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## Essay

# Substantive Equality: A Perspective

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Men have asked over the centuries a question that, in their hands, ironically becomes abstract: “What is reality?” They have written complicated volumes on this question. The woman who was a battered wife and has escaped knows the answer: reality is when something is happening to you and you know it and can say it and when you say it other people understand what you mean and believe you. That is reality, and the battered wife, imprisoned alone in a nightmare that *is* happening to her, has lost it and cannot find it anywhere.

Andrea Dworkin, *A Battered Wife Survives*, in LETTERS FROM A WAR ZONE 100, 104 (1988).

The emptiness of U.S. constitutional equal protection doctrine has long been apparent from its lack of reach to its shaky grasp on questions of sex inequality. When women are abused because they are women—physical aggression by male intimates with legal impunity is cardinal and emblematic—almost never are the acts, or the systemic failure to prevent and sanction them, found to discriminate based on sex.<sup>1</sup> The insecurity of women’s person because of sex is still widely regarded as a fact of life rather than a shortfall of law, even as goals more conventionally set by sex equality law, such as equal pay, continue to be largely unrealized as well.<sup>2</sup>

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1. For discussion of cases attempting to establish equal protection violations in situations of domestic violence, see CATHARINE A. MACKINNON, *SEX EQUALITY* 717–22 (2d ed. 2007). Subsequent cases include *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F.3d 415, 438–39 (2d Cir. 2009).

2. Women recently employed full-time earned approximately eighty cents for each dollar earned by a man. U.S. DEP’T OF LABOR & U.S. BUREAU OF

That the empty formalism of legal equality in the United States is the limit of equal protection's visible horizon, not just its unconscious fallback position, was made explicit by the Supreme Court majority in *Lawrence v. Texas*.<sup>3</sup> Explaining why due process was a preferable route for invalidating the criminal sodomy law at issue, the Court conceded that an equal protection analysis was "a tenable argument" but rejected it because "[i]f protected conduct is made criminal and the law which does so remains unexamined *for its substantive validity*, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."<sup>4</sup> Equal protection examines a statute only for its framing, not for "its substantive validity;" not for what it does, only how.<sup>5</sup> Due process—intrinsically a procedural idea—has a substantive component; a venerable line of cases makes clear, in my view, that its substance is morality.<sup>6</sup> But the equality component of the Constitution cannot address the substance of a statute, only its mechanism.<sup>7</sup> Curiously, it also seems that equal protection invalidation cannot eliminate the stigma of a statute that due process scrutiny would permit.<sup>8</sup> At least at the lowest tier of scrutiny, where sexual orientation quite potently resides at the moment,<sup>9</sup> a substantive equality jurisprudence not only does not exist, it is unthinkable.

Perhaps stricter scrutiny permits the substance of social context and reality of the category to enter into legal considera-

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LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 68 (2010), available at <http://www.bls.gov/cps/wlf-databook-2010.pdf>.

3. 539 U.S. 558, 574–75 (2003).

4. *Id.* (emphasis added).

5. *Id.* at 575.

6. Justice Harlan's widely cited dissent in *Poe v. Ullman* makes this textually clear at its origins. See 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting) ("[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."); see also *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (contending that the majority's decision "effectively decrees the end of all morals legislation").

7. Arguably how a statute is drawn and the substance it regulates are not entirely distinguishable; the lines it draws, however abstract in appearance, have substance.

8. See *Lawrence*, 539 U.S. at 575.

9. See *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (holding a state constitutional amendment invalidating state action to prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" violates the Fourteenth Amendment as lacking a rational relation to a legitimate state purpose and born of animosity to groups).

tion, although this has never been said. Recall that using race at all in a marriage statute can violate the Fourteenth Amendment, “even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”<sup>10</sup> This is analytically identical to the move in *Lawrence* that reaches out to invalidate the prohibition on anal or oral sex even if evenhandedly drawn against heterosexual as well as homosexual participants.<sup>11</sup> Except, *Loving v. Virginia* did under equality what *Lawrence* said equality could not do.<sup>12</sup> The difference is, the substance of the statute was recognized in *Loving* and not in *Lawrence*. In *Loving*, a statute drawn only to prevent intermarriage of “white person[s]” with persons of other races was seen as “obviously an endorsement of the doctrine of White Supremacy.”<sup>13</sup> Given that it is not at all obvious whether, why, or how keeping a race “pure” makes it supreme, unless one knows that this is how White Supremacy fancies itself to work in substance, it is remarkable that the substantive understanding extended from White Supremacy to the more abstract race per se to invalidate a hypothetical racially symmetrical anti-intermarriage statute. Presumably keeping all races pure could not keep them all supreme.

What *Lawrence* missed in this connection is what the ruling is essentially (if mostly tacitly) predicated on: the realization that prohibiting same-sex sodomy, and not non-same-sex sodomy, is a transparent expression of homophobia, imposing an ideology of straight privilege, placing heterosexual over homosexual in a hierarchy of supremacy. Both cases also substantively contain a stratum of sexuality, hence gender, making both at least intersectional cases—*Lawrence* intersecting sex with sexual orientation, *Loving* intersecting race with sex.<sup>14</sup> Reading *Loving* in this light, it says a lot about white racism that white men put up with other white men telling them who

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10. *Loving v. Virginia*, 388 U.S. 1, 12 n.11 (1967) (Stewart, J., concurring).

11. See *Lawrence*, 539 U.S. at 566, 578.

12. Which is not to forget that *Loving* is also a substantive due process case. See 388 U.S. at 2–11 (majority opinion).

13. *Id.* at 6–7.

14. For an explanation of intersectionality by its originator, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989), and Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). For an analysis of the idea’s further development and application, see Elżbieta H. Oleksy, *Intesectionality [sic] at the Cross-roads*, 34 WOMEN’S STUD. INT’L F. 263 (2011).

they could marry for so long, although of course it constrained their sexual and reproductive behavior almost not at all.

No understanding of White Supremacy has so far overcome equal protection's formalism in the affirmative action cases, where some white people stand not to get what they want materially, although there is hope.<sup>15</sup> But knowing what segregation substantively meant—that it treated some people as less human and lesser citizens than others, relegated some to inferiority compared with others, while being an evenhanded separation on its face, so that it did not even occur to the Supreme Court in *Brown* that being separated “from others of similar age and qualifications solely because of their race” might “generate[] a feeling of inferiority” in the “hearts and minds” of white children, who were just as separated from Black children as Black children were separated from them—is, I think, what Herbert Wechsler objected to in *Brown*.<sup>16</sup> It was the Court's grasp of substance, finally, that he found so un-lawlike.<sup>17</sup> So he designed his “neutral principles” of constitutional law<sup>18</sup> to reinstitutionalize what he saw as “a point in *Plessy*”<sup>19</sup> that any such substance of hierarchy was not real but an illusion in Black people's minds, legally unprincipled to cognize. This “neutral” approach, now a doctrinal term for formal equality, has continued, in the guise of principle, to provide the undertow, if not the text, of much if not most constitutional adjudication in the equality area in the United States to the present. Despite some real gains, arguably attributable to submerged recognitions of substantive inequality like those that animated *Brown*, or more express as in the VMI case,<sup>20</sup> this may account

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15. The Court of Appeals panel decision invalidating Proposal 2, which struck down the University of Michigan Law School's affirmative action procedure previously upheld by the Supreme Court, makes sense when read in this light. See *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, Nos. 08–1387, 08–1389, 08–1534, 09–1111, 2011 WL 2600665, at \*24 (6th Cir. July 1, 2011), *vacated and en banc hearing granted*, 2011 U.S. App. LEXIS 18875, at \*3–4 (6th Cir. Sept. 9, 2011).

16. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1953); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 23 (1959).

17. Wechsler, *supra* note 16.

18. *Id.*

19. *Id.* at 33 (citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

20. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (“Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for *denigration* of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women ‘for particular economic disabilities [they have]

for the precious little effective headway made by law in eliminating racial inequality from American society for most of the people who are harmed by it.

The empty abstract Aristotelian “likes alike, unlikes unlike” test of formal equality can hold A and not A with equal logical consistency.<sup>21</sup> It can conclude both that a gay marriage law does not discriminate against gay men and lesbian women based on sex because both men and women equally cannot marry persons of their own sex, and that it does discriminate against them based on sex because each person who wishes to marry a person of their own sex could do so but for their sex.<sup>22</sup> This is more than indeterminate. If abstraction is seldom (maybe never) truly empty, here it masquerades as such while building in the content of things as they are, which is highly determinate: determinately unequal. It is no equality rule at all.

This problem does not end with lowest tier scrutiny, nor is it solved at the highest. The higher one ascends up the tiers of scrutiny, going from the merely rational to the more rational to the most rational, seeking equality ever more rigorously is measured by how much of the regularity of sex can be ignored. Put another way, it is shown by how few outliers to a sex-based generalization it takes to invalidate a sex-based regularity. The meaning given to “rationality” here is “reflection of existing conditions.” We know how much we care about sex equality by the extent of sex-based distinctions we cannot legally see. It makes the sex that is unequal a distinction, not second-class status, abstract classifications not substantive classes.

*Reed v. Reed*, the constitutional breakthrough, could invalidate Idaho’s sex-based intestate estate administration rules because women, substantively, could be presumed relatively educated in business matters.<sup>23</sup> If all women were kept illiterate, as they often have been, society would have been even more in need of sex equality, but the statute would have survived as rational. *Craig v. Boren* invalidated a statute that prohibited boys from buying 3.2 beer at the same age as girls be-

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suffered,’ to ‘*promot[e]* equal employment opportunity,’ to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic *inferiority of women*.” (emphasis added) (citations omitted).

21. See MACKINNON, *supra* note 1, at 4–12.

22. Compare, for example, the opinions of Justice Spina and Justice Cordy in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).

23. 404 U.S. 71, 77 (1971).

cause boys got into many more damaging accidents while driving drunk.<sup>24</sup> Because the data showed this substantive difference, invalidating it meant a greater attention to sex inequality. But suppose boys were even more dangerous and exclusive drivers than they are. Society would be even more sexually stereotyped, but the statute could have met middle tier scrutiny at some as yet unspecified point. *Frontiero v. Richardson* momentarily applied strict scrutiny to sex to invalidate a rule requiring military spouses of women to prove their dependency before receiving benefits while paying them automatically to military spouses of men.<sup>25</sup> Perhaps it would still have been invalidated under strict scrutiny if virtually all military spouses were women dependent on men, but it would have been even more rational, hence more defensible under this doctrine, even though the social arrangement that caused it would have been more unequal. The point is, because sex is conceived as a difference, and equality is understood as based on sameness in the Aristotelian approach of “likes alike, unlikes unlike,” the worse the inequality gets, the more disparate its social reality becomes, the less this legal approach can do about it, hence the more equal protection doctrine operates to institutionalize it.

In this approach, if equality already exists, or to the extent it is seen to exist—as it did for the few women qualified to be admitted to VMI<sup>26</sup> or to be made partner at Price Waterhouse<sup>27</sup>—it is rational for law to mirror it; if sex inequality exists, as it does for most victims of battering or rape<sup>28</sup> with impunity, it is rational, hence equal, to mirror that as well. Where sex inequality is based on an illusion of sex difference, this approach will work, even well, to counter unequal legal rules. But what about all those situations in which the sex inequality is real, so the sexes are situated unequally? The more pervasive the reality of sex inequality is, the fewer outliers will be permitted in reality, so the more that reality will look like a sex-based difference, mapping itself onto (the social idea of) sex as such, which it will be increasingly rational for law to ignore as it ascends the tiers of scrutiny. This approach is perverse even

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24. 429 U.S. 190, 208–10 (1976).

25. 411 U.S. 677, 690 (1973). This discussion is more fully elaborated in MACKINNON, *supra* note 1, at 235–37.

26. *See* United States v. Virginia, 518 U.S. 515 (1996).

27. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 232–36 (1989).

28. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 335–37 (1977) (holding a policy sex based because it is based on rapeability as definitive of womanhood).

before it reaches the capstone of affirmative action, in which it is legally possible to act more affirmatively against classifications that call for less scrutiny, and to act less against those that call for more scrutiny. Meaning, the more a classification can be scrutinized—that is, the more it is suspected of being unequal—the less can legally be done about it. Maybe this equality concept is called formal because it is equal in form only.

Absent a substantive comprehension of inequality, the many forms discrimination takes in social life, although no authority so requires, have been compressed into two: facial/direct or in-effect/indirect.<sup>29</sup> Lacking substance in the foreground, some sex-based distinctions are missed even when they are facial, as was the *Lawrence* statute's prohibition on "deviate sexual intercourse with another individual of the same sex."<sup>30</sup> For similar reasons, perhaps, others are found to be facially sex-based when they are not, as was the statute in *Michael M. v. Superior Court* prohibiting "sexual intercourse accomplished with a female not the wife of the perpetrator" who is underage.<sup>31</sup> The disparate impact standard, while partially capturing another real part of discrimination's effects, which are usually disparate in numbers, even statutorily reduces to a nose-counting exercise.<sup>32</sup> This process may indicate by numerical skew that discrimination is present but remains devoid of any substantive comprehension of what is being counted.

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29. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). *Teamsters* also helpfully notes that these categories are not mutually exclusive in that "[e]ither theory may, of course, be applied to a particular set of facts." *Id.*

30. TEX. PENAL CODE ANN. § 21.06(a) (2003) (emphasis added). For further consideration of *Lawrence* through a sex equality lens, see Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004).

31. 450 U.S. 464, 466 (1981). The Court puzzlingly concluded from this that "[t]he statute thus makes men alone criminally liable for the act of sexual intercourse." *Id.* There being no test for what is "facial" in the entire corpus of sex equality law does not help.

32. Under Title VII of the Civil Rights Act, exactly how disparate an impact must be to be deemed discriminatory remains an unclear matter of counting, although the EEOC Uniform Guideline has attempted to resolve this with its eighty percent rule. 29 C.F.R. § 1607.4(d) (2010); see also *EEOC v. Warsawsky & Co.*, 768 F. Supp. 647, 654–55 (N.D. Ill. 1991) (applying the eighty percent rule).

