent of observations that are obvious to the point of requiring no detailed proof when made in the context of critical theorizing about, say, economics and race: the social meanings and effects of social practices of inequality can be independent of what happens in, hence what happens to be true about, individual cases. Few seriously doubt, for instance, that capitalism's hierarchical relations are reflected and reinforced in structural terms, hence that the capitalist system is furthered, even when capitalist-worker relations are in individual instances entirely willing and affirmatively sought out.¹⁰ Would anyone deny the economic system of capitalism continues to be perpetuated when workers have a great day on the job?¹¹ Turning to race, there is likewise little room for doubting, for instance, that lynching crystallizes and perpetuates race and race-unequal relations no matter that there might in fact or in theory be individual instances, as appear in pornography and art, in which the violence of the act, along with its harms, are portrayed as chosen or desired, either prospectively or after the fact — or at least not entirely without their pleasures.¹² All this being the case, sex equality theory asks, Why should sexuality and its social results be thought to be any different? Without doubt, the consent to, and wantedness of, hierarchical sex may be integral to its experienced delights, and are widely believed to vitiate any individual or individualized harms. Sex equality theory's point — often misunderstood when not simply refused or missed — is that sex not harming persons as individuals doesn't on its own mean it has no gender-producing, structural, social effects. Nor, for that matter, that sex doesn't differentially benefit and disadvantage individuals as members of the very social groups it produces. More directly, sex being good, even enjoyable — or great — and neither rape nor sexual harassment, is neither proof nor guarantee that gender, including its unequal relations, has not been made. When sex inequality works seamlessly as an organized system, sexuality's production of gender hierarchy ideally ought to feel good and be sought after, with individuals choosing to engage in practices that affirm a worldview in which they know and experience the release of achieving their places in the socially-assigned order of things. If sex equality theory keeps a uniquely critical eye on the social construction of consent and desire,

9. See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 3, at 174–78, 184–85, 190 (observing that “force and desire are not mutually exclusive under male supremacy” and drawing into question whether “consent is a meaningful concept”). Robin West elucidates these ideas in West, *Law's Nobility*, *supra* note 8, at 392–400, 408–12.

10. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 218 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED] (“To put it mildly, people take sex personally. A woman has to feel bad about sex every minute, apparently, or a critique of sexuality as a realm of sex inequality is reductive or demeaning or incorrect. In serious political analyses, say marxism, a worker can sometimes have a good day or even a good job. That does not mean the worker has false consciousness or the work is not exploited labor, structurally speaking.”).

11. See, e.g., *id.*

12. Pornographic sources are common enough. An artistic rendering of racist violence like this is in Lewis Allen's *Strange Fruit*. Cf. DAVID MARGOLICK, STRANGE FRUIT: BILLIE HOLIDAY, CAFÉ SOCIETY, AND AN EARLY CRY FOR CIVIL RIGHTS 25–26 (2000). For not wholly unrelated commentary, see Adrienne D. Davis, *But It Feels So Good to Be Bad: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker's) Art and (Janet Halley's) Law*, 23 YALE J.L. & FEMINISM 1 (2011). For other thoughts on agency in relation to slavery, see Janet Halley, *My Isaac Royall Legacy*, 24 HARV. BLACKLETTER L.J. 117 (2008), additional perspective on which is supplied by DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 223–25 (1989).

along with pleasure, all of which are at times implicated in the manufacture and reproduction of sex inequality, this is why.

Unfortunately, sex equality theory's recognition that even consensual and wanted sex may not be harmless per se, but rather can produce unjust social effects, has led many to characterize it as holding that all sex is the perfect equivalent of harassment or rape.¹³ When not a misapprehension or simple lie about a position, this is a mistake.¹⁴ Sex equality theory, formulated from lived experience, not induced or deduced from ideal theory, knows the differences between and among hierarchical sex's various forms.¹⁵ Much as any other theory, and more than most, it has helped to articulate and give them recognizable names.¹⁶ Sex equality theory thus does not mechanically equate sex that is consensual and wanted with sex that is consensual but unwanted or either of those with sex that is neither. Acknowledging different forms of hierarchical sex exist and can contribute to sex inequality in different ways, sex equality theory nevertheless is focused on another truth about them, widely missed. Shared by all forms of hierarchical sex under conditions of sex inequality driven by male supremacy is their function as a means of sorting and slotting persons into their respective sex-caste positions as, from top to bottom, men and women. Not forgetting the complex ways in which race-based and sex-based inequalities can be — and are — mutually constituted and intersecting,¹⁷ it is nevertheless useful to note that, as lynching races persons, sexuality genders them, positioning them in, and so contributing to and furthering, a larger system of sex-unequal hierarchical relations, of which sexuality is an — if not *the* — integral part.¹⁸

13. Perhaps most prominently, the claim has regularly been made about the work of Catharine MacKinnon and Andrea Dworkin. As to MacKinnon's, a few sources are collected in Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 143 n.2 (1995) [hereinafter MacKinnon, *Pornography Left and Right*] (reviewing RICHARD A. POSNER, *SEX AND REASON* (1992) and EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* (1992)). As to Dworkin's work, MacKinnon has observed: "Lies about [Dworkin's] views on sexuality (that she believed intercourse was rape) and her political alliances (that she was in bed with the right) were published and republished without attempts at verification, corrective letters almost always refused." Catharine A. MacKinnon, *Who Was Afraid of Andrea Dworkin?*, N.Y. TIMES, Apr. 16, 2005, at A13.

14. See, e.g., MacKinnon, *Pornography Left and Right*, *supra* note 13, at 143–45. See also Editors' Note, N.Y. TIMES, Feb. 12, 2006, at F6. Andrea Dworkin disavowed the view, among other places, in Michael Moorcock & Andrea Dworkin, Interview, *Fighting Talk*, NEW STATESMAN & SOC'Y, Apr. 21, 1995, at 16, 17, as well as in ANDREA DWORKIN, *INTERCOURSE*, at xxxii (Basic Books 2007) (1987) [hereinafter DWORKIN, *INTERCOURSE*] (illuminating reasons why some misapprehend the work as reducing all sex to rape).

15. On the difference between, for instance, sexual harassment and rape, see, for example, Brief of Respondent Mechelle Vinson at 17–18, 23, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979). Likewise, see CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 37–40 (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*] (discussing unwantedness as a condition of sexual harassment as experience and under law).

16. See, e.g., Brief of Respondent Mechelle Vinson, *supra* note 15, at 23, ("It is false that the Court of Appeals 'eliminates unwelcomeness as an issue.' Perhaps the Bank perceives this because it does not distinguish, as do the Court of Appeals and respondent, between sexual *advances* that are welcome and sexual *intercourse* that appears voluntary." (citation omitted)); MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 15, at 1–2. See also, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 17–18 (1989) [hereinafter DWORKIN, *PORNOGRAPHY*] (discussing the importance of naming); MACKINNON, *WOMEN'S LIVES*, *supra* note 3, at 306 ("Calling an injury what it is, is important to effectively addressing it.").

17. See, e.g., Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2011).

18. Perhaps the most memorable citation for the strong version of this position is Catharine MacKinnon's conditional description of sexuality as "the linchpin of gender inequality." MacKinnon, *Feminism, Marxism*,

Seen in light of this understanding, heterosexuality, still sexuality's statistically and normatively preeminent type, long cherished as society's bedrock, its marital version touted as civilization's cornerstone, special to the degree of being sacred, is exposed as an institution of, and for, social dominance — by men, of women — when it takes on hierarchical form. Backing and coordinating heterosexuality's functions, the ideology of male supremacy has, it turns out, both religious and secular — even ostensibly progressive, sex liberatory — iterations,¹⁹ all of which, if for different reasons and ends, dream of men's dominion the world over, including over women who, with and thus under them, inhabit it. Far from being an historical relic, this ideology flourishes in the present tense, inflicting its imprint on the social scene, including through sex, notwithstanding the increasingly accepted demands for women's freedom and equality that, in their contemporaneous forms, including sex equality theory, are in vital ways novelties of recorded history.²⁰ Functionally, male supremacy operates as other supremacist ideologies do: with aggressive presumptions of one group's superiority to others. Possessed of and possessing social power, including access to the levers of the State, male supremacy, as documented by sex equality theorists for some time, has pervasively defined not only the State's legal rules, but also more basically the horizon of the real, giving meaning and shape to social reality and being itself, including the unequal social conditions of collective life. Male supremacy's fantasies of male dominance, which include not only male dominance over women but also hierarchies of men among men, have been imbued with the power of truth. So deep have its currents run that its power to shape truth and fact has often remained invisible to the untrained eye,²¹ making social constructions like sexuality and gender — and the inequalities they reflect and reinforce — seem more like nature, natural justice, or social inevitability, than anything else. Once this ideology and its grip on the social scene are exposed as historical contingencies that have shaped world history in oppressive and unjust, but not necessary, ways, the question that must be asked is the question sex equality theory prominently frames: What's to be done?

For its part, sex equality theory figures a full-fledged resistance to male supremacy and its social effects that, in principle, anyone willing to, can join. While its doors have been wide open for some time, the ranks of those traversing its threshold have not been swelled by men. The self-identified straight man who, confronting the realities sex

Method, and the State, *supra* note 2, at 533 (“If this is true, sexuality is the linchpin of gender inequality.”). With Sandra Bartky, one needn't agree that “the eroticization of relations of domination . . . lie[s] at the heart of the system of male supremacy” in order to accept that “it surely perpetuates it.” SANDRA LEE BARTKY, *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* 51 (1990).

19. Some of these are critically engaged, among other places, in MacKinnon, *Pornography Left and Right*, *supra* note 13.

