NOTE

AKIN TO MADMEN: A QUEER CRITIQUE OF THE GAY RIGHTS CASES

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Cases such as Lawrence v. Texas *and* Obergefell v. Hodges *are the result of LGBTQ advocacy that has grown and developed at a stunning rate since its inception just over a century ago. As recently as the nineteenth century, our culture had no conception of sexual orientation as a facet of one's identity. Now, sexual orientation serves as the core of a movement that uses it as a tool for advocacy. The prevailing approach has been to emphasize commonality with straight people, by associating LGBTQ people with values like monogamy, romance, respectability, and more. This strategy has led to a succession of LGBTQ legal victories in the last two decades. Unfortunately, those victories have sometimes reflected a narrow idea of what it means to be LGBTQ, premised on the values pushed by assimilationist advocates. This Note argues that the reliance on these values to justify extending rights to LGBTQ people runs the risk of making it more difficult to extend protection in areas where these values are absent.*

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INTRODUCTION

When same-sex marriage became legal nationwide in the United States in 2015 following *Obergefell v. Hodges*,[1] many lesbian, gay, bisexual, transgender, and queer or questioning ("LGBTQ") activists feared that the public would wrongly perceive the development as "the end" of gay rights advocacy—that there was nothing more to accomplish.[2] After the 2016 presidential election, LGBTQ activists are worried for a different reason: that that "end" might be unwound, and their victories rolled back.[3] This Note, however, presents a distinct, equally unsettling hypothesis: the landmark gay-rights cases—while still major victories of which the LGBTQ community should be proud—had minor but important flaws that continue to imperil progress for the community.

Cases such as *Lawrence v. Texas*[4] and *Obergefell* are the result of LGBTQ advocacy that has grown and developed a shocking amount since its inception just over a century ago. As recently as the nineteenth

[1] 135 S. Ct. 2584, 2602–03 (2015).

[2] Hailey Branson-Potts, LGBT Activists Say the Fight Doesn't End At Marriage, L.A. Times (July 12, 2015), http://www.latimes.com/local/california/la-me-lgbt-activism-20150712-story.html [[https://perma.cc/865C-5TV3]].

[3] Liam Stack, Trump Victory Alarms Gay and Transgender Groups, N.Y. Times (Nov. 10, 2016), http://www.nytimes.com/2016/11/11/us/politics/trump-victory-alarms-gay-and-transgender-groups.html?_r=0.

[4] 539 U.S. 558 (2003).

century, our culture had no conception of sexual orientation as a facet of one's identity. Now, sexual orientation serves as the core of a movement that uses it as a tool for advocacy. While there have been and continue to be debates within the LGBTQ community over goals, tactics, and strategy, the prevailing approach has been to emphasize commonality with straight people by associating LGBTQ people with values like monogamy, romance, respectability, and more. The strategy worked: there have been a succession of LGBTQ legal victories in the last two decades. Unfortunately, those victories have sometimes reflected a narrow idea of what it means to be LGBTQ, premised on the values pushed by assimilationist advocates. This Note argues that the reliance on these values to justify extending rights to LGBTQ people runs the risk of making it more difficult to extend protection in areas where these values are absent.

Queer[5] criticism of the gay rights cases is not new.[6] Many prior articles focused on only one of the major gay rights cases or on the implications of multiple cases for one particular issue (i.e. public sex, nonmarriage, polyamory, etc.). The criticism of *Lawrence*, one of the first major Supreme Court victories for the LGBTQ community, tended to be broader, forward-looking, and focused on the movement as a whole. *Obergefell* and *United States v. Windsor*[7] generated a more measured response, one concerned with specific issues the cases did not address rather than the LGBTQ movement broadly. This Note collects and synthesizes queer criticism of *Lawrence*, *Windsor*, and *Obergefell*, and identifies multiple ways in which potential LGBTQ rights claims are endangered by the vulnerabilities in these decisions.

[5] Queer is an "umbrella term for sexual and gender minorities who are not heterosexual and/or not cisgender," which is sometimes used by those who "seek a broader and deliberately ambiguous alternative to the label LGBT." Queer, Wikipedia, https://en.wikipedia.org/wiki/Queer (last visited Mar. 4, 2018). Though the word is sometimes used offensively, id., this Note uses it as an in-group term to identify a particular collection of thinkers and advocates. The meaning and history of the term is discussed in further depth in Part I.

[6] See, e.g., Hadar Aviram & Gwendolyn M. Leachman, The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle, 38 Harv. J.L. & Gender 269, 269 (2015); Melissa Murray, *Obergefell v. Hodges* and Nonmarriage Inequality, 104 Cal. L. Rev. 1207, 1208 (2016); Laura A. Rosenbury & Jennifer E. Rothman, Sex in and out of Intimacy, 59 Emory L.J. 809, 809–11 (2010); Teemu Ruskola, Gay Rights Versus Queer Theory: What Is Left of Sodomy After *Lawrence v. Texas*?, 23 Soc. Text 235, 237 (2005).

[7] 133 S. Ct. 2675 (2013).

I am conscious of the perils of probing these cases' shortcomings at a time when the LGBTQ community is understandably apprehensive about losing this hard-won progress. For those who have been left behind by these decisions, however, acquiescing is not good enough.

Part I recounts the history of sexuality and the development of competing schools of thought within the community of LGBTQ advocates. Part II analyzes recent legal victories and draws out the decisions' reliance on values espoused by the assimilationist school. Part III explores how the reliance on these values could negatively affect future legal battles. Part IV looks to other elements of the gay rights cases that provide a different, more inclusive reading.

I. A HISTORY OF SEXUALITIES

The history of LGBTQ identity and activism is complicated, and has been recounted elsewhere by far more expert scholars at greater length.[8] The goal of this brief narrative, painting with a very broad brush, is to give an overview of that history for a specific purpose: to locate (at least) two different schools of thought that can serve as lenses for how to analyze the legal progress the LGBTQ community has made in the last few decades.

To modern readers, it may seem obvious that people seek out certain sex acts and partners because of their sexuality. But for much of history, those acts stood alone, signifying nothing innate about those who engaged in them.[9] It was not until the late nineteenth century that the concept emerged of a *homosexual*: the person who has engaged in the activity because the desire to do so is a part of their identity.[10] The word

[8] See generally Michel Foucault, The History of Sexuality (Robert Hurley trans., Vintage Books 1990) (1978) (tracing conceptions of sexuality through time); Annamarie Jagose, Queer Theory: An Introduction (1996) (providing an explanation and history of queer theory and advocating for a reconsideration of traditional notions of sexuality and gender); Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, *in* Pleasure and Danger: Exploring Female Sexuality 267 (Carole S. Vance ed., 1984) (arguing that sex is inherently political and calling for an upheaval of the current sexual hierarchy); Eve Kosofsky Sedgwick, Epistemology of the Closet (1990) (arguing that the homo/heterosexual distinction is oversimplified and its contours and subtleties should be illuminated).