The intent requirement in disparate impact cases,<sup>33</sup> apart from being usually impossible to prove, may be seen as an attempt to fill the void at the center of the existing concept of equal protection, occupying the space or force of *deus ex machina* where the real substance of inequality would be seen as the driver if it was seen at all. Intent, variously called also motive, purpose, or animus, although the Supreme Court has never said why on principle it is required in constitutional discrimination cases, fills an apparent psychological need in some for a substantive wrongness and impelling force that treating less well a substantial disproportion of people of one group, or a single person because of their group membership, seems inexplicably to lack. The reason for this lack is a failure to see the substance of inequality that particular cases present. Intent also entrenches in doctrine the assumption that the social world is equal other than in a few exceptional situations in which bad apple individuals set out to make it otherwise on purpose. Intent as a requirement supplies a veneer of moral negativity to acts that, although disparate, are otherwise not seen as unequal on a group basis. This would not be needed if the tilt of white privilege or male dominance, historic and extending into the present—the barrel problem of substance—was identified.

Both facial and impact discrimination are real, in other words, but neither is the only measure of discrimination and hardly exhausts its reality. Systemic discrimination results in jobs that mainly women do being paid less than jobs that mainly men do, yet comparable worth claims are not recognized in the United States.<sup>34</sup> Sexual harassment is recognized as gender-based in substance but is not necessarily either facial or impact in form. Although it is generally statutorily treated as akin to disparate treatment, proof of motive in the usual sense is not generally required. Sexual harassment can be discriminatorily gender-based even if it happens to only one woman. And structural bias against women's needs is embedded throughout the legal system, for example in the public/private distinction, which underlies family law among others, yet neither that structural feature nor that area of law is legally seen

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33. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271–81 (1979) makes the intent requirement explicit in sex cases, as *Washington v. Davis*, 426 U.S. 229, 238–48 (1976) does in race cases.

34. See *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 180–81 (1981); *AFSCME v. Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985); *Christensen v. Iowa*, 563 F.2d 353, 355–56 (8th Cir. 1977); *Lemons v. City & Cnty. of Denver*, 17 Fair Empl. Prac. Cas. 906, 910 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980).



as gender-based.<sup>35</sup> Lacking a substantive grasp of the role of reproduction in sex inequality, the Supreme Court has found that discrimination against pregnant people is not discrimination based on sex,<sup>36</sup> although Congress has taken the opposite view in some areas within its power.<sup>37</sup> But for constitutional purposes, a pregnant woman still is not regarded as a woman in the sense of being a member of a sex-based class when she is discriminated against because of her pregnancy.<sup>38</sup> None of these examples is especially indirect although they are not what is regarded as direct either. All are forms of discrimination *de facto*, the closest American law comes to recognizing the larger reality context of discrimination, which it simply opposes to *de jure* discrimination that is legally created, and is accordingly considered beyond the reach of constitutional law even when law is deeply implicated.

*Sub rosa*, the substance of the facts of cases animated by substantive inequality do affect the doctrinal moves on the surface. But typically those realities can be invoked by litigants, if at all, by inference or trick mirrors, because the terms and tests on which the determination of whether a statute or practice is equal has been kept as far away as possible from open engagement with them. Nothing is openly allowed to turn on reality. Litigating an equality case for a plaintiff, as a result, often revolves around efforts to shoehorn the facts and context before the court into a doctrinal straightjacket that is dead set on making the outcome turn on anything but. Supporting this arrangement is the shibboleth that, with equality, there can be no agreement on substance, but people can come together on empty abstractions. This is just another way entrenched power—the perspective from the top of the inequality hierarchy—controls the real and how it is seen and authoritatively contended with. With litigants precluded from talking openly about substance, whatever anyone cares about emerges, often

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35. The latter is made structurally vivid in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201–03 (1989) (holding state agency not responsible for severe beating of child. “While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation . . . .”); and *Harris v. McRae*, 448 U.S. 297, 316–18 (1980) (rendering abortion right structurally private in that deprivation of public funding for it is not unconstitutional).

36. *Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974).

37. See 42 U.S.C. § 2000e(k) (2010).

38. See, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269–77 (1993).

in pretzeled form, in those hypotheticals that increasingly dominate Supreme Court arguments, frequently overwhelming the people and situations directly at stake.

Equality is substantive in Canada. Unimaginably, life and law do go on, often animated by a greater spirit of live-and-let-live than slightly further south. Equality began to be understood as substantive in Canada in 1989 in *Andrews v. Law Society of British Columbia*, which repudiated the Aristotelian “likes alike, unlikes unlike” approach for the first time in history and replaced it with a substantive test of historical disadvantage on enumerated and akin concrete grounds.<sup>39</sup> The actual substance of each inequality is to construct the law of that ground. Substantive inequality follows the substance of the inequality in question, so the first issue is whether the legally challenged inequality is part of the socially prior inequality. Tellingly, Canadian equality law has no intent requirement because most inequality is not, in reality, intentional and because its doctrine, having no empty center to fill, does not need it.<sup>40</sup> Losing its way for a time in tests that arguably performed abstraction in the name of substance,<sup>41</sup> the Supreme Court of Canada in 2008 openly returned to *Andrews*.<sup>42</sup>

The Canadian example illustrates that when courts fail to grasp the nettle of hierarchy, they cast about, at sea for a way to express what is unequal about inequality. A substantive approach, no silver bullet just because it is called that, can also fail to hit the target. The substance of inequality is, obviously, open to discussion. *Ontario v. M&H*<sup>43</sup> inaugurated the current fervor for dignity as the test for equality. The material inequalities attendant to non-recognition of same-sex partners as spouses apparently was not enough. (Further off the mark was Mr. Justice Gonthier’s dissent, substantive though it was, missing the gay/straight hierarchy altogether.)<sup>44</sup> Deprivation of dignity is often a powerful dimension of the substance of inequality and does some of its work. It is just not all there is to it, or even its irreducible core, *sine qua non*, or floor, especially in the

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39. [1989] 1 S.C.R. 143 (Can.).

40. *See id.* at 172–75.

41. An example is the test in *Law v. Canada*, [1999] 1 S.C.R. 497, 523–24 (Can.).

42. *See R. v. Kapp*, [2008] 2 S.C.R. 483, 501–08 ¶¶ 14–30 (Can.).

43. [1999] 2 S.C.R. 3 (Can.).

44. *Id.* at 19 (Gonthier, J., dissenting).

one Kantian conception of dignity<sup>45</sup> that implicitly dominates its legal applications.<sup>46</sup> Not being used for another's ends would help women in some respects. It certainly condemns prostitution, for example, although dignity's adherents do not generally seem to notice. Yet many women dedicate themselves to being instruments to the ends of others with whom they are in relation, such as their children, as do many people of both sexes who understand the purpose of their lives in communal terms to give them dignity rather than sacrifice it. Dignity is also notoriously susceptible to culturally gender-based differences that cannot be decoded without a grasp of substantive inequality. If inequality were understood in terms of its specific hierarchical substance, which is virtually always material as well as dignitary, all this would be evident, and inequality's material dimensions would not be covered up. Courts can also adopt a substantive equality approach without saying so, as the Supreme Court of Canada has repeatedly done,<sup>47</sup> with benefits in particular cases but without fully unlocking the transformative potential of a substantive equality jurisprudence.