20. Robin West traces some of this genealogy in West, *Law's Nobility*, *supra* note 8.

21. In this sense, sex equality theory in certain respects challenges the conventional split between fact and value, recognizing that facts (at least social facts) can themselves be so thoroughly conditioned by normativity (including ideologically-soaked normativity) as to be indissolubly bound up with it. Examples are found throughout MacKinnon's work. See, e.g., Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1 (2006). The point is also registered in the context of same-sex sexual violence and injury in Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179 (2011) [hereinafter Spindelman, *Sexual Freedom's Shadows*].

equality theory speaks, pauses to inquire about his own contributions to them, much less what might be done to end them, is rare, to say the least. Rarer still, though, is the self-identified straight man who dedicates himself through actions to ushering male supremacy, along with its social consequences, off history's stage. Among the few who have seemed to contemplate these possibilities sympathetically — there are some;²² rare isn't none at all — the efforts that ultimately ring truest are those that expressly acknowledge their own deep and abiding ambivalence about opposing sex inequality, recognizing the multiple threats it poses, high among them, to heterosexual men and their sexuality.²³

What these threats are should not be all that difficult to imagine at this point. Perhaps most basically is the deep and abiding challenge sex equality theory poses for heterosexuality's existing sexual economy — chiefly its unequal practices and their resulting pleasures — and its systematic, social benefits for men. From a conventional perspective that maintains sex is inherently unequal and must be unequal to be sex,²⁴ sex equality theory's promise to eliminate sexuality's inequalities in order to eliminate social inequalities of sex looks to be aiming for women's equality by destroying heterosexuality *tout court*.²⁵ From the perspective of these concerns, sex equality theory isn't only anti-sex, and doesn't only appear an enemy of pleasure. As a program that seeks to eradicate one of the central institutions of social life by which straight men experience themselves and come to know — and be — who they sexually, hence socially, are, sex equality theory also appears aggressively anti-man, a frontal assault on masculinity and manhood as ways of knowing and being in the world, as they operate in and through, and are constituted by, heterosexual sex. By extension, sex equality theory can seem anti-knowledge and anti-life, against the world itself, which may help explain the regularity of its dismissal as bloodless, joyless, totalitarian mind control.²⁶ Short of

22. See, e.g., Leo Kanowitz, *The Male Stake in Women's Liberation*, 8 CAL. W. L. REV. 424 (1972); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Gerald Torres, *Sex Lex: Creating a Discourse*, 46 TULSA L. REV. 45 (2011).

23. See, e.g., DUNCAN KENNEDY, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination, in SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 126, 156 (1993) ("For some straight men — for many, including myself — the vulnerability of women, and phallic power in relation to it, have, sometimes, deep erotic appeal. . . . Because abuse is important to the whole regime of liberal patriarchy, the male interest in the whole regime is implicated in efforts to abolish it."). See generally *id.* at 150–58; S.M. Miller, *On Men: The Making of a Confused Middle Class Husband*, 2 SOC. POL'Y, July–Aug. 1971, at 33.

24. That the idea often animates so-called critical or progressive thinking about sex doesn't make it any less conventional or convergent with male supremacy. See Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 212–18 (1987), discussed in detail in Marc Spindelman, *Sexuality's Law*, 20 COLUM. J. GENDER & L. (forthcoming 2011) [hereinafter Spindelman, *Sexuality's Law*]; Janet Halley, *Sexuality Harassment, in DIRECTIONS IN SEXUAL HARASSMENT LAW* 182 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004), discussed in detail in Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004) [hereinafter Spindelman, *Sex Equality Panic*].

25. DWORKIN, INTERCOURSE, *supra* note 14, at xxxii.

26. These characterizations are found differently expressed in different sources, but many find a home in JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008). See, e.g., *id.* at 124–25 ("Since male dominance is the form of power that it sees as unfreeing, it understands that sex equality would be liberty. This formulation produces a certain indifference to possible tensions between equality and liberty that may help to explain the totalitarian trend visible in some feminist law reform proposals."); *id.* at

such descriptive extremes, heterosexual men accustomed to male supremacy's forms of masculinity and manhood could not possibly contemplate endorsing sex equality theory and remaining entirely unchanged. If successful with what it seeks to achieve, sex equality theory would fundamentally alter their lives, eliminating their privilege and power as men. It has been reported that, for some heterosexual men, sex equality theory induces vertigo or a sense of falling, a world wholly out of their control. The wonder isn't why it does when it does, but how and why it doesn't for most or all.

As accurate as it is to say that sex equality theory's power derives from the power of the facts and truths about the social world that it apprehends — facts and truths otherwise often taken for granted or ignored — it is also the case that this power is practically a check on sex equality theory's strength, viewed in political movement terms. Precisely because sex equality theory goes as far as it does and requires so much about heterosexuality and heterosexual manhood to be rethought — and repudiated, not simply reformed — it is much, much easier, even for those straight men who have no especially deep and open and abiding commitment to male supremacy, to resist its description of the social world, and in particular, its view of sexuality's role in constructing gender and gender injustice as social norms. Treating these ideas as bare mistakes saves sexuality from any full scale interrogation, hence seems to liberate and protect it, hence heterosexuality, hence heterosexual manhood, hence heterosexual men, hence themselves, from having to give sex equality and their own roles in it a critical once-over, and change. If sex equality theory misapprehends the relevant facts of the matter, sexuality need not be altered in order to cease producing social effects it never produced to begin with. Better yet from this point of view, should sex equality theory's central descriptive claims about sexuality's function in producing sex inequality be wrong, one need not dispute any of the other factual claims about sex inequality's existence or how it is created and reinforced. Sex inequality may well exist as a social force, only not as something properly attributable to sex. Of those individual cases in which sex may entail a woman's subordination, as with rape or sexual harassment that may be conceded to happen, it can be treated as sex sometimes is within certain liberal theories of sex-based harm: as individualized, interpersonal forms of domination that do not go on to generate structural inequalities of sex, hence call into question all other forms of hierarchical sex as sexual practices that produce unequal social effects. To see all hierarchical sex as problematic because of its unjust social consequences goes too far, by needlessly challenging, if not also opposing, sex that people choose and say they want. Worse is when the powers of the State are enlisted to redress them. Though sex equality theory itself only takes aim at hierarchical sex, regulating it by law is seen as going beyond the regulation of sexual acts to actively disrespecting sexual choices and desires themselves, putting sexual and gender identity — prominently including manhood — under the gun.

The picture is appreciably different for those straight men fully committed to male

341 ("One motive force driving the Brain Drain is, surely, the ferocious preclusion imposed on inquisitive minds and avid justice seekers by the paranoid structuralist and prescriptive convergentist presuppositions, indeed by the stricture that theory must create living space. When these impulses emerge in their more moralistic form, moreover, feminism has been not only dogmatic, but notoriously *not fun*.")

supremacy. There is no need in principle for them to deny sexuality, particularly heterosexuality, is, in fact, a constitutive element in men's domination and the subordination of women. It is, and that is as it should be. From this perspective, sex equality theory's central mistake — not small, but huge — is its embrace of the idea that male supremacy's worldview is false and so should relinquish its grip on material life. The insurrection sex equality theory entails — everywhere and growing, both domestically and internationally, it having long since gone worldwide — must thus be put down. There is no need for self-immolation or agonizing here, only the urgent need to stop sex equality theory's program by any means necessary, commensurate with the existential threat it entails. All things being fair game in a war like this, denying what is actually believed to be true is not out of bounds. Challenges can thus be (as they sometimes have been) mounted against sex equality theory's facts in a way that makes them seem paranoid, delusional, or figments of perverse and wild imaginations. Not unheard of, either, are personal attacks and slurs, along with various promises of violence issued to attempt to silence those who, rejecting male supremacy, speak out against it. Though male supremacist *fatwahas* have issued, the courage of those who have lived under them while keeping silent about the threat has kept them from being widely known about. Male supremacy's straight male interlocutors continue to make it abundantly clear that this ideology isn't going quietly, of its own volition, into any good night.

* * *

As easy as it may be to apprehend why straight men have not endorsed sex equality theory and joined its fight in any substantial numbers, a question about gay men remains. Are they just like their straight brothers in relation to sex equality theory and its cause? Or are there yet particular dynamics and ways in which gay men relate to sex equality theory and its struggle?²⁷

From within sex equality theory itself, on a rough, initial cut, male homosexuality, if taken to indicate sexual disinterest in, hence sexual non-involvement with, women, might appear to be tidily unimplicated in the heterosexually-based production of gender and sex inequality.²⁸ If only reality were that crisp. Many gay men, despite their sexual

27. Useful observations in these directions can be found in Brief of National Organization on Male Sexual Victimization, Inc. et al. as Amici Curiae in Support of Petitioner, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) [hereinafter MacKinnon, *Oncale* Brief], reprinted in 8 UCLA WOMEN'S L.J. 9, 30-34 (1997); MACKINNON, FEMINISM UNMODIFIED, *supra* note 10, at 60-61; CATHARINE A. MACKINNON, SEX EQUALITY 1073-90 (2001); MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 15, at 190 n.*, 201, 204-06; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 3, at 141-42, 143-44, 248. See also, e.g., DWORKIN, INTERCOURSE, *supra* note 14, at 188-204; DWORKIN, PORNOGRAPHY, *supra* note 16, at 56-62; JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE 101-14 (1989); John Stoltenberg, *You Can't Fight Homophobia and Protect the Pornographers at the Same Time — An Analysis of What Went Wrong in Hardwick*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM, *supra* note 1, at 184. Christopher Kendall has also written about gay men's relation to sex equality in the context of his work on pornography. See, e.g., CHRISTOPHER KENDALL, GAY MALE PORNOGRAPHY: AN ISSUE OF SEX DISCRIMINATION 30-43, 105-30 (2004) [hereinafter KENDALL, GAY MALE PORNOGRAPHY]; Christopher Kendall, *Gay Male Pornography After Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN'S L.J. 21 (1997); Christopher Kendall, *The Harms of Gay Male Pornography: A Sex Equality Perspective Post Little Sisters Book and Art Emporium*, 10 GAY & LESBIAN L.J. 43 (2001).

28. See MARILYN FRYE, *Lesbian Feminism and the Gay Rights Movement: Another View of Male*

orientation, hence their preferences for sex with other men, do have sex, including unequal sex, with women, just like (and sometimes as) heterosexual men. Gay men who do not engage in these sexual activities, like those gay men for whom sexuality with women is a practice of equality, may not themselves directly contribute sexually to the inequalities between the sexes. But that, of course, does not, without more, mean there may not be — and are not — other ways in which gay men do their part to contribute to them.