[9] Brief of Professors of History, George Chauncey et. al. as Amici Curiae in Support of Petitioners at 10, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02–102) [hereinafter Brief of Professors of History] ("Over the generations, sodomy legislation . . . regulated *conduct* in which *anyone* (or, at certain times and in certain places, any male person) could engage.").

[10] Id. at 10–11 ("The sodomite had been a temporary aberration; the homosexual was now a species.") (quoting Foucault, supra note 8, at 43).

"homosexual" appeared for the first time in 1868,[11] and is thought to predate the word "heterosexual"[12]—possibly because only by identifying the "deviation" did anyone think to give name to the "normal."

Emerging understanding of sexuality as an identity was initially used to single out LGBTQ individuals for persecution. Anti-gay actors were alarmed both by what was perceived as homosexuality's exacerbation of the unraveling of traditional gender roles at the turn of the twentieth century,[13] and by "the growing size and complexity of cities [loosening] the constraints on sexual conduct."[14] Sodomy prosecutions increased alongside a "general escalation in the policing of sexual activity, which also included stepped-up campaigns against prostitution, venereal disease, and contraception use,"[15] as well as "masturbation, especially among the young, . . . obscene literature, nude paintings, music halls, . . . and public dancing."[16] Persecution prompted defensive cohesion, hastening the understanding of queerness as something akin to a religious or racial minority.[17] This community cohesion in turn further exacerbated both persecution and the beginnings of resistance. Gays and lesbians, "who would have been vulnerable and isolated in most pre-industrial villages, began to congregate in small corners of the big cities . . . . Areas like these acquired bad reputations, which alerted other interested individuals of their existence and location."[18] LGBTQ people found themselves anchored to one another—by their friends, by their partners, for their very safety, and now too by their newly minted *identity*.

The earliest pro-LGBTQ advocacy, known as the homophile movement,[19] developed in tandem with the recognition of sexuality as a facet of identity.[20] The most well-known members of this movement were the Mattachine Society, a loosely structured, quasi-secret society established in Los Angeles in 1951 and largely focused on issues affecting gay men, and the Daughters of Bilitis, a lesbian political group

[11] Id. at 11.
[12] Sedgwick, supra note 8, at 2.
[13] Brief of Professors of History, supra note 9, at 12.
[14] Id. at 8–9.
[15] Id. at 9.
[16] Rubin, supra note 8, at 268.
[17] Id. at 287.
[18] Id. at 286.
[19] Nikki Sullivan, A Critical Introduction to Queer Theory 22 (2003).
[20] Jagose, supra note 8, at 22.

founded in 1955 partly in response to the exclusion of lesbian issues by groups like the Mattachine Society.[21] These groups predominantly aimed "to be accepted into, and to become one with, mainstream culture."[22] Their tactics were to argue that "homosexuals are 'just like everybody else,'"[23] appealing to a "belief in a common humanity to which both homosexuals and heterosexuals belong."[24] Their advocacy took the form of educational programs and political reform aimed at increasing tolerance and, in some cases, decriminalization.[25] Underpinning their arguments was the assumption that homosexuality had to be made "acceptable to mainstream society,"[26] an assumption that made "differences invisible, or at least secondary."[27] Homophile groups sought gradual change and presented themselves as "model citizens, as respectable as heterosexuals, and no more likely to disturb the status quo."[28]

Over time, dissatisfaction grew with the goals and tactics of homophile groups.[29] For the most part, these groups consisted of "white, middle-class, 'well-educated' gays and lesbians"[30] who "publicly dissociated themselves from anyone who transgressed received notions of gender propriety, such as drag queens or even butch women,"[31] and even those "who frequented 'gay bars' and whose lifestyles were regarded as simply too radical or flagrantly confrontational."[32] As the 1960s drew to a close, LGBTQ activists felt increasingly betrayed by the apologetic stance of the homophile movement, whose rallying cries ("that's just the way I am") could sometimes sound like pleas ("I'd be straight if I could").[33] It is worth remembering that the homophile

[21] Id. at 24–26; see also Sullivan, supra note 19, at 22.
[22] Sullivan, supra note 19, at 23.
[23] Id. at 24.
[24] Id. at 23. Some have called this tactic "the Shylock argument, the assertion that a homosexual is . . . 'a creature who bleeds when he is cut, and who must breathe oxygen in order to live.'" Daniel Harris, The Rise and Fall of Gay Culture 240–41 (1997) (quoting Ward Summer, On the Bisexuality of Man, 1 Mattachine Rev. 16, 16 (1955)).
[25] Jagose, supra note 8, at 22.
[26] Id. at 31.
[27] Sullivan, supra note 19, at 23.
[28] Jagose, supra note 8, at 30–31.
[29] Id. at 30; Sullivan, supra note 19, at 25.
[30] Sullivan, supra note 19, at 25.
[31] Jagose, supra note 8, at 27.
[32] Sullivan, supra note 19, at 25.
[33] Cathy J. Cohen, Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?, 3 GLQ 437, 445 (1997) ("Assimilation is killing us. We are falling into a

groups' seeming conservatism was largely shaped by "the historically, culturally, and politically specific context in which they found themselves,"[34] and that ultimately it was "impossible . . . for the homophile movement to succeed in 'appearing respectable to a society that defined homosexuality as beyond respectability.'"[35]

Eventually, however, the homophile movement gave way to a new form of LGBTQ activism known as the gay liberation movement.[36] The inciting moment for this shift is commonly thought to be the Stonewall riots,[37] a weekend of riots in June 1969 prompted by the police raid of a Greenwich Village gay and drag bar called the Stonewall Inn.[38] Stonewall provided a "fortuitous and dramatic illustration of a break with homophile politics," embodying many of the founding tenets of the gay liberation movement: the riots occurred "at a cultural site . . . that was both disreputable and an index of a nascent gay culture;" they "articulated notions of self-determination;" and they "were [a] militant . . . expression of political disquiet."[39]

The gay liberationist movement rejected the homophile groups' goal of assimilation and their tendency to "measur[e] our relationships by straight values,"[40] seeking far more than mere tolerance.[41] It was

trap." (quoting Queers United Against Straight-acting Homosexuals, Assimilation is Killing Us: Fight for a Queer United Front, Why I Hated the March on Washington 4 (1993))). Some homophile organizations "even represented homosexuals as abnormal, arguing that since homosexuality is a congenital condition, they deserved pity rather than persecution." Jagose, supra note 8, at 27.

[34] Sullivan, supra note 19, at 24; see also Jagose, supra note 8, at 29 (hedging criticisms of the homophile movement by noting its historical context).

[35] Jagose, supra note 8, at 29 (quoting John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940–1970 125 (1983)).

[36] Sullivan, supra note 19, at 26; Jagose, supra note 8, at 30–31.

[37] Sullivan, supra note 19, at 26.

[38] Jagose, supra note 8, at 30–31 ("Commentators have described Stonewall dramatically as 'the shot heard round the homosexual world' or more campily in the New York Mattachine newsletter as 'The Hairpin Drop Heard Round the World.'" (quoting Margaret Cruikshank, The Gay and Lesbian Liberation Movement 69 (1992) and D'Emilio, supra note 35, at 232, respectively)). The date of the riot is why modern-day Pride rallies, especially in the U.S., are held in June. Gay pride, https://en.wikipedia.org/wiki/Gay_pride#LGBT_Pride_Month (last visited Mar. 4, 2018).