A substantive equality approach, as the foregoing discussion implies, does not fully fit into any mainstream equality doctrine and changes not only the outcomes of discrimination cases but, as importantly if not more so, alters the circumstances that are identified as giving rise to equality questions in the first place. It begins by asking, what is the substance of this particular inequality, and are these facts an instance of that substance? Its core insight is that inequality, substantively speaking, is always a social relation of rank ordering, typically on a group or categorical basis—higher and lower, more and less, top and bottom, better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate, justly forceful and rightly violated or victimized, commanding and obeying—that precedes the legal one.<sup>48</sup> It is actualized concretely in specific domains for each inequality, often intersecting and overlapping. What is wrong with unequal treatment in this approach

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45. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 39–41 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993) (1785).

46. An interesting examination of its vicissitudes can be found in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT'L L.* 655 (2008).

47. One pertinent example in the present context is *R. v. Lavallee*, [1990] 1 S.C.R. 852, 871–89 (Can.).

48. See *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1330–34 (Can.).

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is that it is harmfully predicated on a ranking of one's group that positions some as inferior to others when they are not—for example, based on their group membership, as the appropriate targets of violence or violation, or as inappropriate to be paid as much as others. It is thus fundamentally factually false. When a society decides that a particular ground is a prohibited basis for discrimination, the question whether the group(s) defined by that ground are appropriately placed in caste-like arrangements, some being treated and considered better than others, is no longer open for discussion. It is this that the United States Supreme Court's approach to equal protection on the basis of sex has yet to squarely resolve. The resulting material and dignitary deprivations and violations are substantive indications and consequences of this hierarchy, but it is the hierarchy itself that defines the core inequality problem.

The essence of inequality is the misanthropic notion—misogynist in the case of women—that some are intrinsically more worthy than others, hence justly belong elevated over them, because of the group of which they are (or are perceived to be) a member. The substance of each inequality, hence the domain in which it operates as a hierarchy, is distinctive to each one, but it is hierarchy that makes it an inequality. The point here is, equality is only secondarily a value, and it is not basically a matter of morality, meaning judgments of right and wrong. Primarily, it is a fact. People are human equals,<sup>49</sup> meaning falsely rendered inferior or superior in society or by the state by group assignment. Obviously, this has nothing whatever to do with the human universality of difference, since no group difference makes one social group another group's inferior or superior. Everything makes everyone different from everyone else, but no group characteristic makes everyone in one social group more or less valuable than everyone in another group.<sup>50</sup> Inequality is, accordingly, a fact as well, and it is finding facts that courts are for.

Gender is the unequal social system attributed to sex, the central myth of which is that gender hierarchy is natural. Sex, in reality, is an equality, the sexes being equally similar or equally different as well as equally human. It is gender, the so-

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49. Aristotle neither believed nor said this or anything of the sort.

50. Here, I am talking about real social groups, such as African Americans, Hispanic women, children, or the disabled, not phony groupings that could be invented for abstract purposes such as "all people who are not qualified for this job" or "everyone who cannot lift more than 30 lbs."

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cial reality of sex, that makes men and women, the beings assigned a sex and ascribed gender accordingly, into unequals in a hierarchy relative to one another. Gender hierarchy is the transnational social system of masculinity over femininity that becomes men over women predicated on the lie of male superiority and female inferiority. Inherently, equality is relational and comparative. Under gender hierarchy, women in this sense are not what the standard equality approach imagines them to be: a demographic with shared biological features. Women are a social group formed by gender inequality in all of its substantive domains, which are sexual and economic, among others.

The inequalities that affect the group women are often revealed by disparity in numbers compared with men, but the range and depth, hence reality, of the inequality is not exhausted by head-counting, which is why substantive equality cannot be fully expressed by the doctrine of disparate impact or discrimination in effect, although that is as close as the mainstream United States' approach gets to it. The substance of substantive inequality can be visited on a single person, so long as it is grounded in the concrete historical discriminatory social reality of group membership. Presuming equality of entitlement without requiring sameness of traits, the substantive question centers on dimensions for comparison: What is the substance of each inequality, such that each plaintiff is or is not an example of it? In this approach, equality remains concretely comparative and operates on material rather than ideational ground. And since failure to act is as substantively potent as acting, there is no distinction between negative and positive rights.

Gender hierarchy, “[w]hether from overt discrimination or from the socialization process of a male-dominated culture,”<sup>51</sup> litters the United States legal system in instances frequently unrecognized by a law fixated on “sex classifications.”<sup>52</sup> The systemic failure to protect women in their homes from violence by men with whom they are close is a prime example. Discrimination in this form does not look the way the law expects sex classifications, modeled on racial classifications, to look. It has its own shape, often the shape of absence. Absent are laws that address these crimes of misogyny as they actually happen. Ab-

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51. *Kahn v. Shevin*, 416 U.S. 351, 353 (1974).

52. The constitutional sex equality doctrine addresses sex classifications virtually exclusively in *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Craig v. Boren*, 429 U.S. 190 (1976).

sent is enforcement of laws that do exist that might help. Absent are legal standards that find any of these absences illegal. Absence of accountability for violence against women is so reliable it has become the presence of impunity. As one instance, faced with the need to establish a liability standard for schools for sexual harassment under Title IX, the Supreme Court adopted the due process test of “deliberate indifference,”<sup>53</sup> which is not only low, and has not only virtually eliminated institutional liability for sexual harassment in education, but has nothing to do with equality and everything to do with procedural due process: how the institution proceeds, not what it does. It says it all about the vacuity of equal protection, its failure to grasp the substance of gender inequality, that *Town of Castle Rock v. Gonzales*<sup>54</sup>—a situation of domestic violence in which a father murdered his three daughters, violating a “mandatory” order of protection even to have them with him, despite their mother’s allegedly numerous frantic calls to the unresponsive police—was, no doubt for strategic reasons, brought as a due process property case.<sup>55</sup>

The contrast between formal and substantive equality as standards can be further illustrated by considering the law of prostitution. To decide whether prostitution law is sex discriminatory, formal equality asks whether it treats men and women the same.<sup>56</sup> Typically, on the level of prostituted people, it does, because whoever is being sold as sex is treated according to the female standard without regard to sex, like whoever begs for bread under bridges is treated the same. The nose-counting disparate impact test would show a dramatic disparity in numbers, though, given that many more women are sold for sex. This indicates something. But it would not be dispositive of inequality in the standard approach, which looks for in-

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53. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 292–93 (1998); *see also* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

54. 545 U.S. 748, 751–55 (2005).

55. Jessica Gonzales, the mother, complained to the Inter-American Commission on Human Rights of the Organization of American States under the American Declaration on the Rights and Duties of Man, of “a widespread, systemic, and longstanding practice of treating domestic violence as a less serious crime than other crimes and marginalizing domestic violence victims on the basis of their gender.” Final Observations Regarding the Merits of the Case at 149, *Gonzales v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011), *available at* <http://www.cidh.oas.org/casos/11.eng.htm>.

56. *See* *People v. Hartway*, 562 P.2d 1315, 1319–20 (Cal. 1977); *State v. Jordan* 2002 (6) SA 642 (CC) at para. 73 (S. Afr.) (O’Regan, J. and Sachs, J., dissenting), *available at* <http://www.saflii.org/za/cases/ZACC/2002/22.pdf>.

tent, or necessarily in the substantive approach either, which looks for pre-existing hierarchy. In the mainstream approach, the fact that most pimps are men would legally be treated the same as the fact that most prostituted people are women, the gendered hierarchy between the two being invisible and irrelevant, the symmetrical facts even providing evidence of lack of sex discrimination in the law.