With respect to gay men's own sexuality, it is at times properly described much the way women's has been: as "that which is most [their] own yet most taken away"²⁹ by the forces of sex inequality that have conditioned homosexuality's meaning, along with its structure, by denying it its autonomy, and, disparaging it, refusing to give it its independence and full respects. Distinct from straight men who, though regularly benefitted by the sex-based injustices constructed on their behalf, can nevertheless find themselves regulated and constrained by them in some ways,³⁰ gay men endure a far-reaching set of disadvantages in the sex-based hierarchy that exists among men. Same-sex sexuality's illicitness, established as a limit on men doing to other men what they are only supposed to do with women,³¹ operates to block gay men's achievement of the pinnacle of male hierarchy's peaks. Locked out of it, gay men are afforded no great security as men in men's commoner ranks, where, both historically and contemporaneously, they have been subject to the almost randomly-enforced vicissitudes of homophobic violence that constructs its perpetrators — and them — in gendered terms, as real and not-so-real men, not women quite, but not too far from that, either, an attitude Norman Podhoretz grotesquely captured while suggesting AIDS was rough justice for men who, violating nature, "allow[ed] themselves (in that striking old Victorian phrase) to be 'used as girls' by other men."³² And homophobic violence works in other ways, too, including the ongoing exclusions of gay men from many of the central institutions of male social life — still broadly including marriage — even, until recently, respectable society itself, where the sex they enjoyed was outlawed in any number of jurisdictions, and in a number of significant respects, still is.³³ Where these

Supremacy, Another Separatism, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY (1981), reprinted in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 499, 499 (Mark Blasius & Shane Phelan eds., 1997) [hereinafter *WE ARE EVERYWHERE*].

29. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 3, at 3.

30. This includes both the problems of being an oppressor and also the more particular ways in which oppressing classes can regulate one another, including themselves, in relation to the lines of their salient distinctions (say, gender in the sex equality context, or, as Adrienne Davis, in Adrienne D. Davis, *Slavery & Shadow Families: Re-Thinking Interracial Intimacy Regulation* (Fall 2009) (unpublished manuscript), has studied to tremendous effect, race in the White Supremacist South).

31. If it weren't enough that gay men dared to refuse to take women as the objects of their sexual attentions, they affirmatively put men in their sexual sights, either desiring other men to treat them the way men more commonly treat women, or because as sexual "wolves," they threaten to reduce other men to that status by doing to them what is, under ideal circumstances, reserved as treatment for women to endure.

32. Norman Podhoretz, *The Plain Truth About AIDS*, N.Y. POST, Oct. 27, 1987, at 31.

33. Outlaw gay sex continues to include various forms of sex that gay men, like others, have, including public sex, multi-partner relations, as well as sadomasochistic and purchased sex. One relatively recent survey of laws criminalizing consensual sexual relations is in *Prohibited Consensual Sexual Activity, in 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS: CRIMES* (2007), 0030 SURVEYS 14 (Westlaw). Along similar lines are legal rules regulating the consensual transmission of various sexually-transmitted infections and HIV,

laws persist, their violation, as a violation of social norms set and typically enforced by heterosexual men, can still land gay men in jail, including in the world of all-male prisons, where the sexual machinations of the (ostensibly) free world lose many of their false conceits.³⁴ Not uncommonly figured as a realm of gay sexual fantasy,³⁵ sex in these settings has been documented to be forced as a norm,³⁶ making violence and abuse in sex a feature of everyday sexual life, hence life, particularly (but not only) for gay men. From aught that appears, this is a world dominated, hence conditioned, by an active awareness of truths that sex equality theory keeps: Inequalities in sex produces gender, men and women, as those relations shape the organization of society in prison, itself scarcely unrelated to the remainder of social life.³⁷ The gender and resulting sex-inequalities produced by forced sex in all-male prisons comes not through the sexual objectification and use of biological females, but biological men, proving another of sex equality theory's facts: that it means what it says when it says it is not a biological theory of sex.³⁸ Through bodies regarded and used as things for sex by other men, gay men

including exposure to them. See *HIV Criminalization: State Laws Criminalizing Conduct Based on HIV Status*, LAMBDA LEGAL (July 12, 2010), http://data.lambdalegal.org/publications/downloads/fs_hiv-criminalization.pdf. For reflections on consensual transmission of HIV, see Spindelman, *Sexual Freedom's Shadows*, *supra* note 21, and Spindelman, *Sexuality's Law*, *supra* note 24.

34. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 285–97 (1981); HUMAN RIGHTS WATCH, *WORLD REPORT 2001: EVENTS OF 2000*, at 432 (2000). See also HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001) [hereinafter HUMAN RIGHTS WATCH, *NO ESCAPE*]. Recent legal academic scholarship discussing prison rape includes Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 *YALE L. & POL'Y REV.* 1 (2010); I. Bennett Capers, *Real Rape Too*, 99 *CALIF. L. REV.* 1259 (2011); Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 *VA. J. SOC POL'Y & L.* 281 (2010); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race & Incarceration*, 99 *CALIF. L. REV.* 1309 (2011).

35. See, e.g., JEAN GENET, *MIRACLE OF THE ROSE* 121–22, 136–37 (1966); KENDALL, *GAY MALE PORNOGRAPHY*, *supra* note 27, at 58–59, 63, 97–98, 109; John Mercer, *In the Slammer: The Myth of the Prison in American Gay Pornographic Video*, in *ECLECTIC VIEWS ON GAY MALE PORNOGRAPHY: PORNUCOPIA* 151, 162–66 (Todd G. Morrison ed., 2004).

36. Some important evidence is in HUMAN RIGHTS WATCH, *NO ESCAPE*, *supra* note 34. See also Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prisons*, *N.Y. TIMES*, Oct. 16, 2004, at A1; Adam Liptak, *Inmate Was Considered "Property" of Gang, Witness Tells Jury in Prison Rape Lawsuit*, *N.Y. TIMES*, Sept. 25, 2005, at A14. The findings in the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2006), also testify to the underlying facts the Act seeks to address.

37. REGINA KUNZEL, *CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY* (2008), presents an illuminating and fascinating study of the subject. For an interesting analysis of the spread of HIV in prison and its impact on society at large after release, see James C. Thomas et al., *Incarceration and Sexually Transmitted Infections: A Neighborhood Perspective*, 85 *J. URB. HEALTH* 90, 97 (2007) (concluding that “[i]n some cases, men who only had female partners before prison engage in sex with men while in prison, including nonconsensual partnerships,” and “[a]n infection acquired or maintained during incarceration is likely to be infused into a community upon release from prison”). See also Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates Among African American Women and Men*, 52 *J.L. & ECON.* 251, 286 (2009) (controlling for a number of significant variables, the study concludes that “the lion’s share of the racial differentials in AIDS infections rates for both men and women are attributable to racial differences in incarceration trends”).

38. See, e.g., MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 3, at 112 (“Women experience the sexual events these issues codify as a cohesive whole within which each resonates. The defining theme of that whole is the male pursuit of control over women’s sexuality — men not as individuals or as biological beings, but as a gender group characterized by maleness as socially constructed, of which this pursuit is definitive.”); *id.* at 114 (“Male is a social and political concept, not a biological attribute, having nothing whatever to do with inherency, preexistence, nature, essence, inevitability, or body as such.”); *id.* at 127 (“Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy; gender is one.”), *id.* at 128 (“To make a theory feminist, it is not enough that it be authored by a biological female. . . . A

individually and many more gay men collectively, along with differently sexually-oriented men and trans-folk of different genders,³⁹ have had to live the knowledge, the truth, that sex equality theory holds: that the system of sex inequality sexuality builds can be affirmatively and very concretely bad news for both women and men, including those men who self-identify or are identified by others as gay. Readily seen when it happens inside prison, these are truths that obtain in the balance of the social world, where they are more commonly experienced than publicly recognized and discussed as such, male supremacy's homophobia making much of this sexual abuse seem like desert, hence not worth complaining about. Hands might be thrown up if they were not in so many ways already tied down.

Far from passively contemplating injustices like these, sex equality theory, following its commitment to ending all sex-based inequalities, has tangibly helped to chip away at homophobia's social, including legal, hegemony, proving through its successes to be a substantial boon for those who do or would engage in same-sex sex. Some years back, sex equality theory's insights about homophobia's crucial role in furthering women's inequality, aided by keeping male sexuality locked into channels of cross-sex sex,⁴⁰ were translated and taken up in the language of law. Laws and legal practices that discriminate on the basis of sexual orientation, including against gay men, were recognized as implicating legally-established, including constitutionally-based, sex equality norms.⁴¹ Those norms suggest that anti-gay laws and practices, lacking any secular, rational basis, much less any more powerful non-religious form of justification, should be eliminated from the waters of the law.⁴² Despite the radical possibilities of the

theory of sexuality becomes feminist methodologically . . . to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender.”)

39. Letter from Dean Spade, Esq., Founder, Sylvia Rivera Law Project, to the Nat'l Prison Rape Elimination Comm'n (Aug. 15, 2005) (on file with author), available at http://www.nclrights.org/site/DocServer/prison_spade081905.pdf?docID=944. Spade's oral testimony can be found here: Dean Spade, Esq., Founder, Sylvia Rivera Law Project, Testimony Before the Nat'l Prison Rape Elimination Comm'n (Aug. 19, 2005), available at http://replay.web.archive.org/20090102235052/http://nprec.us/docs/sf_atrisk4_dspade_statement.pdf (accessed by searching for National Prison Rape Elimination Commission in the Internet Archive index). For more information about the hearings, see *Hearing: At Risk: Sexual Abuse and Vulnerable Groups Behind Bars - August 19, 2005*, NAT'L PRISON RAPE ELIMINATION COMM'N, http://replay.web.archive.org/20090101085812/http://nprec.us/proceedings_sf.htm (last visited Oct. 16, 2011) (accessed by searching for National Prison Rape Elimination Commission in the Internet Archive index).

40. As Andrea Dworkin explained:

As long as male sexuality is expressed as force or violence, men as a class will continue to enforce the taboo against male homosexuality to protect themselves from having that force or violence directed against them. . . . Male homosexuality in male-supremacist societies has always been contained and controlled by men as a class, though the strategies of containment have differed, to protect men from rape by other men, to order male sexuality so that it is, with reference to males, predictable and safe.

DWORKIN, PORNOGRAPHY, *supra* note 16, at 60–61. See also, e.g., DWORKIN, INTERCOURSE, *supra* note 14, at 191–98.

41. One of the most well-known articulations in the legal academic literature, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Discrimination*], in some respects traces, but also significantly diverges, from radical feminist insights, treating sexuality, and in particular gay sexuality, somewhat uncritically, it not being its point. Some small bit of evidence is in *id.* at 224 n.103.