[39] Jagose, supra note 8, at 31.

[40] Barry D. Adam, The Rise of a Gay and Lesbian Movement 75 (1987) (quoting Carl Wittman, A Gay Manifesto, *in* Out of the Closets: Voices of Gay Liberation 330, 334 (Karla Jay and Allen Young eds., 1972)).

[41] Jagose, supra note 8, at 40.

centered on "a distinctly gay identity," one that deserved its own attention and its own institutions,[42] and that "scandalised [sic] society with [its] difference rather than wooing it with claims of sameness."[43] The movement developed throughout the 1960s and 1970s alongside a range of other "radical political movements" including the anti-war movement, the black power movement, and the women's liberation movement.[44] Though it was organized "primarily around gay identity and gay pride," it initially welcomed "other sexually marginal identities like bisexuals, drag queens, transvestites and transsexuals."[45] And it took on breathtakingly broad goals for itself, because it "saw gay liberation as possible only in the context of . . . a much broader sexual liberation."[46]

Yet there was a tension in the gay liberation movement that would eventually cause it to splinter—a tension between its broad liberationist goals and the appeal of having a distinct, LGBTQ identity.[47] This new sense of identity became problematic to certain parts of the LGBTQ community because it created an incentive to focus resources and attention on "a distinct and identifiable population, rather than a radical potentiality for all."[48] Instead of "radical change to society," the identity model posited a narrower scope of ambition, one where "all that is involved is the granting of civil rights to a new minority."[49] Advocates of the identity model, by contrast, grew "disillusion[ed] with the grand scale of the liberationist project . . . [and] turned their attention increasingly to local sites of struggle and concentrated on securing specific rather than universal transformations of social structures."[50]

This splintering would eventually result in two modern forms of LGBTQ advocacy: gay advocacy and queer advocacy. These ideologies each take some elements from both the homophile and gay liberation movements, and there is no hard and fast rule separating them.

[42] Id. at 31–32.
[43] Id. at 31.
[44] Sullivan, supra note 19, at 29.
[45] Jagose, supra note 8, at 40.
[46] Id. at 41 (quoting Dennis Altman, Homosexual Oppression and Liberation 58 (1971)).
[47] Id. at 62.
[48] Id. at 61.
[49] Dennis Altman, The Homosexualization of America, The Americanization of the Homosexual 211 (1982).
[50] Jagose, supra note 8, at 60.

Gay rights advocacy, an offshoot of the identity model, "demand[s] recognition and equal rights within the existing social system."[51] This approach defines the community in specific terms, associating LGBTQ people with qualities that straight people admire: monogamous, stable, upper-middle-class, traditional, etc.[52] These advocates emphasize commonality between themselves and straight people, and between their values and straight or mainstream values.[53] Gay rights advocates have less politically threatening requests than queer advocates; for instance, they "did not want to change marriage, they simply wanted access to it."[54] This necessarily means that gay rights advocates seek equality on terms set by the straight community, with goals that are merely what straight people already have: marriage, the right to adopt, the ability to serve openly in the military, etc.[55]

In contrast, queer advocacy[56] retains the gay liberation movement's desire for wholesale sexual revolution. While it is difficult to define queer advocacy with precision, "indeterminacy being one of its widely promoted charms,"[57] these advocates typically criticize the existing social system and the sex and gender constructs it imposes.[58] Queer advocates challenge the notion of gender or sexual orientation as

[51] Id. at 61.

[52] Jonathan Kemp, Queer Past, Queer Present, Queer Future, 6 Graduate J. Soc. Sci. 3, 8 (2009).

[53] Id.

[54] Clare Huntington, *Obergefell*'s Conservatism: Reifying Familial Fronts, 84 Fordham L. Rev. 23, 25 (2015).

[55] Libby Adler, The Gay Agenda, 16 Mich. J. Gender & L. 147, 165–72 (2009); Kemp, supra note 52, at 8.

[56] See, e.g., Libby Adler, The Future of Sodomy, 32 Fordham Urb. L.J. 197, 199 (2005) (aligning herself with "queer" writers, who she also describes as "feminist" or "pro-sex"); Rosenbury & Rothman, supra note 6, at 821–22 (identifying their goal, for "the law [to] respect more diverse conceptions of sex and intimacy," as aligned with queer theory rather than more traditional thinking on sex and gender); Ruskola, supra note 6 (criticizing *Lawrence* from a queer theorist perspective). Importantly, while the term "queer" is "often used as if it were equivalent to 'gay/lesbian', though with a hipper, more radical edge," it can also convey less "a category of identity . . . [and] more a set of cultural-political positions," discussed infra text accompanying notes 57–68. Deborah Cameron & Don Kulick, Language and Sexuality 28 (2003).

[57] Jagose, supra note 8, at 3. For this reason, the term is also seen as embracing a wider number of people, such as those "who might or might not identify as lesbian or gay, but who challenge heteronormativity in other ways . . . [and even] people who claim to have no sexual orientation, precisely because that claim challenges the logic of currently orthodox understandings of sexuality." Cameron & Kulick, supra note 56, at 28.

[58] Kemp, supra note 52, at 8 (explaining that while gay rights advocates wanted a "place at the table," queers "want[ed] to burn the table").

predictive forces, "dramati[zing] incoherencies in the allegedly stable relations between chromosomal sex, gender and sexual desire."[59] They do not shy away from differences between LGBTQ people and others (or within those communities), arguing that recognizing and respecting these differences is an important step toward broadening societal attitudes about sex.[60] The same values emphasized by gay rights advocates, they warn, could become requirements.

Moreover, many queer advocates view some traditionally straight values as actively harmful, such as enforced gender roles[61] and the property-based history of marriage.[62] This suspicion has at times expressed itself in the form of deliberate noncompliance with social norms—the adoption of "chosen families, the families they saw themselves creating as adults,"[63] or of "constructed families that transgress and transform notions of family"[64]—in explicit opposition to the pursuit of straight institutions like marriage.[65] A passage in Michel Foucault's famous *The History of Sexuality* demonstrates both the appeal and the anxiety of segregated queer life: a "sub race," circulating

> through the pores of society; they were always hounded, but not always by laws; were often locked up, but not always in prisons; were sick perhaps, but scandalous, dangerous victims, prey to a strange evil that also bore the name of vice and sometimes crime. They were children wise beyond their years, precocious little girls, ambiguous schoolboys, dubious servants and educators, cruel or maniacal husbands, solitary collectors, ramblers with bizarre impulses; they haunted the houses of correction, the penal colonies, the tribunals, and the asylums; they carried their infamy to the doctors and their sickness

[59] Jagose, supra note 8, at 3.

[60] Kaaryn Gustafson, Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism, 5 Stan. J. C.R. & C.L. 269, 301 (2009); Kemp, supra note 52, at 8–9, 12–15.