Within the conventional formal framework, prostitution does not pose issues of sex discrimination unless a law is facially sex-based or its application is intentionally invidious. From a substantive perspective, the social institution of prostitution—selling people for sex—is a gendered activity that is fundamental to male dominance. It treats people, most of whom are women, all of whom are feminized, as objects for sexual use, making them into social inferiors, stigmatizing them as human dirt, while the laws against pimping are largely unenforced and the laws against buying, an activity usually engaged in by men, always masculine, are largely nonexistent. The absence of effective laws and law enforcement against those who, in substance, exploit people in prostitution is substantive sex discrimination, as is the typical law enforcement pattern of criminalizing prostituted people. A substantive sex equality approach, accordingly, would decriminalize people sold in prostitution and strongly criminalize those who buy and sell them.<sup>57</sup> Almost all those who would be prosecuted under such a scheme, as with rape laws, would predictably be men, either as sellers or buyers of others, a substantively male dominant behavior. Anyone bought or sold for sex would not be prosecuted, due to being substantively in a female/subordinate position, regardless of their sex.

If equality was substantively understood in the United States, the recent Third Circuit case of *Reedy v. Evanson*<sup>58</sup> would be such a case. The plaintiff, Sara Reedy, was raped by a robber of the convenience store where she worked.<sup>59</sup> Shortly after reporting the rape, she was arrested by Detective Frank Evanson for allegedly robbing her employer and falsely reporting the rape to cover it up.<sup>60</sup> After the perpetrator later admit-

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57. For further analysis of the Swedish model, predicated on this analysis, see Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 301–04 (2011).

58. 615 F.3d 197 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1571 (2011).

59. *Id.* at 202.

60. *Id.*

ted both her rape and the robbery, subsequent to being arrested for a similar crime in the vicinity, Reedy sued Evanson for a range of violations, not including sex discrimination,<sup>61</sup> despite the misogyny written all over his attitudes and behavior. The amicus brief for Reedy by many groups,<sup>62</sup> had it been a legal argument rather than a policy brief, could have marshaled its strong evidence and cogent analysis to argue that Evanson used his official position to deprive Reedy of equal protection of the laws on the basis of her sex by disbelieving her report of rape, following standard rape myths typical of rape-prone societies, and falsely accusing her of theft because she was a woman accusing a man of sexual assault. She neither received the protection of the law of rape as a shield nor was she protected from the false prosecution that used state power against her as a sword. These are among the reasons that most rapes are not reported. As it was, she won primarily on her claim that analyzing her blood, drawn for the rape kit not the other purpose for which it was also used, violated her expectation, hence right, of privacy.<sup>63</sup> The only mention of equality in the brief is in some of the groups' descriptions of their missions.<sup>64</sup>

If much of the most vicious substance of sex inequality, taken on its own terms rather than calling it anything else or pursuing it by analogy to something else, has gone missing in U.S. law—even if no authority has denied that violence against women is sex discriminatory, and the U.S. Congress once adopted this theory<sup>65</sup>—the international order has found it. Over the last two decades or so, attention to crimes committed against women in peace and war under international humanitarian and criminal law principles has combined with muscular pursuit of violence against women as a violation of human rights to produce the converged concept of “gender crime.” In a dual motion, United Nations treaty bodies and regional legal

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61. *Id.*

62. Brief Amici Curiae of Thirty-Nine Organizations Dedicated to Improving the Criminal Justice System's Response to Violence Against Women in Support of Appellant and Requesting Reversal, *Reedy*, 615 F.3d 197 (No. 09-2210) [hereinafter Brief of Amici Curiae].

63. *Reedy*, 615 F.3d at 230.

64. Brief of Amici Curiae, *supra* note 62, at 26, 28–30, 36–37.

65. See, e.g., H.R. REP. NO. 103-711, at 152 (1994) (Conf. Rep.); S. REP. NO. 102-197, at 42 (1991). The case that invalidated the civil remedy afforded by the Violence Against Women Act (VAWA) did so for impermissible use of the federal legislative power—wrongly in my view—but did not question that violence against women may be properly cognized as sex discrimination. *United States v. Morrison*, 529 U.S. 598, 617–20 (2000).



systems, with governments as defendants, began to recognize violence against women as gender-based and sex discriminatory when tolerated, although the acts were crimes, at the same time international criminal justice entities came to see prosecuting individual perpetrators of the same crimes as a tool for protecting the human rights of their victims.

In the largest single step in this direction, the CEDAW Committee in 1992 interpreted the prohibition on discrimination against women in the Convention on the Elimination of All Forms of Discrimination against Women to include “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>66</sup> Over the following decade, international criminal prosecutions came to be seen as an instrument for vindicating human rights on the basis of gender. The Rome Statute of the International Criminal Court represents the apex articulation of the concept to date, recognizing gender crimes as crimes against humanity, war crimes, and acts of genocide.<sup>67</sup> The Latin American regional system, under the most substantive hu-

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66. Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th sess, Jan. 20–30, 1992, ¶ 6, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993); *see also* Rep. of the Comm. on the Elimination of Discrimination Against Women, 32d–33d sess, Jan. 10–28, 2005, July 5–22, 2005, at 80–92, U.N. Doc. A/60/38; GAOR, 60th Sess., Supp. No. 38, Annex III (2005) (finding Hungary responsible for sex-discriminatory treatment of battered woman under Optional Protocol). CEDAW’s original approach, if broad-gauged socially, economically, and culturally, was largely formal and conventional so far as equality itself was concerned and did not include violence against women.

67. *See* Rome Statute of the International Criminal Court, art. 7, ¶ 1(g), July 17, 1998, 2187 U.N.T.S. 3 (defining “crime against humanity” to include “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”); *id.* art. 7, ¶ 1(h) (recognizing persecution based on gender as a “crime against humanity”); *id.* art. 8, ¶ 2(b)(xxii) (defining “war crimes” perpetrated during international armed conflicts to include “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”); *id.* art. 8, ¶ 2(e)(vi) (extending definition to encompass non-international armed conflicts); *id.* art. 6(b) (defining “genocide” to include “[c]ausing serious bodily or mental harm to members of [a] group,” which has been interpreted to apply to sexual atrocities in genocides). Almost all the first cases prosecuted include gender crimes in some form. *See, e.g.,* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 339–54 (Sept. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

man rights convention in the world on the subject,<sup>68</sup> requires that member states reduce domestic violence and stop condoning it, including through effective police and judicial action.<sup>69</sup>

In its most instructive and farthest-reaching decision in the area, the European Court of Human Rights found Turkey substantively responsible for the murder of a woman by her daughter's husband, whose violence and threats had been repeatedly reported to them, under the European Convention on Human Rights,<sup>70</sup> violating the complainants' rights to equal protection of the laws on the basis of sex. "Bearing in mind its finding [that] . . . discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women," the Court said, "the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women."<sup>71</sup> Moreover, the "overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors . . . indicated that there was insufficient commitment to take appropriate action to address domestic violence."<sup>72</sup> The view that discrimination need not be intentional to be discriminatory was essential to this finding both as a practical matter and (on present moral terrain) perhaps as a face-saving mechanism for men holding other men accountable for what still other men do to women. The same virtually routine collaboration of law enforcement with batterers continues in the United States into the present in "a lengthy and tragic history" that the *Bakke* plurality said gender under law was not perceived to have.<sup>73</sup>

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68. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, available at <http://www.oas.org/juridico/english/treaties/a-61.html>.