42. The imagery is borrowed from *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 357 (1951) (Frankfurter, J., concurring in the result) (“[T]hey ought not to be left as derelicts on the waters of the law.”).

idea, it wasn't entirely shunned by often-conservative legal actors, especially courts.⁴³ Almost remarkably, the sex equality arguments for gay rights, as they have come to be known, made their most famous and indelible legal mark around the law governing one of society's most treasured institutions: heterosexual marriage. Starting with Justice Steven Levinson's opinion for the Hawaii Supreme Court in *Baehr v. Lewin*,⁴⁴ which embraced the sex equality arguments for gay rights in a way that launched them permanently into orbit,⁴⁵ the pattern continued in significant, if broadly overlooked,⁴⁶ ways, in the Massachusetts's Supreme Judicial Court's landmark opinion in *Goodridge v. Department of Public Health*,⁴⁷ where the crucial "swing" vote in the case was based expressly on sex-equality grounds.⁴⁸ More recently, Judge Vaughn Walker's historic opinion in *Perry v. Schwarzenegger*,⁴⁹ recognizing that the constitutional right to marry under the U.S. Constitution includes a right to same-sex marriage that the state has no good reason to take away, continued the line, mobilizing constitutional sex equality norms in the course of striking California's discriminatory constitutional marriage amendment down.⁵⁰

The legal successes that the sex equality arguments for gay rights have generated hardly stop there. In a range of cases, sex equality protections have given gay men remedies for public and private discriminations the law would otherwise have ignored. No small point of note, the first case in which the U.S. Supreme Court afforded gay men statutory rights under federal anti-discrimination law, *Oncale v. Sundowner Offshore Services, Inc.*,⁵¹ was a sex equality decision.⁵² In other cases, sex equality principles, if

43. For an answer to some of the charges of conservatism in the underlying project, see Catharine A. MacKinnon, *Afterword*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 24, at 672, 674–87.

44. 852 P.2d 44 (Haw. 1993).

45. The launch was permanent even though the decision itself was short-lived in virtue of an amendment to the Hawaii Constitution authorizing the legislature to ban same-sex marriage. HAW. CONST. art. 1, § 23 (giving the legislature "the power to reserve marriage to opposite-sex couples"), a right the legislature evidently believed it already had, *see* HAW. REV. STAT. § 572-1 (2011) (providing that a marriage contract is valid "only between a man and a woman"); H.B. 2312, 17th Leg., Reg. Sess. (Haw. 1994) (enacted) (repudiating *Baehr* as "effac[ing] the recognized tradition of marriage in this State and, in so doing, impermissibly negat[ing] the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government"). For some of the relevant history, see Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 GEO. MASON U. CIV. RTS. L.J. 1, 3–6 (1998). More recent legislative developments include S.B. 232, 26th Leg., Reg. Sess. (Haw. 2011) (enacted) (extending same rights, benefits, protections, and responsibilities of marital spouses to partners in civil unions).

46. Susan Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 120 & n.167 (2005), doesn't miss it.

47. 798 N.E.2d 941 (Mass. 2003).

48. *Id.* at 970–74 (Greaney, J., concurring) ("Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry.").

49. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

50. *Id.* at 994–1004 ("Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex. . . . [T]he court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.").

51. 523 U.S. 75 (1998).

52. Catharine MacKinnon filed an important amicus brief in the case on behalf of a coalition of groups working on and against male sexual victimization. *See* MacKinnon, *Oncale* Brief, *supra* note 27. In the interest of full disclosure, I worked on that brief. My own commentary on *Oncale*, both before and after it was decided,

not sex equality doctrine as such, have limited the reach of legal discrimination against homosexuals and same-sex relations in ways that shouldn't be left out of any larger account of the connection between them.⁵³ With nods to the need for a comprehensive catalogue of the sex equality gains and victories that have benefitted gay men,⁵⁴ enough has been said to register the crucial point: A significant slice of the legal protections gay men currently enjoy against anti-gay discrimination have been as a result of existing sex equality rules and the social theory and practices that, in turn, produced and sustain them.⁵⁵

Given the dangers and concrete harms of sex inequality for gay men, along with the concrete benefits for them that sex equality theory has supplied, there are ample reasons for thinking that gay men — perhaps unlike their straight male counterparts — might have joined cause with sex equality theory and at least some of the political programs it has spun out — and without much or any ambivalence about it.⁵⁶ Increasingly evident over time, however, is that, while gay rights advocates are not (or

treats it in sex equality terms. See Spindelman, *Sex Equality Panic*, *supra* note 24 (presenting a sex equality analysis of *Oncale*); Marc Spindelman, *Case Threatens Male Supremacy*, LEGAL TIMES, OCT. 6, 1997, at S38. See also Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 24, at 201.

53. See, e.g., *State v. Carswell*, 871 N.E.2d 547, 554 (Ohio 2007). See also Marc Spindelman, *State v. Carswell: The Whipsaws of Backlash*, 24 WASH. U. J.L. & POL'Y 165, 173 (2007); Marc Spindelman, *The Honeymoon's Over: Cultural Conservatives Stumble Legally in Campaign to Ban Same-Sex Marriage*, LEGAL TIMES, June 12, 2006, at 66.

54. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (holding “that an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment.”). But see *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–65 (6th Cir. 2006) (refusing to recognize plaintiff’s claim of sex stereotyping under Title VII since plaintiff’s alleged harassment was based on his co-workers perception of him as gay). Cf. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

55. In ways that have not yet been studied, one might even say that the so-called radicalness of the sex equality arguments have helped normalize more conventional arguments for gay rights, making them seem more modest and acceptable by comparison.

56. Some early gay liberation writing recognized the possibilities of this joint effort as they existed at that time. As Carl Wittman wrote in the spring of 1969:

Male Chauvinism: All men are infected with male chauvinism — we were brought up that way. . . .

Male chauvinism, however, is not central to us. We can junk it much more easily than straight men can. For we understand oppression. We have largely opted out of a system which oppresses women daily — our egos are not built on putting women down and having them build us up. Also, living in a mostly male world we have become used to playing different roles, doing our own shit-work. And finally, we have a common enemy: the big male chauvinists are also the big anti-gays.

Carl Wittman, *A Gay Manifesto*, in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 330, 332 (Karla Jay & Allen Young eds., 1972), reprinted in WE ARE EVERYWHERE, *supra* note 28, at 380, 382. For other historical sources addressing the relationship of gay men to sex equality, see FRYE, *supra* note 28, at 499–500; Steven Dansky et al., *The Effeminate Manifesto*, in DOUBLE F: A MAGAZINE OF EFFEMINISM (1973), reprinted in WE ARE EVERYWHERE, *supra* note 28, at 435, 435; Revolutionary People’s Constitutional Convention, Statement of the Male Homosexual Workshop (1970), in WE ARE EVERYWHERE, *supra* note 28, at 402, 402–03; Third World Gay Revolution, *The Oppressed Shall Not Become the Oppressor* (1970), in WE ARE EVERYWHERE, *supra* note 28, at 400, 400–01. See also John Lauritsen, *Disruptions, Censorship, Bigotry*, in THE NEW GAY LIBERATION BOOK: WRITING AND PHOTOGRAPHS ABOUT GAY (MEN’S) LIBERATION 155, 155–63 (Len Richmond & Gary Noguera eds., 1979); Jane Ward, *Queer Sexism*, in GAY MASCULINITIES 152 (Peter Nardi ed., 2000).

are no longer) shy about making sex equality arguments for gay rights in court as a means to secure judicial, hence legal, hence political victories for gay men,⁵⁷ gay men themselves have been much, much less willing to embrace and pursue sex equality theory systematically as a theory and politics, including a sexual politics, for social and political life.

Why? What is it that is keeping gay men from embracing sex equality theory and joining its programmatic struggle for sex equality, including gay rights? How, if at all, do these reasons (or some of them) relate to men's more general reluctance to endorse sex equality theory and its political projects? Without presuming uniformity of gay men's reasons, what follows sketches some preliminary thoughts.

* * *

Begin, initially, with some of the general ways in which gay men are invested in male privilege and inequalities of sex. Notwithstanding their sexual orientation, gay men, to state the obvious, are and remain men. With other boys and men, they are socialized to be and conform to the strictures of masculinity and manhood the very best they can. With these performances (and the more seamless, the better) come real social rewards, the various social privileges male supremacy reserves for men. Not that male homosexuality has no cost in male hierarchy. It does: There is nothing insignificant about the ways in which gay men are excluded from male hierarchy's heights, subject to, among other things, the brutality, terror, shunning, banishment, and other forms of violence and abuse they are known to have to endure because they are or are merely thought to be gay.⁵⁸ Recognizing these forms of homophobia for what they are, including how utterly unjust, the driving purpose of the discipline they impose should not be forgotten. The idea is not simply to punish gay men for their actual and perceived deviations from norms of masculinity and manhood, though there's certainly that. Significantly, this discipline is designed to get them in line, as well as to send all men the message what the requirements for membership in manhood are and how deviations from its norms will be handled. Seeking to avoid these costs, some gay men try to fully closet themselves, attempts that, successful or not, can inflict their own set of harms. Life in the closet, full of constant self-surveillance, can exact significant psychic and material tolls. But whether inside the closet or outside of it, for all gay men can and do suffer inside male hierarchy, either at other men's hands or ultimately also their own, for all they are subordinated because of their sex, homosexuality is not, in the final analysis, the only axis of subordination in male supremacy's hierarchy among men. Gay men aren't always only ever at the bottom of the gendered social well. Wherever they happen to find themselves in male hierarchy, as men — however lowly, even degraded, and however excluded — gay men always have at least a chance of attempting to reclaim male supremacy's dream of male heterosexuality, an opportunity for reinclusion and upward

57. The point may already have come that it would constitute professional negligence for them not to.

58. For recent reports, see Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9; Michael Wilson & Al Baker, *Lured Into a Trap, Then Tortured for Being Gay*, N.Y. TIMES, Oct. 9, 2010, at A1, A18; cf. IT GETS BETTER PROJECT, <http://www.itgetsbetter.org> (last visited Oct. 16, 2011).

mobility that is simply denied to women.⁵⁹ Understood as a sexual choice — as male supremacy not uncommonly regards it — homosexuality implies a social status, that, in principle, may be repudiated, hence be overcome.