[61] Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage," 79 Va. L. Rev. 1535, 1536, 1538–41 (1993).

[62] See the discussion of coverture in *Obergefell*. *Obergefell*, 135 S. Ct. at 2595. Even post-*Windsor*, objections to marriage as an institution within the LGBTQ community persist. Cara Buckley, Gay Couples, Choosing to Say 'I Don't', N. Y. Times (Oct. 25, 2013), https://nyti.ms/16BcRKb.

[63] Kath Weston, Families in Queer States: The Rule of Law and the Politics of Recognition, 93 Radical Hist. Rev. 122, 130 (2005).

[64] Gustafson, supra note 60, at 300.

[65] See Polikoff, supra note 61, at 1539, 1549.

> to the judges. This was the numberless family of perverts who were on friendly terms with delinquents and akin to madmen.[66]

This appeal extends beyond those who identify as gay or lesbian. Carrying on the gay liberationist goal of "radical reformulation of the sex/gender system,"[67] queer advocates seek to "free the homosexual in everyone."[68] Based on the developments of the last few decades, it appears that the gay advocacy model won this debate. By the 1980s, LGBTQ activism had "shifted from the progressive and radical strain of gay liberation politics to a 'gay rights' model defined by traditional civil rights strategies such as litigation and lobbying."[69] Gay rights advocates pushed for marriage equality,[70] adoption rights,[71] and the end of Don't-Ask-Don't-Tell,[72] depicting "the gay family as morally indistinct from an idealized version of the heterosexual family, i.e., wholesome, monogamous, bourgeois and much more about love than sex."[73] In the roughly ninety cases challenging same-sex marriage bans, plaintiffs emphasized in their filings that they were "devout Christians, military veterans, law enforcement personnel, and otherwise mainstream professionals and productive members of society"—and virtually none were identified as bisexual, HIV-positive, or transgender.[74] To be sure, the choice of "blemish-free" plaintiffs is standard impact litigation procedure.[75] But queer theorists decry a gay movement that posits that there is "*no other way* for gay people to be fully equal to non-gay people—both in the eyes of the law, and in the eyes of the larger community—than to participate in the same legal institution using the same language."[76]

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[66] Foucault, supra note 8, at 40.

[67] Jagose, supra note 8, at 58.

[68] Wittman, supra note 40, at 341.

[69] Aviram & Leachman, supra note 6, at 286.

[70] *Obergefell*, 135 S. Ct. at 2584; *Windsor*, 133 S. Ct. at 2675.

[71] See, e.g., Jim Saunders, Same-sex Couples Seek Ruling in Birth Certificate Dispute, The News Serv. of Fla. (Dec. 16, 2015), http://www.news4jax.com/news/florida/same-sex-couples-seek-ruling-in-birth-certificate-dispute [https://perma.cc/6W2M-BQ7T].

[72] Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

[73] Adler, supra note 55, at 148.

[74] Scott Skinner-Thompson, The "Straight" Faces of Same-Sex Marriage, Slate (Apr. 24, 2015), http://www.slate.com/blogs/outward/2015/04/24/the_straight_faces_of_same_sex_marriage.html [https://perma.cc/64VW-32HC].

[75] Id. But see the discussion of the plaintiffs in *Lawrence*, infra Section II.C.

[76] Katherine M. Franke, The Domesticated Liberty of *Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1415 (2004) (quoting Marriage Equality California & Lambda Legal Defense and

There are certainly dissenting voices within the community. Many gay advocacy groups came to marriage equality "kicking and screaming," worrying that the cause was "either hopelessly unattainable or dangerously assimilationist."[77] At times the queer and gay agendas have coincided, moving awkwardly hand-in-hand, as when early demonstrations in favor of gay marriage were "aimed less at endorsing marriage and more at expressing queers' 'outrage' at marriage and shocking the public."[78] And there have been times when the LGBTQ community has come together to decry a politics of inter-community marginalization.[79]

By and large, however, the victories of the last several decades have been gay rights victories. Queer theorists fear that this strategy has run fissures throughout the community between those who can fit into the narrow limits of "acceptable" gay identity and those who cannot.[80] The concern is that carving out and valorizing certain sections of the LGBTQ community "reinforce[s] the basic dichotomy" "leav[ing] entirely intact the sexual moralism of the anti-gay right."[81] *Lawrence*, *Romer v. Evans*,[82] *Windsor*, and *Obergefell* are, undeniably, victories. Because these victories are predicated on supposed shared values—values taken from the traditional perception of straight morality—they run the risk of not extending legal protection in cases where those values are absent.

II. LGBTQ IDENTITY FROM *BOWERS* TO *OBERGEFELL*

A. Bowers v. Hardwick

Bowers v. Hardwick dismissed a challenge to a Georgia sodomy statute on the ground that there is no constitutional right to "homosexual

Education Fund, Roadmap to Equality: A Freedom to Marry Educational Guide 12 (2002)) (emphasis added).

[77] Keith Cunningham-Parmeter, Marriage Equality, Workplace Inequality: The Next Gay Rights Battle, 67 Fla. L. Rev. 1099, 1107 (2015).

[78] Aviram & Leachman, supra note 6, at 290.

[79] For instance, when Representative Barney Frank argued that the federal Employment Non-Discrimination Act could only be passed if it protected against discrimination on the basis of sexual orientation but *not* gender identity, the community largely united to insist on a more inclusive version of the bill. Adler, supra note 55, at 195–96.

[80] Katherine M. Franke, Eve Sedgwick, Civil Rights, and Perversion, 33 Harv. J.L. & Gender 313, 318 (2010).

[81] Adler, supra note 55, at 168.

[82] 517 U.S. 620 (1996).

sodomy."[83] Although the statute forbade oral and anal sex between any individuals regardless of gender, and in fact Michael Hardwick had been joined in his suit by a heterosexual married couple,[84] the Court quickly disposed of the married couple's suit for lack of standing in a footnote that clarified that the decision would "express no opinion on the constitutionality of the Georgia statute as applied to [heterosexual] acts of sodomy."[85] In his dissent, Justice Blackmun characterized this footnote as an "almost obsessive focus on homosexual activity."[86] At a minimum, the choice to focus only on same-sex sodomy suggests that *Bowers* was a result in search of a rationale.

The majority opinion vacillates between oversimplifying and complicating what it takes homosexuality to be, "at various times both conflat[ing] and disaggregat[ing] 'sodomy' and 'sodomites.'"[87] For instance, the opinion vastly shrinks down and cordons off its conception of homosexuality as having "[n]o connection [to] family, marriage, or procreation" in its attempt to explain why *Loving v. Virginia*,[88] *Griswold v. Connecticut*,[89] and *Pierce v. Soc'y of Sisters*[90] were not controlling.[91] Yet the majority later claims that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes"[92]—blurring the lines between homosexuality and these other offenses to justify its discriminatory holding.