69. See *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01 (2001), available at <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>.

70. *Opuz v. Turkey*, App. No. 33401/02 ¶ 153 (Eur. Ct. H.R. June 9, 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33401/02&sessionId=81975731&skin=hudoc-en>.

71. *Id.* ¶ 200. Europe is embarking on further advances in this area. See, e.g., Eur. Consult. Ass., *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, 121st Sess. (2011), available at <http://conventions.coe.int/Treaty/EN/Treaties/HTML/DomesticViolence.htm>.

72. *Opuz*, 2009 Eur. Ct. H.R., ¶ 200.

73. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978) (Powell, J., plurality opinion).

Aside from certain features of the existing U.S. constitutional approach that palpably fall short by a substantive sex equality measure—in this pantheon, the intent requirement<sup>74</sup> and the scope of the federal legislative power<sup>75</sup> stand out—case after case decided under doctrines wholly other than sex equality have gendered dimensions at their core that pass completely unnoticed to women’s systematic detriment. The recent line of cases on the Confrontation Clause provides an example.<sup>76</sup> These cases tacitly presume that the people confronted in court are the social equals of the people who confront them, as if no extrinsic social power systematically situates one over the other. Many of the Confrontation Clause cases involve domestic battering, one of the most common crimes in the United States,<sup>77</sup> with women the most frequent victim of men with

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74. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979).

75. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating the Violence Against Women Act, which provided a federal civil remedy for the victims of gender-motivated violence, as exceeding Congress’s legislative power). *But cf.* *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (permitting Family and Medical Leave Act as federal prophylactic legislation against sex discrimination at the work-family interface).

76. These cases are discussed subsequently, see *infra* text accompanying notes 82–85, 89–90.

77. The FBI Uniform Crime Reports 2010 lists aggravated assault as the most common violent crime in the United States, likely to be committed every 40.5 seconds. *Uniform Crime Reports: National Data*, THE FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offenses-known-to-law-enforcement/standard-links/national-data> (last visited Nov. 3, 2011); see also JULIE L. GERBERDING ET AL., DEP’T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 1–2 (2003), available at [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/ipvbook-final-feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/ipvbook-final-feb18.pdf); NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, UNDERSTANDING INTIMATE PARTNER VIOLENCE: FACT SHEET (2011) (applying PATRICA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (providing findings from the National Violence Against Women Survey)), available at [http://www.cdc.gov/violenceprevention/pdf/ipv\\_factsheet-a.pdf](http://www.cdc.gov/violenceprevention/pdf/ipv_factsheet-a.pdf) (stating that each year women experience about 4.8 million intimate partner related physical assaults); JENNIFER L. TRUMAN, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION 2010 at 9–10 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf> (indicating intimate partner violence makes up 22% of violent crimes committed against women); Antonia C. Novello et al., *From the Surgeon General, US Public Health Service*, J. AM. MED. ASS’N 3132, 3132 (1992) (reporting domestic violence the leading cause of injuries to women ages fifteen through forty-four); *Uniform Crime Reports: Expanded Homicide Data Table 10*, THE FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl10.xls>.

whom they are acquainted (often well).<sup>78</sup> Battered women try to avoid testifying against their batterers because of sex inequality: terror for their lives and security and that of their children and animals; fear of loss of economic support in the absence of viable economic options of their own because they are women; depression or PTSD due to long-term gender-based abuse; a well-founded belief that the criminal justice system will not believe them because they are women and will believe him because he is a man. Battering men manipulate and threaten their victims to keep them from testifying against them, including with promises to change. Often these men are the fathers of the women's children; the women want to believe them and frequently continue to love them, a dynamic difficult to separate from the self-annihilation of traumatic bonding. Domestic battering, in other words, is a gender crime, a cornerstone of male dominance as a substantive system. Is it any surprise to learn that between eighty and ninety percent of all women who report being battered in the United States do not cooperate with prosecution?<sup>79</sup> Their abuser has more power in their lives than their government does.

Battered women's relation to the legal system has been extensively studied in a variety of procedural postures. Studies of mediation in divorce tellingly show that, when battering enters the picture, women are in no position to face men as equals in a legal setting, even when formally on the same plane, represented by counsel.<sup>80</sup> For example, we do not know if Crawford battered his wife; we do know that she saw him kill a man said to have raped her, after which she hid behind spousal immunity to avoid testifying against him<sup>81</sup>—perhaps out of loyalty, perhaps out of fear. Her testimony was found inadmissible as testimonial hearsay, since he could not confront her in court.<sup>82</sup>

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78. That intimate relationships are gendered regardless of sex only expands the point.

79. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 281 n.70 (2006) (citing *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004)); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996)).

80. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 516 (1992).

81. See *Crawford v. Washington*, 541 U.S. 36, 39–40, 68 (2004).

82. *Id.*

The Supreme Court cases that followed *Crawford* involved domestic violence expressly. In *Davis*, a woman's 911 call was found non-testimonial hearsay, hence admissible.<sup>83</sup> In its companion case, *Hammon*, the woman's affidavit was taken by police within minutes of reporting her husband's battering, as he was being occupied by another police officer in the next room.<sup>84</sup> Her affidavit was considered testimonial rather than addressing an ongoing emergency. The battered woman who has (usually temporarily) escaped from a gun at home is less likely to be able to present her reality to a court without risking her life further because her statements will be less construable as part of an ongoing emergency. The extent to which the life of a battered woman is something of an ongoing emergency—it was through taking the affidavit in question that the officer learned Herschel Hammon had just then stopped assaulting Amy<sup>85</sup>—was not seen.

It is when taking decisive and powerful steps against their batterers, which testifying in court certainly represents, that battered women's lives become most unsafe.<sup>86</sup> The whole point of "evidence-based prosecution" has been to keep batterers from getting off the hook by further manipulating and coercing their victims.<sup>87</sup> Lininger is rightly apprehensive that the requirement of live testimony by accusers produced by the *Crawford* line "may tempt defendants to intimidate or even kill their victims before trial because the unavailability of the victim may foreclose any possibility of prosecution."<sup>88</sup> Amici pointed this

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83. *Davis v. Washington*, 547 U.S. 813, 828 (2006).

84. *Id.* at 819–20.

85. See Brief for the United States as Amicus Curiae Supporting Respondent at 15, *Davis*, 547 U.S. 813 (2006) (No. 05-5705) (discussing the facts of *Hammon v. Indiana*, which was consolidated with *Davis* at the Supreme Court). This brief rightly sees *Hammon* as emergency questioning.

86. See JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 84–85 (1999) (discussing danger of batterer retaliation in response to victims' attempts to secure legal protection); Lenore E.A. Walker et al., *Risk Assessment and Lethal Potential*, in THE BATTERED WOMAN SYNDROME 107, 107–08 (3d ed. 2009) (pointing to general consensus that battered women are most vulnerable to retaliation "from the point of separation to about two years afterwards").

87. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751–52 (2005). The National Network to End Domestic Violence and others documented this response and the need for it well without making the equality argument. See Brief of Amici Curiae the National Network to End Domestic Violence et al. in Support of Respondents at 14–15, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224) [hereinafter *Davis Amici Brief*].

88. Lininger, *supra* note 79, at 284–85.

out to the Court with no sex equality analysis.<sup>89</sup> Forfeiture of the right of confrontation when the defendant makes the declarant unavailable could help the prosecution but may prove impossible to use if the same sex inequalities preclude access to the evidence needed to establish it.

Gendered realities could be incorporated into constitutional assessments through myriad technical routes if the substantive regularities of gender inequality were visible and regarded as relevant, resulting in women being full citizens. In the absence of an explicit sex equality guarantee, in the vacuum of women's voices and concerns in constitutional history, *Crawford* relies upon common law and the views of the framers from a period when women were tantamount to chattel and were permitted no public voice.<sup>90</sup> This latest interpretation of the Confrontation Clause, with predictably disastrous implications for security and justice for battered women, even has a disproportionate impact on women in a fairly conventional sense: neutral on its face but systematically disadvantaging one sex, in this case the sex that is disempowered through the acts for which the State is seeking criminal redress, against a backdrop of centuries of neglect. It is women, battered by male intimates in dramatically differential numbers,<sup>91</sup> who, based on gender, are not effectively protected by state laws that effectively exempt from legal

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89. See Davis Amici Brief, *supra* note 87, at 19–20; Brief for the United States as Amicus Curiae at 19 n.10, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

90. See Davis Amici Brief, *supra* note 87, at 7–9 (arguing the legal system has historically failed to substantively address domestic violence). The ACLU, purporting to take both sides of the case seriously, sided with the defendant in both *Davis* and *Hammon*. See Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners at 5, *Davis*, 547 U.S. 813 (2006) (No. 05-5224) (arguing “[a] strategy to address domestic violence cannot be premised on an end run around the Constitution”).

91. According to the Bureau of Justice Statistics, approximately eighty-five percent of victims of intimate partner violence in 2001 were female. CALIE MARIE RENNISON, INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>. Similarly, the Senate Judiciary Committee reported that women were six times as likely as men to be victims of intimate partner violence. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 2 (Comm. Print 1992); see also WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 93 (Etienne G. Krug et al. eds., 2002), available at [http://whqlibdoc.who.int/publications/2002/9241545615\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf) (“Studies from Australia, Canada, Israel, South Africa and the United States of America show that 40–70% of female murder victims were killed by their husbands or boyfriends, frequently in the context of an ongoing abusive relationship . . .”).

accountability those who exercise violent power over them. Legal questions arising because of the unequal status of women, a matter few were thinking about at the founding or even after John Stuart Mill's illuminating analysis of "ill usage" in 1869,<sup>92</sup> are resolved as if women do not exist. But Sir Walter Raleigh still lives in their minds.<sup>93</sup>

The subsequent Supreme Court case of *Michigan v. Bryant* allowed that the emergency may be ongoing because it "extends beyond an initial victim to a potential threat to the responding police and the public . . ." <sup>94</sup> This offers hope for battered women only because (and to the degree) it looks to the danger the batterer poses to people other than her. When the Supreme Court in 1992 found unconstitutional a statute that required wives to notify their husbands of plans to abort because it empowered the husband with a "troubling degree of authority over his wife," this was supported by evidence that many women are assaulted by their male partners, even though the sex inequality was not legally framed as such.<sup>95</sup> In the recent Confrontation Clause cases, instead of preventing the state from lining up behind the battering man, as the *Casey* plurality did, the hand of the batterer is strengthened by the hand of the Court.

If the home is the most dangerous place for women, a usable firearm makes it even more so.<sup>96</sup> Further ignoring battered

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92. JOHN STUART MILL, THE SUBJECTION OF WOMEN 25–26, 59 (Transaction Publishers 2001) (1869). Not having the empirical evidence we have today, he hopefully concluded, "[i]f married life were all that it might be expected to be, looking to the laws alone, society would be a hell upon earth." *Id.* at 60.

93. *Crawford*, 541 U.S. at 44 (2004) (pointing to the injustice resulting from the conviction and execution of Sir Walter Raleigh on the basis of the testimony of a man whom Raleigh was not permitted to confront).

94. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

95. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992) (plurality opinion).

96. Some sources documenting this uncontroversial reality include: Wendy Cukier & James Cairns, *Gender, Attitudes and the Regulation of Small Arms: Implications for Action*, in *SEXED PISTOLS: THE GENDERED IMPACTS OF SMALL ARMS AND LIGHT WEAPONS* 18, 21–24 (Vanessa Farr et al. eds., 2009) (analyzing research on the nexus of gender, violence, and small arms in developing and developed countries); Wendy Cukier, *Global Effects of Small Arms: A Gendered Perspective*, in *IN THE LINE OF FIRE: A GENDER PERSPECTIVE ON SMALL ARMS PROLIFERATION, PEACE BUILDING AND CONFLICT RESOLUTION* 15, 17–18 (Women's Int'l League for Peace and Freedom ed., 2001); Vanessa Farr, *Scared Half to Death: The Gendered Impacts of Prolific Small Arms*, 27 *CONTEMP. SECURITY POL'Y* 45, 51 (2006). See generally *GENDER PERSPECTIVES ON SMALL ARMS AND LIGHT WEAPONS: REGIONAL AND INTERNATIONAL CONCERNS* (Vanessa A. Farr & Kiflemariam Gebre-Wold eds., 2002), available at

women's reality, the Supreme Court recently made the right to bear arms in the home a right recognizable against federal<sup>97</sup> and state<sup>98</sup> regulation. Surely the fact that almost sixty percent of the nearly 650 million small arms that exist in the world are in private hands, most of them male, has implications for women.<sup>99</sup> Data from the United States were used by the Human Rights Council to document the gendered dimensions of the issues raised by small arms for human rights policy on domestic violence.<sup>100</sup> "[F]irearms are used in 59 per cent of all intimate partner homicides of women, and having one or more guns in the home makes a woman 7.2 times more likely to be murdered by an intimate partner."<sup>101</sup> Amici in *Heller* tabled evidence that sixty to seventy percent of women killed by their male partners were murdered with guns, and that guns in the home presented "a constant lethal threat"<sup>102</sup> with terrorizing effects. This information, if powerful, was presented as a policy argument without legal equality dimension.

Belying the self-defense justification that formed the basis for the Supreme Court's decision in *Heller*<sup>103</sup> and *McDonald*,<sup>104</sup>

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[http://seesac.org/sasp2/english/publications/1/Gender/1\\_Gender\\_Perspectives.pdf#page=14](http://seesac.org/sasp2/english/publications/1/Gender/1_Gender_Perspectives.pdf#page=14) (providing comprehensive overview of how local gender ideologies determine attitudes to small arms and underpin social and political practices that make women more vulnerable to violence everywhere).

97. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

98. McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010).

99. AMNESTY INT'L, THE IMPACT OF GUNS ON WOMEN'S LIVES 2 (2005), available at <http://controlarms.org/wordpress/wp-content/uploads/2011/02/The-Impact-of-Guns-on-Womens-Lives.pdf> (examining "the impact on women of guns in the home, in communities and during and after conflict," considering "violence committed with guns against women, the role women play in gun use, and the campaigns women are spearheading against gun violence"); see also *id.* at 10–19 (exploring the impact of guns in the home on domestic violence).

100. Human Rights Council, Sub-Comm'n on Promotion and Prot. of Human Rights, *Specific Human Rights Issues: Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, ¶ 36, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) [hereinafter *Prevention of Human Rights Violations*].

101. *Id.* (citing Nicolas Florquin & Christina Wille, *A Common Tool: Firearms, Violence and Crime*, in SMALL ARMS SURVEY 2004: RIGHTS AT RISK 173, 183 (U.S. Bureau of Justice Statistics ed., 2004); James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES INTERNAL MED. 777 (1997)).

102. Brief of Amici Curiae of National Network to End Domestic Violence et al. in Support of Petitioners at 26, 29, *Heller*, 554 U.S. 570 (2008) (No. 07-290).

103. *Heller*, 554 U.S. at 636.

104. McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010).



the international order recognizes the fact that “research indicates that firearms are rarely used to stop crimes or kill criminals”<sup>105</sup> but “are often turned on the very person who may have the best arguments for self-defense—the woman herself.”<sup>106</sup> In the United States, the “historical reality”<sup>107</sup> of what “every man,” (1811)<sup>108</sup> “able bodied men,”<sup>109</sup> and “all males,” (1939)<sup>110</sup> have perceived and wanted and expected supported a right to possess a firearm in the home, making them “better able to resist tyranny.”<sup>111</sup> That men at the same time became better able to exercise tyranny over women was not noticed by the Court; nor was what half the population might perceive, want, or expect, then or now, or its absence of being perceived. It is remarkable to read of men’s understanding of the common law of bearing arms at the time of the framing of the Constitution as supporting “an individual right protecting against both public and private violence.”<sup>112</sup>

Justice Breyer, dissenting, recognizes women among those “particularly at risk” from gun violence.<sup>113</sup> He understands that the point of the Fourteenth Amendment was primarily to eradicate discrimination rather than to incorporate federal rights

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105. Prevention of Human Rights Violations, *supra* note 100, at ¶ 36, ¶ 36 n.39 (“In 2003 only 203 justifiable homicides by private citizens using firearms were reported by the United States Federal Bureau of Investigation Uniform Crime Reports, including 163 with handguns. This number compares to the 17,108 suicides, 11,829 homicides and 762 accidental deaths caused by firearms in 2003, data compiled by the Centers for Disease Control and Prevention.”). In its most recent assessment, the Centers for Disease Control and Prevention reported 34,235 suicides and 25,423 homicides by firearm among U.S. residents. *Violence-Related Firearm Deaths Among Residents of Metropolitan Areas and Cities—United States, 2006–2007*, 60 MORBIDITY AND MORTALITY WKLY. REP. 573, 573 (2011).

106. Prevention of Human Rights Violations, *supra* note 100, at ¶ 36 (citing K.M. Grassel et al., *Association Between Handgun Purchase and Mortality from Firearm Injury*, 9 INJ. PREVENTION 48, 50 (2003)) (finding women who died from violence were more likely, not less, to have purchased a handgun in the three years preceding death).

107. *Heller*, 554 U.S. at 599.

108. *Id.* at 596 (referencing an 1811 letter from Thomas Jefferson describing the “militia of the State” as including “every man able to bear arms”).

109. *Id.* at 595 (noting Webster defined “militia” as being comprised of “able bodied men”).

110. *Id.* (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

111. *Id.* at 598.

112. *Id.* at 594.

113. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3127 (2010) (Breyer, J., dissenting).

against the states.<sup>114</sup> But the two points never come together in the analysis that precluding discrimination in the Fourteenth Amendment sense requires facing the socially unequal distribution of perpetrators and victims of gun violence on the basis of sex and gender. Justice Stevens even maintains that there is a weaker, not stronger, basis for restricting firearm possession in the home.<sup>115</sup> An approach far better grounded in substantive reality, recognizing gender inequality, is that of the U.N. Security Council, calling for inquiry into “the interplay between armed personal protection and armed power projection” in the gendered context; facing the fact that “[w]omen and girls are often gravely affected by small arms violence, through armed sexual violence, intimidation and coercion;” and finding “[g]ender approaches . . . particularly relevant for targeted policy interventions” in the area.<sup>116</sup>

By contrast, in *Crawford* and *Heller*, Justice Scalia writing for the Court treats the common law at the founding as precisely the “brooding omnipresence in the sky”<sup>117</sup> that Justice Holmes said it was not, as does Justice Alito for the Court in *McDonald*.<sup>118</sup> Claiming to discover the truth of the Second Amendment and the Sixth Amendment, entrenched before women were citizens, certainly before the Fourteenth Amendment installed equal protection of the laws in the Constitution, the Court has made women’s lives quantifiably more dangerous, heightening physical insecurity and legal impunity. In both areas, it was men’s concern over the power of the state that gave rise to the rights in the first place. In both situations, these provisions are now being used to extend men’s power over women with the backing of the state, with no inquiry into their abuse of power and use of coercion in the process. Batterers are legally armed, their victims legally further disarmed, in the silence of the constitutional command that laws protect equally.<sup>119</sup>

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114. *Id.* at 3133.

115. *Id.* at 3105 (Stevens, J., dissenting).

116. U.N. S.C., *Small Arms: Report of the Secretary-General*, ¶ 7, U.N. Doc. S/2008/258 (April 17, 2008).

117. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

118. See *McDonald*, 130 S. Ct. at 3028–29 (Kennedy, J.) (relying on original intent to interpret the Bill of Rights); *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) (Scalia, J.) (arguing the Second Amendment codified a “pre-existing right”); *Crawford v. Washington*, 541 U.S. 36, 46–56 (2004) (Scalia, J.) (using historical documentation of original intent to analyze the scope of the Confrontation Clause).

119. Perhaps the fact that the avatars of federalism are also here riding roughshod over state laws consciously framed to assist prosecution of batter-

However doctrinally achieved,<sup>120</sup> cognizance of the substance of gender could not leave these cases untouched. Certainly the ratification of the Convention on the Elimination of All Forms of Discrimination against Women, a substantive treaty, would improve the climate as well as the legal foundation for sex equality cases, as could an Equal Rights Amendment. But so too would incorporating substantive reality into the Fourteenth Amendment's guarantee of equal protection of the laws.<sup>121</sup> Substantive equality principles, rather than requiring that reality fit existing legal equality interpretation, could transform inequality by recognizing substance—the reality of inequality—as what it is.

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ers deserves a footnote. The attorneys general of thirty-eight states reveal, should more evidence be needed, that federalism is an ideological convenience. See Brief of the States of Texas et al. as Amici Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521) (arguing that the Second Amendment prevents state and local governments from certain kinds of gun control legislation).

120. Specific doctrinal solutions or proposals would have to be specific to the substance and legal context of each problem; as such they are beyond the scope of this paper.

121. More women judges may help. In cases claiming sex discrimination, women's presence on appellate panels has been documented to make a difference for sex discrimination plaintiffs in federal cases. See Christine L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010).