Needless to say, gay men do not typically report experiencing their desires this way. Homosexual desire is not commonly said to be felt as springing from a volitional well. Nor is it itself commonly lived as choice. Gay men pervasively describe homosexual desire as one of their deepest and most enduring truths, an essential fact about themselves that cannot simply be changed, or could not be, if tried.⁶⁰ Against these sensations and their potential implications, including for law,⁶¹ stands Michel Foucault's famous excavation of the social forces that he maintained converge to make same-sex sexuality and desire, and sexuality and desire, more generally, be experienced these ways.⁶² Absent from that analysis, useful as it otherwise is, is any serious speculation, indeed, any speculation at all, on male supremacy's role in the process. Venturing a few lines, the idea is that the intensity of male supremacy's taboo on homosexuality, important for maintaining the gender polarity integral to men's domination of women, has deeply constructed and defined the experiences that gay men have of their desires, hence their sexuality, hence themselves. The more homosexuality appears to be an essential and inalterable truth about an individual, constitutive of a distinct form of person, the easier it is to define manhood in the remainder of all men as essentially heterosexualized, hence naturally directed all and only at women, the result being that what men do sexually to women is excused as something for which they simply cannot be blamed. How could they possibly help themselves? What straight men desire as part of their nature is not only natural, it cannot be unjust. Understandably, efforts to eliminate male supremacy's stigma on male homosexuality have, with time, increasingly

59. DWORKIN, PORNOGRAPHY, *supra* note 16, at 61–62 (“The devalued males can often change status, escape; women and girls cannot. And the devalued male who cannot change his devalued status can always find solace in his own rights of tyranny and privilege, however circumscribed, over women and girls in his own family, class, race, or group.”).

60. See, e.g., David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999). For some perhaps telling toss-away lines about sexual orientation in an important public description of it, see Brief of Petitioners at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“A gay or lesbian sexual orientation is a normal and *natural* manifestation of human sexuality.” (emphasis added)); *id.* at 33 (“Gay people have a same-sex sexual orientation and heterosexuals have a different-sex one.”); *id.* at 39 (describing sexual orientation as a “deeply rooted personal characteristic that we all have”).

61. These ideas lend weight to the view that homosexuality is an immutable characteristic that might operate to satisfy the *Carolene Products* criterion. See *United States v. Carolene Products Inc.*, 304 U.S. 144, 153 n.4 (1938). Of no small moment, the Obama Administration recently gave this view a legal boost. Letter from Eric J. Holder, Jr., Att’y Gen. of the United States, to John A. Boehner, Speaker of the U.S. House of Representatives 3 (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (stating that “while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable” (citing POSNER, *supra* note 13, at 101)). A debate about homosexuality's immutability has waged for some time, including in relation to heightened scrutiny for laws that discriminate against lesbians and gay men. Sam Marcosson's essay on “constructive immutability” is indispensable to understanding this debate, and an important attempt to navigate through it under law. Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001). Questions about the applicability of heightened judicial review to anti-gay discrimination on traditional grounds have recently been raised in Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010).

62. See generally 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Vintage Books 1990) (1976).

prominently featured the act (really, the process) of “coming out,” the logic of which transvalues homosexuality’s meaning without disturbing it as an elemental fact about a self. What was once a deep source of shame becomes a source of enduring pride. Either way, whether the discourse is homophobic or entirely pro-gay, homosexuality and same-sex desires are fixed facts about a person. Seen in constructivist terms, not as revealing sexual truth, but as actively producing it, these ways of imagining homosexuality, particularly when synchronized with the social networks that have developed around same-sex desires, both inside and outside the gay community, have had the effect of focusing and intensifying same-sex desires in the bodies thus marked as gay — to the point of, if not quite locking those bodies permanently into those desires, then rendering the non-same-sex desires they experience opaque and unintelligible, indescribable, effectively foreign sensations that should be ignored or minimized or dispelled, like gas.⁶³

However this hypothesis ultimately bears out, reports by gay men themselves already suggest the male homosexual has become more or less what male supremacy finds it useful for him to be: a wholly distinct type of being, the living embodiment of male-male sexual desire. Regarded in this light, struggles for gay rights are easily seen as categorically distinct from struggles for the rights of other sorts of social beings, including women who, like gay men, have sexual desires oriented toward men. Practically by definition, gay rights in this approach just are not — and are not related to — women’s rights. Nor are they related to sex equality, more generally. To hold otherwise, as sex equality theory does, is accordingly regarded as an obvious mistake.⁶⁴ Too bad, as sex equality theory knows, it is this rigid categorical thinking, unaware of its own determinants, that’s gotten it wrong.

In step with this common attitude, though not formally necessitated by it, are attempts gay men have undertaken to turn their sexual orientation into a non-disadvantaging condition inside male hierarchy. Admitted openly or not, the goal of these efforts is to gain for gay men the full set of privileges — including sexual privileges — that heterosexual men have long enjoyed. Sexually, the project, pursued on its own, seeks to gain for gay men the right to do to other men what heterosexual men have the right to do to women. Substantively, that is what sexual orientation equality for

63. To be complete, this account would, of course, have to illuminate and explain the breaks between the so-called ontology of male homosexual desire and the very different ways in which lesbian desire has been lived and thought about, the possibility of a continuum of it being not only imaginable but lionized as a fountain of theorizing about women’s sexuality. See, e.g., ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence* (1980), in BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985, at 23 (1994). The account would also have to address the status of bisexuality, about which legal academics at least continue to show only sporadic interest. Among the significant efforts in the direction of theorizing bisexuality from inside the legal academy, see RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15–38 (1996); Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127 (1993); Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. (forthcoming 2012); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN’S L.J. 98 (1995); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

64. For a different way of rendering the point, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 223–24 (1999) (“A deeper, yet perhaps more obvious, objection is that sexuality and gender are simply different. Why should gay men benefit from a jurisprudence designed to put women on an equal plane with men?”).

and among men means, in contrast, for instance, to sex equality efforts on gay men's behalf that systematically challenge male social dominance and sexual privilege. Perhaps no more prominent recent example of the gay sexual orientation equality approach exists than the litigation strategy pursued in *Lawrence v. Texas* when the case arrived at the U.S. Supreme Court.⁶⁵ Although the sodomy statute at issue in the case outlawed same-sex, but not cross-sex, sex,⁶⁶ hence traced a facially sex-based line that primed it for sex equality challenge under law, by the time the case reached the Supreme Court, the main gay rights briefs filed on Lawrence's behalf, along with the oral argument offered to the Court, effectively ventured no sex equality claim.⁶⁷ The argument for Lawrence that was urged on the Supreme Court focused on a right to sexual intimacy, grounded in notions of autonomy, registered both in terms of due process and equal protection, said to be enjoyed by homosexual persons like their heterosexual counterparts.⁶⁸ The task of advancing the sex equality position was carefully doled out to the National Organization of Women's Legal Defense and Education Fund, which filed an important amicus brief with the Court,⁶⁹ written largely, or so it seemed, for the benefit of Justice Ruth Bader Ginsburg, who chose publicly to ignore it. The Supreme Court's majority opinion in *Lawrence*, authored by Justice Anthony Kennedy, neatly followed the main litigation strategy in the case, affirmatively equating homosexuality with heterosexuality as the basis for recognizing gay men's sexual rights.⁷⁰ Or a right to sexual intimacy at least.⁷¹

65. Marc Spindelman, *Sodomy Politics in Lawrence v. Texas*, JURIST (June 12, 2003) [hereinafter Spindelman, *Sodomy Politics*], <http://jurist.law.pitt.edu/forum/forumnew115.php>.

66. *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)). Justice O'Connor's concurring opinion in *Lawrence* focused on the text of the statute, but curiously read out its sex-specificity. *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring in the judgment) ("The statute at issue here makes sodomy a crime only if a person 'engages in deviate sexual intercourse with another individual of the same sex.' Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants." (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2003))). For critical commentary on the point, see Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1083 (2004).

67. See Petition for Writ of Certiorari at 22 n.22, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief of Petitioners, *supra* note 60, at 32 n.24; [Petitioners' Merits] Reply Brief at 6, 12 n.11, 16, *Lawrence*, 539 U.S. 558 (No. 02-102); Respondent's Brief at 32-33, *Lawrence*, 539 U.S. 558 (No. 02-102). This stands in contrast to how the case was litigated in the lower courts. Compare *Lawrence v. State*, 41 S.W.3d 349, 357-59 (Tex. Ct. App. 2001) (rejecting appellants' arguments that the Texas sodomy statute created an impermissible gender classification on the grounds that "it applies equally to men and women" and observing that "[t]he mere allusion to gender is not a talisman of constitutional invalidity"), with *id.* at 367-75 (Anderson, J., dissenting) (finding that gender "alone that determined the criminal nature of the conduct"). See also Defendant's Motion to Quash Complaint/Information Under Texas Penal Code § 21.06 at 119a-121a, *State v. Lawrence*, Cause No. 98-48530 (Harris Cnty. Tex. Crim. Ct. Dec. 22, 1998), reprinted in Petition for Writ of Certiorari, *supra*, at app. G, at 117a.

68. See, e.g., Petition for Writ of Certiorari, *supra* note 67, at 9, 29; Brief of Petitioners, *supra* note 60, at i, 8-10, 10-19, 32-34; [Petitioners' Merits] Reply Brief, *supra* note 67, at 4-6, 11-13, 20.

69. Brief of NOW Legal Defense and Education Fund as Amicus Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102).

70. On this "like-straight" logic and how it is woven throughout the *Lawrence* Court's opinion, see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1619-32 (2004) [hereinafter Spindelman, *Surviving Lawrence*].

71. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1409 (2004); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 810-11, 823-29 (2010); Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?*, 23 SOC. TEXT 235, 238-45 (2005); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1385-86 (2005) [Spindelman, *Homosexuality's Horizon*], all variously converging — critically — on an

As with the briefs on Lawrence's behalf, nothing in the Court's *Lawrence* opinion questioned the meaning of homosexuality or heterosexuality, especially heterosexuality, for women. Indeed, much as other decisions have, notably in its wake, *Lawrence* touts the intimacies of heterosexual marriage as a model for constitutional freedom as though they never were or went bad⁷² — or made people, especially women, unfree.⁷³ Worse, from a legal perspective, anyway, by protecting sexuality on constitutional grounds, the Court insulated one of sex inequality's most productive reproductive forms from a broad range of ordinary legislation addressing it. What was good news for some gays — not all — was thus bad news for sex equality, including those women and men sexuality harms.⁷⁴ The depressing part was how few gay men knew it. Or cared. Either then or now.