In contrast, Justice Blackmun's dissent implicitly embraces a queer approach to Hardwick's claim. The dissent can be characterized as a form of queer theory because it argues that sex is important in and of itself, not because it is tied to traditionalist values like romance or

[83] 478 U.S. 186, 192, 196 (1986).

[84] Only Hardwick was charged with violating the statute; the married couple "alleged that they wished to engage in sexual activity proscribed by [the statute] in the privacy of their home, and that they had been 'chilled and deterred' from engaging in such activity by both the existence of the statute and Hardwick's arrest." Id. at 188 n.2 (citations omitted).

[85] Id.

[86] Id. at 200 (Blackmun, J., dissenting) (By "relegat[ing] the actual statute being challenged to a footnote and ignor[ing] the procedural posture of the case before it," he argued, "the majority has distorted the question this case presents.").

[87] Ruskola, supra note 6, at 240.

[88] 388 U.S. 1 (1967).

[89] 381 U.S. 479 (1965).

[90] 268 U.S. 510 (1925).

[91] *Bowers*, 478 U.S. at 191.

[92] Id. at 195–96.

respectability. The dissent notes that the reason certain rights have been afforded protection under the substantive due process doctrine is "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."[93] The guiding principle in this and other privacy cases ought to be, Blackmun argues, "the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"[94] Specifically, Justice Blackmun recognizes that "sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,'"[95] and that "in a Nation as diverse as ours, . . . there may be many 'right' ways of conducting [sexual] relationships, and . . . much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[96] Blackmun notes that the true consequence of *Bowers*' holding was to dismiss "the fundamental interest all individuals have in controlling the nature of their intimate associations with others"[97]—associations that "touch[] the heart of what makes individuals what they are."[98]

Bowers was eventually overturned, a cause of much-deserved celebration in the LGBTQ community. Unfortunately, the decision that overruled *Bowers* abandoned Blackmun's queer reasoning in favor of a gay rights approach, which resulted in significant drawbacks.[99]

B. Romer v. Evans

Whereas *Bowers* over-defined LGBTQ people as a pretext for proscribing their behavior, *Romer* spent far less time discussing the LGBTQ community than the anti-LGBTQ law at issue. *Romer* struck down an amendment to the Colorado Constitution that would have prohibited local governments from adopting measures to prevent anti-

[93] Id. at 204 (Blackmun, J., dissenting).

[94] Id. (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)).

[95] Id at 205. (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

[96] Id. Justice Blackmun continues: "In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices." Id. at 205–06.

[97] Id. at 206.

[98] Id. at 211.

[99] See Section II.C for discussion of *Lawrence*.

LGBTQ discrimination.[100] The amendment was held to violate the Equal Protection Clause.[101] The Court found the challenged amendment invalid because it possessed "the peculiar property of imposing a broad and undifferentiated disability on a single named group," and because its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[102]

In this sense, *Romer* can be described as a queer opinion. Rather than attempting to identify values associated with the LGBTQ community, *Romer* focuses primarily on the doctrinal defects in the challenged amendment. This allows the opinion to avoid making broad generalizations about the LGBTQ community to support its holding. Unfortunately, *Romer* is unique in this respect, and subsequent decisions would largely abandon its approach.

C. Lawrence v. Texas

Lawrence struck down a Texas statute criminalizing sodomy between individuals of the same sex, overruling *Bowers*.[103] The *Lawrence* Court found that the Due Process Clause provides adults the right to engage in private sexual conduct, and that this right cannot be abridged for gay people merely because a State has traditionally viewed their sexual activity as immoral.[104] The Court limited this right to sex between consenting adults that is non-commercial and occurs in private.[105]

As has been noted elsewhere,[106] the opinion's language is replete with romance. The word "intimate" appears frequently, especially to modify references to sex—the case twice frames the right at issue as the right to "intimate conduct," and four times to "intimate sexual conduct" or

[100] 517 U.S. at 623–24 (1996).
[101] Id. at 623.
[102] Id. at 632.
[103] *Lawrence*, 539 U.S. at 567, 578.
[104] Id. at 578.
[105] Id. In fact, the opinion's very first sentence invokes the protections due "dwelling[s] or other private places." Id. at 562. Moreover, when disputing *Bowers*' assertion that prohibitions against gay sex are longstanding, the Court concedes that "a significant number" of "prosecution[s] of consensual, homosexual sodomy between adults for the years 1880–1995 . . . involved conduct in a public place." Id. at 570.
[106] Libby Adler, The Dignity of Sex, 17 UCLA Women's L.J. 1, 17 (2008); Franke, supra note 76, at 1407–08; Margo Kaplan, Sex-Positive Law, 89 N.Y.U. L. Rev. 89, 145–50 (2014); Rosenbury & Rothman, supra note 6, at 810; Ruskola, supra note 6, at 236.

"sexual intimacy."[107] Intimacy is also featured in a quote the opinion takes from *Planned Parenthood v. Casey*,[108] describing the importance of autonomy in making certain life decisions,[109] as well as in a quote from Justice Stevens' dissent in *Bowers* discussing "individual decisions by married persons, concerning the intimacies of their physical relationship . . . [and] intimate choices by unmarried as well as married persons."[110] This last use of intimacy is transparently a euphemism for sex. It is not clear, however, what the other "intimates" are referring to. The word "intimate" can be used to describe sexual or emotional closeness,[111] and the former would be needlessly repetitive unless the Court intended to elliptically clarify *which* sex acts they were discussing—not any sexual conduct, but *intimate* sexual conduct. If that was their intention, it is convenient that the word also has an emotional connotation—so that the opinion reads as a defense not just of any sexual conduct, but sex in the context of an emotional bond.[112]

Four times the opinion uses the term "relationship" when referring to the right sought, and once uses the phrase "a personal bond."[113] In these instances, and when repeatedly referring to "intimacy," Justice Kennedy's motives are unclear. One possibility is that he felt sex was not all that was at stake. The opinion situates the issue in the context of *Casey*, which confirmed constitutional protection for "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[114] because they involve "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[115] *Lawrence* begins by telling us that the case "involves liberty of the person both in its spatial and in its more *transcendent* dimensions."[116]

It is clear, however, that Justice Kennedy is not just describing sex. The opinion charges its predecessor, *Bowers*, with "fail[ing] to

[107] *Lawrence*, 539 U.S. at 562–64, 566–67.
[108] 505 U.S. 833 (1992).
[109] *Lawrence*, 539 U.S. at 574.
[110] Id. at 578.
[111] Intimate, Merriam-Webster, http://www.merriam-webster.com/dictionary/intimate [https://perma.cc/Q5GP-LQY7] (last visited Nov. 9, 2016).
[112] For the argument that the Court intended only the emotional connotation, see Rosenbury & Rothman, supra note 6, at 810.
[113] *Lawrence*, 539 U.S. at 567, 574.
[114] Id. at 574.
[115] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
[116] *Lawrence*, 539 U.S. at 562 (emphasis added).