Obscuring these facts, hence conditioning the reluctance of some gay men to accept the sex equality arguments for gay rights, are the ways in which male supremacy makes it difficult for gay men in particular to credit the idea that sex equality principles are really equality principles at all. Some gay men may acknowledge sex equality theory's stated commitment to eliminating all sex-based hierarchies. But many gay men steeped in male supremacist thinking, believe this is nothing more than, at best, a clever political ploy. Having lived and struggled within male supremacy's hierarchy of men, and perhaps other social hierarchies, as well, gender-based hierarchy may seem to these men the only form of social organization that is practically imaginable — even to the point of appearing an inevitable fact. While the existence of social hierarchy, and gender hierarchy in particular, may be a non-negotiable fact, what isn't, which is to say, what may be alterable, if with effort, is where one stands within it. Power being the means by which to raise and defend one's status in hierarchy, any social force powerful enough to overcome existing sex hierarchies — whether among men or between men and women

understanding of *Lawrence* as an intimacy rights decision, raising important, but largely unanswered questions about the legal status of "non-intimate" forms of sexuality like promiscuous sex.

72. See *Lawrence*, 539 U.S. at 567 ("To say the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."). See also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–55 (Mass. 2003) ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. 'It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.' " (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

73. See, e.g., Spindelman, *Homosexuality's Horizon*, *supra* note 71, at 1364–65, 1378–79; Spindelman, *Surviving Lawrence*, *supra* note 70, at 1633–35.

74. Interestingly, while the Supreme Court seemed to acknowledge the historical contingency of homosexuality as such, *Lawrence*, 539 U.S. at 568 ("The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." (citing JONATHAN KATZ, *THE INVENTION OF HETEROSEXUALITY* 10 (1995); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions."))), it nevertheless largely seemed to treat homosexuals as not just persons in any uninteresting sense, but as a distinct class, separate and distinct from heterosexuals, *id.* at 567 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice."); *id.* at 575 ("[*Hardwick's*] continuance as precedent demeans the lives of homosexual persons."), if entitled to (at least some of) the same rights that heterosexuals receive, and for the same reasons.

— will obviously seem powerful enough to install itself, or anyone it anoints, as the new King of the realm. Given this, sex equality theory's programmatic goal of eliminating existing sex-based hierarchies presupposes not only the power to eliminate them, but also the power to retain them while turning them upside down.

Some gay men, projecting their own commitments to hierarchical thinking onto sex equality theory, thus wonder (sometimes aloud), Why would anyone who could dominate in hierarchy be content with leveling it out? Confident nobody really would, sex equality theory, claiming otherwise, is portrayed as operating in bad faith, in public denial of its own will to, and plans for how to exercise, power.⁷⁵ Were this right, sex equality theory's victory in taking charge of gender hierarchy might very well spell defeat for gay men who would stand to lose their hard-won status gains in the hierarchy of men. Inviting gay men to fight for sex equality principles thus sounds in this register like an invitation for gay men to trade their existing social achievements (and hopes for further progress) for a wholly uncertain status in a new hierarchy defined by the female sex on top. In relation to this possibility, the straight male devil that gays know may seem the better deal — especially for men whose sexual orientation entails the eroticization of manhood. Within the current system, after all, gay men can at least gaze longingly up male hierarchy with a certain sexual investment and thrill. Speaking contingently, male homosexuality is a sexuality oriented to the male gender power that defines and organizes the current sex unequal regime. What would it mean to flip the current hierarchies so women occupied the dominant positions that, as a rule, men now do? Would male homosexuality continue as an orientation to a newly-disempowered sex? If not, who would gay men who are unwilling to abandon homosexuality be? Lesbians? For their part, would lesbians become the new gay men?

Integral to making these thoughts disquieting for some gay men is one of the many unfortunate side effects of being a man in a sex-unequal regime: the learned disdain for women. As powerful as misogyny can be among heterosexual men, it can be no less intense for gay men whose loss of gender privilege often results from male supremacist associations of homosexuality with bodily penetration, hence femininity. For those anxious about such associations, sex equality theory may seem to leverage and even exacerbate them through a frontal assault on masculinity and manhood. How much farther can these men be made to fall? Where will they go if sex equality theory yanks the floor beneath manhood out? Bad enough sex equality theory would strip gay men themselves of whatever otherwise tenuous grip on manhood they may have by eliminating the thing they are trying to get an even stronger handle on. More, maybe worse, is its general elimination of masculinity and manhood, essential ingredients of — and for — the sex that many men who have sex with men have and want. As familiar as the stereotypes of gay men's misogyny are, the venom of their reality can still be

75. This viewpoint is underscored by demonstrating how feminism already operates when empowered. For a negative assessment, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008); Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT'L L. 78 (2008).

stunning (if not entirely surprising) to hear.⁷⁶ Happily, gay male misogyny, like other forms of misogyny, can be overcome. It is learned, not part of any gay gene. But until it is, it is and will remain a brute fact that this sexist thinking about women will continue to shape gay men's attitudes about a project like sex equality theory's that would eliminate male supremacy's sex-based hierarchies in favor of equality for women. It is one thing to promote sex equality among men. Gay men could live with that. That is what sexual orientation equality for gay men seeks to achieve. It is something else again, though, for male freedom from sex-based subordination to be bound up intimately with the political fortunes — and liberation — of women.

Evidently, any kind of intimacy with women — even political coalition, hence political intimacy, around sexual freedom and equality — seems enough to inspire a certain revulsion among some gay men, an experience that is far more commonly felt than publicly expressed. This isn't to say that it has entirely lacked for voice; it hasn't. Nor, it must be said, is this revulsion unique to gay men.⁷⁷ Just so, it can be seen dancing behind various sorts of reservations that have been expressed about sex equality approaches to gay rights, both those articulated by gay men themselves and others, sometimes heterosexual men, on their behalf. Some gay men, for instance, profess simply not to understand what sex equality argument for gay rights purport to mean, as though comprehending the practical implications of a social theory like sex equality theory required gay men to "understand" women themselves from inside their skin. Others regard the sex equality arguments for gay rights as arguments that "'closet[]', rather than confront[], homophobia,"⁷⁸ as though sex equality did not recognize the closet produced by homophobic abuse and inhabited by gay men as a harm. Still others complain that the sex equality approach to gay rights problematically treats homophobia as "a 'side effect' of discrimination against women, and therefore somehow less important,"⁷⁹ as if its commitment to stopping homophobia were not real. And, finally, a

76. Take Leo Bersani's suggestion that gay male drag is a sexual performance of misogyny. Bersani, *supra* note 24, at 208. Bersani still maintains that straight male misogyny is "infinitely nastier" than the gay male version. *Id.* As he puts it:

The gay male parody of a certain femininity, which, as others have argued, may itself be an elaborate social construct, is both a way of giving vent to the hostility toward women that probably afflicts every male (and which male heterosexuals have of course expressed in infinitely nastier and more effective ways) and could also paradoxically [sic] be thought of as helping to deconstruct that image for women themselves.

Id.

77. Heterosexual men's revulsion is often hidden behind their heterosexuality and the desire and love for women that's professed. It's been explored to powerful effect in, for example, DWORKIN, *INTERCOURSE*, *supra* note 14, and ANDREA DWORKIN, *WOMAN HATING: A RADICAL LOOK AT SEXUALITY* (1974).

78. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 *UCLA L. REV.* 471, 504 (2001).

79. The quote is from J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2362 (1997) ("By contrast, I am not claiming that discrimination against homosexuals is merely a 'side effect' of discrimination against women and therefore somehow less important."), but clear in context from the disavowal is that he doesn't mean to be embracing it. Others do. Jonathan Goldberg, for instance, seems to be venturing in these critical directions where he writes:

When [Sylvia] Law and [Norman] Vieira depend upon the hierarchy in which the "real" significance of *Bowers v. Hardwick* involves male-female relations, they relegate homosexuals to a minority position, a consequence of the liberal values both writers uphold. By collapsing questions

telling line that repeatedly appears, if in different forms, is the idea that sex equality arguments for gay rights have “a transvestite quality” to them, because they “dress[] a gay rights issue up in gender rights garb.”⁸⁰ This is, of course, men’s rights being dressed up in women’s clothes. Is there any need to ask what’s real here and what’s fake? What’s natural and what’s not?

These and other similar concerns can be read in various ways. They are clearly operating on different levels. On reflection, they seem to capture how a number of gay men do or are imagined to feel about the thought of a political partnership whose governing normative theory does not give homophobia a singular analytic priority, but rather addresses it, however directly, within the context of a larger problem that significantly includes women’s rights. To some gay men, pursuing this project feels like it puts them back in the closet, a place one goes when it is not safe to be outside, making their concerns “somehow less important,” which is to say, diminishing them, or like playing dress-up in women’s clothes, which is supposed to be both ridiculous and humiliating, at once. Sex equality arguments for gay rights are being reported to make men they help feel unmanned. It’s as though being benefitted by sex equality rights were proof that male supremacy’s homophobic slurs about gay men’s “womanhood” were right.

Interestingly, the sensations and anxieties experienced when gay rights are seen in relation to sex equality rights do not appear to surface with the same regularity when gay rights are framed in more conventional liberal terms. This, even though within liberal accounts for gay rights, homosexuality and homophobia aren’t analytically front and center, either. Within them, gay men get rights, including sexual rights, on grounds of autonomy (or personhood), where it has already been decided that autonomy should reign. Indeed, in both the sodomy and same-sex marriage cases, the arguments that gay rights advocates have been expressly making is that homosexuality is just like heterosexuality and so should receive the same rights and protections heterosexuals do.⁸¹

of sexuality into the “more important” realms of gender, homosexuality is allowed salience insofar as it seems assimilable to heterosexuality, insofar as same-sex relations are taken to be no different from cross-sex ones. . . .

JONATHAN GOLDBERG, *SODOMETRIES: RENAISSANCE TEXTS, MODERN SEXUALITIES* 15 (1992). Andrew Koppelman collects these and some other important sources, including others cited here, in Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 *UCLA L. REV.* 519, 532–33 (2001).

80. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 172 (1996). After characterizing the sex equality argument for gay rights (specifically the sex equality argument from *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)) this way, Eskridge remarks: “Such legal transvestism is not uncommon and this one is persuasive.” *Id.* See also ESKRIDGE, *supra* note 64, at 220 (“The miscegenation analogy has a transvestic quality, dressing up gay rights in sex equality garb. The immediate reaction of lawyers is: this is a trick argument — and has got to be wrong!”).

81. This dimension of *Lawrence* is critically discussed in Spindelman, *Sodomy Politics*, *supra* note 65; Spindelman, *Surviving Lawrence*, *supra* note 70, at 1633–67. It is also discussed in the context of *Goodridge*, in Spindelman, *Homosexuality’s Horizon*, *supra* note 71, at 1375–1406. Others have also recognized this dimension of these cases and the larger litigation strategy of which they were and are a part. See, e.g., Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 *B.U. L. REV.* 227, 269 (2006); Courtney Megan Cahill, *Celebrating the Differences that Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 *OHIO ST. L.J.* 943, 951, 960–68 (2009); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 *WM. & MARY BILL RTS. J.* 1539, 1569, 1577–78 (2006); Nancy Levit, *Theorizing and Litigating the Rights of*

This is, to be clear, a direct argument for derivative rights. That being so, the question that has to be asked is, What is it about the sex equality arguments for gay rights that they are uniquely giving some gay men the heebie-jeebies?⁸² What is it about pursuing sex equality that makes some gay men feel like *castrati*? Part of what seems to be happening is that politics are being confused for sex itself, with gay men imagining that they cannot and do not want to keep up their end of the bargain. Though there can be — and often is — a relation between sexual politics and sex,⁸³ the sex equality arguments for gay rights are not an argument for compulsory heterosexuality. Far from it. In no way do they oblige gay men to have sex with women. Much as anything else they are, they are arguments for protecting the decision not to have sex one doesn't want.

Perhaps what the negative reactions to sex equality arguments for gay rights reveal is a different sort of equation of politics with sex. Beyond the danger that sex equality theory would smash male supremacy's gender hierarchies, and in doing so take away the objects of some gay men's sexual desires, ushering in what Scott Tucker has ominously dubbed a "utopia of detumescence,"⁸⁴ there is sex equality theory's deeply critical portrait of hierarchical sex, reported to be a predicate for pervasive conditions of sexual, hence social, unfreedom. This perspective on sex as an existing social practice is nothing if not sharply at odds with what many gay men report for themselves about the phenomenon and phenomenology of sex. Far from sex being centrally an experience of oppression, including when it involves sexuality's gendered and gendering dimensions, for many gay men, sexuality, including hierarchical sex, including the wielding of male power for delight, is a quintessential experience of freedom and liberation.⁸⁵ For many

Sexual Minorities, 19 COLUM. J. GENDER & L. 21, 23 (2010); Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CALIF. L. REV. 505, 524–25 (2008); Rosenbury & Rothman, *supra* note 71, at 829, 857; Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1520 (2009).

82. Some, not all. See, e.g., Stein, *supra* note 78, at 504 ("The sex discrimination argument is not the only argument for lesbian and gay rights that avoids addressing the actual wrong of discrimination on the basis of sexual orientation. Arguments that appeal to the biological basis of homosexuality and to the right to privacy are subject to the same objection.")

83. For several views, consider Leo Bersani's observation that:

[T]here has been a lot of confusion about the real or potential political implications of homosexuality. Gay activists have tended to deduce those implications from the status of homosexuals as an oppressed minority rather than from what I think are (except perhaps in societies more physically repressive than ours has been) the more crucially operative continuities between political sympathies on the one hand and, on the other, fantasies connected with sexual pleasure. Thanks to a system of gliding emphases, gay activist rhetoric has even managed at times to suggest that a lust for other men's bodies is a by-product or a decision consequent upon political radicalism rather than a given point of departure for a whole range of political sympathies. While it is indisputably true that sexuality is always being politicized, the ways in which *having sex* politicizes are highly problematical. Right-wing politics can, for example, emerge quite easily from a sentimentalizing of the armed forces or of blue-collar workers, a sentimentalizing which can itself prolong and sublimate a marked sexual preference for sailors and telephone linemen.

Bersani, *supra* note 24, at 206.

84. SCOTT TUCKER, *Gender, Fucking and Utopia: In Response to Refusing to Be a Man (by John Stoltenberg)*, in *THE QUEER QUESTION: ESSAYS ON DESIRE AND DEMOCRACY* 81, 92 (1997).

85. Pro-gay forces remain alert to critiques of homosexuality, whatever their source. As yet, pro-gay discourse lacks a mature capacity to differentiate between or among different sorts of critical appraisals of gay sex. Whatever their source — whether religion or conservative morality or a politically progressive normativity; whether they come from outside the gay community or from within — critiques of homosexuality are often treated as presumptively homophobic and anti-sex. It shouldn't be forgotten that from the early days

gay men, there appears to be an important — even a vital — distinction between gender-based hierarchy operating in the world in its ordinary ways, including homophobically, and how it operates sexually. On this view, sex is importantly an escape from the world, a rupture with it that's usefully captured in Tucker's idea that "gay people are likelier [than at least some women] to find an identity in sex (and sometimes nowhere else) that also permits a temporary dissolution of everyday, enforced heterosexual misidentity."⁸⁶ A similar account is served up by Richard Mohr, who sees sexuality as a practice of world-denying-ness. As he describes it, sex overcomes us, and forces us out of our every day identities, our ordinary social worlds, and turns us into our bodies, pulsing, sensing, seeing, feeling, longing, stalking, and if all goes right, eventually having at it sexually until the whole world disappears.⁸⁷ For Mohr, this phenomenology grounds an argument that sex should be treated as private, hence be protected in society and under law.⁸⁸ For others, and Michael Warner's theorizing about sex might be included here, the experience of sex, which may in a way include all the things Mohr describes, is not so much the experience of denying the existing world as creating new ones, the notion being that sexuality's social liminality makes it a place from which one can, perhaps uniquely, work on oneself and with others to spark creativity and new forms of human, hence social, relations, and knowledge, which can, in turn, reconfigure the sexual, hence social, grid.⁸⁹ Michel Foucault, anyway, held a view along these lines. As he explained:

Sexuality is something that we ourselves create — it is our own creation, and much more than the discovery of a secret side of our desire. We have to understand that with our desires, through our desires, go new forms of relationships, new forms of love, new forms of creation. Sex is not a fatality; it's a possibility for creative life.⁹⁰

Either way, within these accounts, whatever their directions, sex is not basically

of the HIV/AIDS epidemic, even gay-driven projects of sexual reform — like efforts at safer-sex — were viewed by many gay men with intense suspicion, as basically anti-gay, acceded to out of a felt necessity of circumstance, though in principle no different from other limitations on sexuality, including legal bans on gay sex. A similar, and no less troubling, illustration is found in reactions to frank discussions of same-sex sexual violence and injury, presumed anti-gay no matter that some victims of this violence self-identify as gay. To the extent this continues to hold true, it should come as no surprise that gay men get prickly when talk of sex equality is raised particularly insofar as sex equality presumes a program of sexual reform.

86. TUCKER, *supra* note 84, at 96. The full sentence is: "Women are likelier to lose identity in sex; gay people are likelier to find an identity in sex (and sometimes nowhere else) that also permits a temporary dissolution of everyday, enforced heterosexual misidentity." *Id.*

87. RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 100–01 (1988) ("There are several way in which sex acts are world-excluding. First, sexually aroused people experience the world in an altered way. . . . At peak arousal, as in a liquid or in a blizzard, the horizon is but the extent of one's flesh. One is hermetic save for the continuation of one's flesh with and in the flesh of another.").

88. *Id.* at 100–06. The argument is critically engaged in Spindelman, *Sexuality's Law*, *supra* note 24.

89. MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 177–78 (1999) ("The practices of public sexual culture, including both cruising and pornography, involve not only a world-excluding privacy but also a world-making publicness. . . . A public sexual culture changes the nature of sex, much as a public intellectual culture changes the nature of thought. Sexual knowledges can be made cumulative."). See generally *id.* at 175–79.

90. Bob Gallagher & Alexander Wilson, *Michel Foucault: An Interview: Sex, Power and the Politics of Identity*, ADVOCATE, Aug. 7, 1984, at 26, 27. Cf. also, e.g., JOHN RECHY: THE SEXUAL OUTLAW: A DOCUMENTARY 71 (1977) ("I see the sexhunt [sic] as an art form too. The beautiful abstract choreography, balletic, symphonic. . . . 'Though sometimes,' I hear myself add, 'after a night of hustling and dark cruising alleys, I think of suicide.' . . . 'But when I'm caught up in the beautiful hunt, I know it's the most exciting experience in the world — and at those times I wouldn't trade it for any other.'").

oppression, even when practiced as inequality. Or, if it is, it is a form of oppression that, paradoxically, is its own negation, akin to the supreme power one can find in and through abjection, the most debased debasement becoming empowerment's ultimate form.⁹¹ In this light, to think of sexuality the way sex equality theory does, as oppression when hierarchical, because reproductive of hierarchical social forms, fails to jibe with how sex feels or what it is thought to do — and be — for gay men. No less problematically, it is to imagine that gay men's quintessential experience of freedom may be the quintessential experience of oppression, which, if true, might mean gay men have no place to turn for relief or repose from the worldly oppressions they individually and collectively face.⁹² Sex equality theory's insistence on the continuities that exist — that sex is no escape from the world, that thinking it is, is to confuse dreams of freedom for freedom itself, the unreal for the real — is reason enough for gay men to be predisposed not to accept sex equality theory, thinking, certainly, hoping, it cannot possibly be right. Easier to imagine things the other way around, rejecting sex equality theory's unflinching sexual account.

Operating behind many of these views, and animating them, or, in any case, moving along side them, new research is starting to reveal,⁹³ is a largely unknown, hence widely undiscussed, ideological feature of gay sexual life. Once seen, some of the deeper reasons sex equality principles have been met with resistance among gay men, notwithstanding all the rational reasons for thinking they should widely embrace them, begin to come more crisply into focus.