appreciate the extent of the liberty at stake,"[117] by framing the issue presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[118] This focus on "*simply* the right to engage in certain sexual conduct," Justice Kennedy argues, "*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."[119] While the statutes involved "purport to do *no more* than prohibit a particular sexual act . . . [t]heir penalties and purposes . . . have more far-reaching consequences."[120] If the petitioners were not seeking a fundamental right to engage in certain sex acts, then the additions made by Justice Kennedy—the intimacy, the relationships, the transcendence—must have been part of it. *Lawrence* was not defending the petitioners' right to engage in sex, it was defending their right to be in love.[121]

Love may be broader than sex—the opinion plainly wants to defend gay people's ability to love openly and to have their relationships respected by society[122]—but sex is also broader than love. The focus on relationships and family "domesticates" queer people and queer sex, "underdetermin[ing], if not writ[ing] out entirely, their sexuality"[123]—a sexuality that may not include love or relationships. Yet the opinion is "fully confident of its ability to apprehend correctly the nature of homosexual sex," despite "its inability, or refusal, to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy."[124]

In his dissent, Justice Scalia agrees with Justice Kennedy that a focus solely on sex acts would be demeaning, which is why they are his

[117] Id. at 567.
[118] *Bowers*, 478 U.S. at 190.
[119] *Lawrence*, 539 U.S. at 567 (emphasis added).
[120] Id. (emphasis added).
[121] Ruskola, supra note 6, at 236.
[122] *Lawrence*, 539 U.S. at 575 (to a limit—not yet including marriage, and perhaps excluding some public displays of affection, discussed infra in Subsection III.A.2).
[123] Franke, supra note 76, at 1408. See also Adler, supra note 106, at 17 (arguing that Justice Kennedy focuses on the potential for an enduring relationship without saying why that is necessary to support his decision); Ruskola, supra note 6, at 239 (arguing that the rhetoric of *Lawrence* refuses to imagine gay sex outside of relationships and thereby domesticates sexual liberty).
[124] Ruskola, supra note 6, at 238–39.

primary focus.[125] Whereas Justice Kennedy wrote about the "best gay" (one whose sex is romantic, and occurs in the context of a relationship),[126] Justice Scalia focuses on the "bad gay" (one who might also be an adulterer, a fornicator, a bigamist, etc.).[127] In his response to Justice O'Connor's concurrence (which would have struck down Texas' anti-sodomy law on Equal Protection grounds), Justice Scalia even demonstrates a fluid understanding of sexuality, noting that "[m]en and women, heterosexuals and homosexuals, are all subject to [the statute's] prohibition of deviate sexual intercourse with someone of the same sex."[128]

Professor Cass Sunstein has similarly argued that *Lawrence* is premised on social understanding, and especially approval, of LGBTQ identity.[129] He argues that *Lawrence* is a narrow opinion: the Court relies on "major changes in social values in the last half-century," and the resulting "broad consensus that the practice at issue should not be punished" to find a fundamental right only to gay sex between consenting adults.[130] This is in contrast to a broader, "simple autonomy" reading of the case, which would extend constitutional protection to any consensual sex that does not harm others.[131] Sunstein argues that the holding cannot be so broad, because it would make "the Court's apparently pivotal discussion of 'emerging awareness' into an irrelevancy" by extending fundamental rights protection to things like adultery or public sex, which do not clearly meet the broad consensus standard.[132] In fact, much of queer life arguably has not achieved broad societal acceptance, with only those who meet the description in *Lawrence*—the romantic, committed, monogamous couple—clearing the bar.

Ironically, John Lawrence and Tyron Garner were not in a relationship, were likely never witnessed engaging in sodomy by the

[125] *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting); see also Kaplan, supra note 106, at 149.

[126] See supra text accompanying notes 106–121.

[127] *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

[128] Id.

[129] Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 Sup. Ct. Rev. 27, 48.

[130] Id. at 48–49.

[131] Id.

[132] Id. at 49 n.122, 64–66 ("Nothing in *Lawrence* suggests that states are banned from regulating sexual conduct that occurs in public view.").

police, and may never have slept together at all.[133] Lawrence maintained that "he and Garner were in separate rooms when the deputies arrived . . . [and] had never been sexually involved with each other."[134] At a minimum, their connection was not romantic and may have been an act of infidelity, as it was Garner's boyfriend who made the call to police, possibly motivated by jealousy over Lawrence and Garner spending time together.[135] What most likely happened is that the police, responding to Garner's boyfriend's call fabricating a gun charge, found Lawrence and Garner at worst in a state of partial dress, inferred that they were gay, and, angered either by the false call or the men's obstreperous response to their arrival, decided to charge them with sodomy.[136] It is worth wondering why the Court "so willfully ignore[d] the parties before it and insist[ed] on constructing an image of transcendental gay intimacy."[137] Ultimately, both the police and the Court over-defined these men, the former as carnal sodomites and the latter as a paradigm of love.

Lawrence is a gay rights opinion. The justices "purport to know the truth of homosexual intimacy" because they believe it to be "just like heterosexual intimacy, except between persons of the same sex."[138] While in *Bowers*, the Court "erred in placing too much emphasis on the sexual act of sodomy at the expense of the relationships of lesbians and gay men," *Lawrence* "erred too far in the other direction by focusing almost exclusively on relationships and almost not at all on sex."[139] It is an opinion stamped with values that, whether or not they are inherent to queer people, are appealing to straight ones.[140] As Professor Ruskola puts it:

> It should not be a crime *just* to have homosexual sex—anal or banal, oral or floral, intimate or not. . . . The implicit bargain the Court

[133] Dale Carpenter, The Unknown Past of *Lawrence v. Texas*, 102 Mich. L. Rev. 1464, 1466 (2004) (providing a fascinating, well-researched dive into the myth and facts of the case).

[134] Id. at 1490.

[135] Id.

[136] Id at 1498.

[137] Ruskola, supra note 6, at 242.

[138] Id. at 241 (emphasis omitted).

[139] Carlos A. Ball, Privacy, Property, and Public Sex, 18 Colum. J. Gender & L. 1, 5–6 (2008).

[140] Adler, supra note 106, at 19.

> proposes is plain. The Court, and the Constitution, will respect our sex lives, but on condition that our sex lives be respectable.[141]

D. United States v. Windsor

Windsor held that the Defense of Marriage Act's ("DOMA") definitions of "marriage" and "spouse," which excluded same-sex couples, were unconstitutional under the Fifth Amendment.[142] In holding that DOMA's "avowed purpose and practical effect . . . to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages" violated the "Constitution's guarantee of equality,"[143] the Court also promoted a separate ideal: the value of marriage in and of itself.