Described succinctly, discoverable from a variety of sources, including not least of all the sexuality that some gay men actually live out, is an ideology of sexual freedom.⁹⁴ Sometimes confused with liberal or libertarian normative approaches to sex, in part because it sometimes finds expression through them,⁹⁵ this ideology is better understood as a Nietzschean outlook on sexuality, hence life, dedicated to the worship of manhood and men, whose ultimate aim is the production — through sex — of a class of sexual supermen. In operation, this ideology functions structurally in much the way sex equality theory holds sexuality generally does: it imagines that it is in and through sexual relations that identity and social status, and a resulting social hierarchy, can be achieved. In this view, a radical form of male supremacy, which distills its logic of the worship and adoration of manhood and male virility while taking it to new heights, sexuality is seen

91. GENET, *supra* note 35, at 265–68. This passage from Genet is discussed in DAVID HALPERIN, *WHAT DO GAY MEN WANT?* 72–84 (2007), as a possible source for theorizing gay sexuality, and also in BROWNMILLER, *supra* note 34, at 289–91, who engaged it some years before for wholly different purposes.

92. Perhaps without meaning to, sex in this perspective speaks of the need some gay men have to split the hierarchies of the world from hierarchies in sex, using sex as a means to dissociate themselves from the cold, brute facts of the material world, and to flee.

93. Spindelman, *Sexual Freedom's Shadows*, *supra* note 21; Spindelman, *Sexuality's Law*, *supra* note 24.

94. The ideology of sexual freedom is described and documented more comprehensively in Spindelman, *Sexual Freedom's Shadows*, *supra* note 21; Spindelman, *Sexuality's Law*, *supra* note 24, at 190–206.

95. Examples might include David L. Chambers, *Gay Men, AIDS, and the Code of the Condom*, 29 HARV. C.R.-C.L. L. REV. 353 (1994), and MOHR, *supra* note 87, both examined in Spindelman, *Sexuality's Law*, *supra* note 24, as well as Michael Warner's efforts in WARNER, *supra* note 89, at 149–93. Not entirely unrelated to these is the libertarian streak of certain efforts in queer theory, such as Halley, *supra* note 24, at 182, *discussed and critically engaged in* Spindelman, *Sex Equality Panic*, *supra* note 24.

as *agon*, a trial, combat, a feat of endurance, proof of one's strength.⁹⁶ Those who live up to the challenge emerge not just as men, but as men-among-men, overmen, the sexually great. Within this account, there is no denying sexuality produces gender. The question is: Which one? Whereas the current form of heterosexual male supremacy might see a heterosexualized version of gender relations effectively being reproduced by same-sex sex, gay male sexuality is perfectly capable of producing two men, not one. Not that it always does. The ideology of sexual freedom may imagine a new man — or new men — can emerge from sex, but that only happens when its challenges are met. Sometimes, they're not; sometimes, men fail to prove themselves; sometimes, they lose the contest, are injured, harmed, devastated, killed when the battle is done. Bad things can happen in the course of combat. But this is not necessarily seen as sex gone wrong; it can serve as a reminder, or more, proof, that sexuality truly is a field of danger on which badges of manhood can properly be won. Sex, being a powerful force, is never safe. These are the risks one takes. Sexuality's dangers define the conditions that supply the reasons sexuality deserves to be worshipped — lived and died for — not somehow be caged.

This way of thinking about sex may sound strange. To date, histories of gay sexuality have generally refused to acknowledge, much less openly grapple with it, though its attitude is on display in a vast array of canonical texts on same-sex sexuality, as well as, according to one of this ideology's most eloquent interlocutors, himself a gay pornographer by the name of Paul Morris, in the pornographic output of the 1970s, through (if with a certain hiatus) to the present date.⁹⁷ As an ideological disposition, the logic of the ideology of sexual freedom is nevertheless widely intuitively understood. In a sense, it is a dark romance tale: man loves man, man gives life for man, man kills man. As Tony Duvert unforgettably put it: "*He loves me* means plainly: he accepts that I capture him, tame him, rape him, kill him, and bury him[.]"⁹⁸ Hearing this said, the ideology of sexual freedom possesses the power to surprise, even shock. What must be said about it — again — is that this is not either an abstract or an historical form. Paul Morris's current pornographic work, which reflects and captures, while popularizing it, helping gay men to reclaim a radicalized dimension of gay sex, shows it is alive and well in what is increasingly being thought of as the subculture of barebacking that exists

96. See, e.g., TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 52, 55, 56–60 (2009); Spindelman, *Sexual Freedom's Shadows*, *supra* note 21, at 190–206 (discussing the ideology of sexual freedom and how it at times frames sexuality as contest this way).

97. For discussion of gay pornography in the 1970s, see Paul Morris, *in the x-stream*, TREASURE ISLAND MEDIA, http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=xStream&page=1 (last visited Oct. 16, 2011). For Paul Morris's work generally, see Paul Morris, *Statement of Purpose*, TREASURE ISLAND MEDIA, http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=StatementOfPurpose1&page=1 (last visited Oct. 16, 2011); Paul Morris, *No Limits: Necessary Danger in Male Porn*, TREASURE ISLAND MEDIA, http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=noLimits&page=1 (last visited Oct. 16, 2011); Paul Morris, *Notes on Christopher Rage*, TREASURE ISLAND MEDIA, http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=ragePaper&page=1 (last visited Oct. 16, 2011).

98. The original, in French, is in TONY DUVERT, ABÉCÉDAIRE MALVEILLANT 11 (1989). The translation is found in LAWRENCE R. SCHEHR, PARTS OF AN ANDROLOGY: ON REPRESENTATIONS OF MEN'S BODIES 152 (1997).

among gay men.⁹⁹ According to one of this subculture's most thoughtful students, it is prominently organized around "men who fuck without protection precisely in order to become infected" with HIV.¹⁰⁰ Its norms — norms increasingly reflected in sexual practices, attitudes, and desires officially located "outside" it, in the gay sexual mainstream — hold what the ideology of sexual freedom does: the worship of sex is more important than life itself; sexuality is a burning fire in which manhood is forged and from which not only men, but supermen, emerge. According to this view, HIV-transmission is no harm, no wrong. Far from it, it is a gift that is being actively sought out, sometimes also willingly given. While the norms that comprise barebacking subculture have not yet generally been seen, much less seen as elements in the ideology of sexual freedom, there is no mistaking, once they are closely investigated, that that is what they effectively amount to.¹⁰¹

If any of this is coming as news, and for many, it will be, it is partly because the ideology of sexual freedom has long operated behind the scenes, not advocated full-dress in terms, exposed, though its imprint, not coincidentally, has been felt, increasingly of late, in the resistance both at the level of politics and theory to sex equality programs at the local and international level, including efforts to get sexual injuries to be recognizable — and recognized — as crimes of war.¹⁰² From the perspective of the ideology of sexual freedom, sexuality-based injuries are not crimes. Sex is always in a sense bound up with war, and, as everyone knows, bad things happen in them when they are waged. People are hurt; they are maimed; they die. But that is in the nature of the event, and so long as men are men, wars will happen. Victor's justice is only justice in name, a happenstance that depends on who happens to win the game. Seen in this light, the real mistake sex equality theory makes is to think that there are crimes in war, the hope of ending sexual violence as one being nothing less than the futile hopes of forever bringing conflict to an end. What sex equality theory appears not to apprehend is how deeply in men's nature warring is. As an expression of it, sexuality is what sex equality theory sees: it's violent, it's brutal, it's anti-nurturing, anti-loving, anti-democratic, despotic, a social force capable of ruining and wiping lives out.¹⁰³ But to try to restrain that, to cabin it, to hold it, to eliminate it, is to miss the glory of the life that is destroyed then reborn. It is to miss that, out of the ashes of destruction, something truly great, the possibility of new worlds, new lives, new men, can arise. Sex equality principles — as they tame sex, seeking to hold it harmless both for individuals and society, more generally — would destroy the genius that may use sex as a medium for creating its effects. What worse form of slave moralism, what greater harm to the world, to humanity, could there possibly be, than that?

99. See generally DEAN, *supra* note 96.

100. *Id.* at 17.

101. Spindelman, *Sexual Freedom's Shadows*, *supra* note 21, at 207–33.

102. This is traced in Spindelman, *Sexuality's Law*, *supra* note 24.

103. Some of this language comes from Leo Bersani. Speaking of the views of Catharine MacKinnon and Andrea Dworkin, he writes: "Their indictment of sex — their refusal to prettify it, to romanticize it, to maintain that fucking has anything to do with community or love — has had the immensely desirable effect of publicizing, of lucidly laying out for us, the inestimable value of sex as — at least in certain of its ineradicable aspects — anticomunal, antiegalitarian, antinurturing, antiloving." Bersani, *supra* note 24, at 215.

It may be obvious, but it is worth underscoring, that women as such play no real role in this picture. What happens to them is really of no deep concern within the ideology of sexual freedom, which is a fantasy of a women-less world, a world that, not insignificantly, some gay men do (in different ways) manage to construct for themselves. But it does anyway provide what has been, so far, an elusive answer to the puzzle of why gay men have been so unwilling to embrace and pursue sex equality theory and its norms. The problem with the existing inequalities by sex are not what they do to women, but what they do to men who do or would have sex with men. The current sex-unequal regime's flaw is its refusal to recognize that its ultimate logic is for the man-loving-warrior to be at the top of the social heap, at male hierarchy's highest height, with access to those underneath him, as he will. In different terms, what happens to women at men's hands in sex is just what can happen in sex. The response is to toughen up, man up, quit complaining, quit whining, quit trying to fix sexuality to make it something other than it ever has been and ever will be. That horizon of possibility is an impossible dream, a myth, a fiction, a fantasy, a hoax, nothing more.

The secret truth is something else again. With a significant debt to Catharine MacKinnon, who has pioneered it, sex equality theory, along with its operative principles, are now firmly on the march. They are brave. They are unafraid of a fight. As they stand firm and tall, they are slowly, but unmistakably, changing the unchangeable, doing the unthinkable, making the impossible dream of sex equality a reality for both women and men, straight and gay. In time perhaps, more of those men who have in fact benefitted from this theorizing and the work it entails may decide to openly join its cause. Meanwhile, despite all the obstacles that have been placed and remain in its way, despite the refusal of more men to help, sex equality theory presses on.