The *Windsor* Court repeatedly references the special "status and dignity" inherent in lawful marriage.[144] Those who marry, the opinion argues, "live with pride in themselves and their union,"[145] as the right to marry "confer[s] upon them a dignity and status of immense import."[146] This right, when provided by the "historic and essential authority" of the State, even "enhanced the recognition, dignity, and protection of the class in their own community."[147] And, citing *Lawrence*, the Court holds that authorizing same-sex marriages "give[s] further protection and dignity" to *Lawrence's* enduring personal bond.[148] The opinion "sends a message that same-sex couples not only deserve inclusion but also should *desire* inclusion" to the institution of marriage.[149]

E. Obergefell v. Hodges

If *Lawrence* was the giddy first act of a love story, *Obergefell* is its triumphant dénouement. *Lawrence* mentions romance; *Obergefell* is read at weddings.[150] *Obergefell* held that, under the Due Process and

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[141] Ruskola, supra note 6, at 238–39.
[142] 133 S. Ct. 2675, 2693 (2013).
[143] Id.
[144] Id. at 2681, 2689, 2692, 2705.
[145] Id at 2689.
[146] Id. at 2692.
[147] Id.
[148] Id.
[149] Douglas Nejaime, *Windsor*'s Right to Marry, 123 Yale L.J. Online 219, 247 (2013) (emphasis added).
[150] Gay and straight alike. Dahlia Lithwick, With This Withering Dissent, I Thee Wed, Slate (June 30, 2015), http://www.slate.com/articles/news_and_politics/low_concept/2015/0

Equal Protection Clauses of the Fourteenth Amendment, same-sex couples cannot be deprived of the fundamental right to marry.[151] Moreover, it required states to recognize lawful same-sex marriages performed in other states.[152] The core of the opinion's argument is the "transcendent importance of marriage."[153] It is "central[] . . . to the human condition," "essential to our most profound hopes and aspirations," and has "transcendent purposes."[154] The Court's "normative view of marriage . . . reminds us that marriage is a public good."[155]

Marriage's importance is due, Justice Kennedy argues, to the manifold benefits it provides—to the spouses, their families, and society at large. Although he details marriage's legal and practical benefits,[156] Justice Kennedy also outlines marriage's many different, "profound benefits."[157] Marriage—specifically, a "lifelong union"—"always has promised nobility and dignity to all persons."[158] It "fulfils yearnings for security, safe haven, and connection that express our common humanity."[159] This stability inheres not just in the marriage itself, but in how the institution of marriage is regarded by the rest of society. Marriage is "a keystone of our social order . . .a building block of our national community,"[160] and "an esteemed institution."[161] The Court is in essence arguing that "marriage is fundamental because people *believe it is* more fundamental than other two-person relationships."[162] Marriage also protects children because it "affords the permanency and stability important to children's best interests."[163] It "allows children 'to understand the integrity and closeness of their own family and its

6/supreme_court_obergefell_dissents_celebrate_a_marriage_with_decision_language.html [https://perma.cc/8UB4-GE9W].

[151] *Obergefell*, 135 S. Ct. at 2602–03.

[152] Id at 2608.

[153] Id. at 2593–94.

[154] Id. at 2594, 2602.

[155] Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509, 1539 (2016).

[156] *Obergefell*, 135 S. Ct. at 2601.

[157] Id. at 2600.

[158] Id. at 2594.

[159] Id. at 2599 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[160] Id. at 2601.

[161] Id. at 2599 (quoting *Goodridge*, 798 N.E.2d at 955).

[162] Matsumura, supra note 155, at 1533.

[163] *Obergefell*, 135 S. Ct. at 2600.

concord with other families in their community and in their daily lives.'"[164] And of course, marriage is valuable because of perhaps its most recognizable trait: romance. People seek to marry in the hopes of not being "condemned to live in loneliness."[165] Once married, "two people become something greater than once they were."[166]

The opinion takes pains to emphasize that marriage is the union of no more than two individuals. It describes marriage as a two-person union ten times,[167] and references couples forty-nine times—almost once for every paragraph in the opinion.[168] Justice Kennedy notes that the "cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."[169] In response, Justice Scalia muses that "one would think Freedom of Intimacy is abridged rather than expanded by" monogamous, two-person marriage.[170]

For *Obergefell*, marriage is not merely essential; it is unique. It "offers unique fulfillment," and "allows two people to find a life that could not be found alone."[171] Marriage is a "union unlike any other in its importance to the committed individuals."[172] There may be other ways for couples or families to express their commitment to each other, but, the opinion concludes, "[n]o union is more profound than marriage."[173]

Obergefell, like *Lawrence*, purports to speak for the LGBTQ community. Responding to fears that gays were seeking to *change* marriage, Justice Kennedy retorted that the petitioners did not seek to "demean the revered idea and reality of marriage."[174] In fact, he argued, "the enduring importance of marriage" was the basis of their claims.[175]

[164] Id. (quoting *Windsor*, 133 S. Ct. at 2694).
[165] Id. at 2608.
[166] Id.
[167] Id. at 2594, 2599, 2607–08.
[168] Id.
[169] Id. at 2607.
[170] Id. at 2630 (Scalia, J., dissenting) ("Ask the nearest hippie.").
[171] Id. at 2594.
[172] Id. at 2599.
[173] Id. at 2608.
[174] Id. at 2594.
[175] Id.; see also Huntington, supra note 54, at 26 (noting that Justice Kennedy justified his argument on the position that same-sex marriage would not "drastically alter the social front of marriage").

F. Summarizing Values Relied on by *Lawrence*, *Windsor*, and *Obergefell*

The gay rights line of cases, taken together, draw out certain values either as being implicit in the definition of the right at issue, or as a reason for extending the right in the first place. Perhaps the most fundamental of these values is consent. The cases also take for granted that they concern only adults.[176] Accepting the importance of the values of consent and adulthood, this Note will highlight five remaining values drawn out by the decisions:

1. Romance. Both *Lawrence* and *Obergefell* value romance, or emotional intimacy.
2. Marriage. *Obergefell* and *Windsor* value marriage above other types of relationships or commitments, and *Lawrence* alludes to marriage's importance both with the analogy used to criticize the framing of the right in *Bowers* and in its reference to the substantive due process freedoms protected by *Casey*.
3. Monogamy. *Obergefell* makes clear that this value is specific to a two-person marriage.
4. Geographical privacy. *Lawrence* limits its holding to sexual intimacy that takes place in the home or other equivalent places.
5. Respectability. Lastly, both *Lawrence* and *Obergefell* implicitly value respectability or social approval.

Defining LGBTQ rights as including these values, or requiring them to be present to extend protection, has the effect of eroding the potential for future rights claims. For instance, *Obergefell*'s "lavish[]" praise of marriage "by implication, casts life outside of marriage as second-rate and less worthy."[177] *Lawrence*'s paean to its "judicially favored brand of sex . . . simultaneously and inherently degrades sex that occurs outside

[176] *Obergefell*, 135 S. Ct. at 2607; *Lawrence*, 539 U.S. at 560. While the value of adulthood is sometimes the source of debate, this Note will not focus on the implications of valuing adulthood as a precondition for sexual activity or marriage.

[177] Murray, supra note 6, at 1210.

of the normatively prized context."[178] As any law student knows, the more prongs in a test, the more factors wrapped on a standard, the harder it is to satisfy.

This Note will explore which rights claims are endangered by the gay rights cases' reliance on these five values. It is possible to point to another reading of these cases, one that prioritizes autonomy and the dignity inherent in the ability to make important life decisions free from state compulsion or stigmatization. These signs of life for queer advocates are discussed in Part IV. However, the values both explicitly and subterraneously espoused in *Lawrence*, *Windsor*, and *Obergefell* have already had dangerous consequences for the queer community.

III. LGBTQ RIGHTS CLAIMS ENDANGERED BY TRADITIONALIST VALUES EMPHASIS

A. Sex without Romance or Respectability

1. Fornication and Adultery

Certainly, *Lawrence* did not explicitly exclude non-romantic sex from its holding,[179] and it has had some positive effects in this area.[180] Just a few years after *Lawrence* was decided, the Virginia Supreme Court relied on it to strike down the state's statute forbidding sex between unmarried persons.[181] That decision, however, still contained worrying hints of *Lawrence*'s value-centric influence. Three times, the Virginia justices described the right at issue as a decision taking place within the context of a "personal relationship," tying their defense of the right specifically to the value of romance.[182]

Other courts have refused to extend *Lawrence* where romance and respectability have been either explicitly or presumed absent. The Sixth Circuit, shortly after *Lawrence* came down, held that the decision did not shield a public employee from being fired for committing

[178] Adler, supra note 106, at 31 (discussing courts' general inclination to protect the dignity of sex).

[179] Id. at 18.

[180] See infra Part IV.

[181] Martin v. Ziherl, 607 S.E.2d 367, 370–71 (Va. 2005).

[182] Id. at 370; see also Rosenbury & Rothman, supra note 6, at 833–34 (arguing that *Lawrence*'s focus on intimacy allows courts to restrict sex in relationships characterized as outside the preferred form).

adultery.[183] In Virginia, *Lawrence* was limited to the criminal context and held to have no relevance in custody determinations, with the effect that family courts can continue to consider unmarried cohabitation by a parent when determining which custody arrangement would serve "the best interest of the child."[184] A federal court in New Jersey refused to apply *Lawrence* to a sex club, because it considered *Lawrence* to "protect[] *relationships* from governmental intrusion."[185] And the Tenth Circuit found that *Lawrence* did not shield a police officer from reprimand for engaging in a consensual sexual relationship.[186] While the court's decision hinged on their finding no fundamental liberty interest in private consensual activity in *Lawrence* (echoing Justice Scalia's dissent),[187] the facts of the case suggest that *Lawrence*'s values were keenly felt. For instance, the Tenth Circuit stressed that the case concerned not "a broad right to sexual freedom," but rather a "police department reprimand . . . based on [the officer's] off-duty conduct with a fellow officer at a training conference paid for in part and supported by the department."[188] In other words, the case was about propriety.

Perhaps these decisions were results-oriented and not influenced by *Lawrence*'s focus on romance and respectability. But many scholars are concerned that the focus on romance and respectability originated in *Lawrence* and confirmed by *Obergefell* will leave unprotected those who choose something beyond "the warm, fuzzy, domesticated backdrop of *Lawrence*."[189]

[183] Beecham v. Henderson County, 422 F.3d 372, 375–78 (6th Cir. 2005) (upholding, under rational basis review, the firing of a county court employee who was having a relationship with the husband of another county court employee).

[184] Vanderveer v. Vanderveer, No. 0122-04-2, 2004 WL 2157930, at *3–5 (Va. Ct. App. Sept. 28, 2004).

[185] 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614, 623 (D.N.J. 2005) (emphasis added). The club's public nature was also a dispositive factor in the court's decision, discussed further in Subsection III.A.2.

[186] Seegmiller v. LaVerkin City, 528 F.3d 762, 764, 771 (10th Cir. 2008).

[187] Id. at 771.

[188] Id. at 770.

[189] Franke, supra note 76, at 1411. For more discussion of the alarm bells sounded by *Lawrence*, see J. Richard Broughton, The Criminalization of Consensual Adult Sex After *Lawrence*, 28 Notre Dame J.L., Ethics & Pub. Pol'y 125, 159 (2014); Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 633 (1980) ("A doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including states of mind."); Marc Spindelman, Tyrone Garner's *Lawrence v. Texas*, 111 Mich. L. Rev. 1111, 1132 (2013).

2. Public Sex

In this section, "public sex" refers to "sex that takes place in sites other than the home . . . [and] analogous places such as hotel rooms"—generally "commercial establishments (such as sex clubs and adult movie theaters) that make available designated areas within their facilities where individuals may engage in sexual conduct," as well as secluded open-access areas such as rest-stops and remote public bathrooms.[190] Public sex participants "rely on practices and norms, as well as on the physical configurations of the chosen locations, to 'privatize' public sites where sex takes place,"[191] so that their sexual activity is extremely unlikely to be observed by so-called "unwilling gazers."[192]

Public sex plays an important role in the LGBTQ community because of its accessibility: "[n]ot everyone has a bedroom to call her own, and gay people in particular may have a hard time finding spaces in their family homes where they can have sex."[193] In the same way that cities functioned as places where LGBTQ people could reliably congregate,[194] some public sex venues, particularly establishments dedicated to that purpose, can serve as a kind of beacon of acceptance.[195] Moreover, many public sex advocates are troubled by a culture comfortable with explicit depictions of heterosexual activity that simultaneously condemns the idea that same-sex people, somewhere, might be having sex in a highly secluded "public" place. This double-standard "stigmatiz[es] nonheteronormative sex by confining it to the realm of the unseen and unacknowledged and unspoken."[196]

Nonetheless, the *Lawrence* Court's limitation of their holding to protect only private sex has, predictably, allowed prosecutions for public

[190] Ball, supra note 139, at 11 (emphasis omitted).

[191] Id. Ball goes on to catalogue the elaborate measures sexual actors may take to "transform" public spaces into areas that are sufficiently private for sex. Id. at 16–31.

[192] Id. at 43; Lior Jacob Strahilevitz, Consent, Aesthetics, and the Boundaries of Sexual Privacy After *Lawrence v. Texas*, 54 DePaul L. Rev. 671, 694 (2005).

[193] Ball, supra note 139, at 9.

[194] See supra text accompanying notes 14–18.

[195] Ball, supra note 139, at 9; see also Phil Hubbard, Sex Zones: Intimacy, Citizenship and Public Space, 4 Sexualities 51, 66 (2001) (describing public sex sites as "ephemeral sites of freedom and control").

[196] Ball, supra note 139, at 12.

sex to continue unabated.[197] In *832 Corp. v. Gloucester Township*, a New Jersey court held that an adult nightclub where patrons engaged in consensual sex could not challenge a local ordinance regulating sexually-oriented businesses under *Lawrence* because the club was a public place.[198] This was in spite of the plaintiffs' claim that "the sexual activities of their patrons are included within *Lawrence*'s scope *because their business is a private establishment*."[199] The court relied heavily on *Lawrence*'s "special emphasis on the private nature of the conduct and setting at issue,"[200] noting that the starting point of the Supreme Court's analysis was *Griswold v. Connecticut*,[201] which famously situated the right at stake as within "the protected space of the marriage bedroom."[202] Therefore, the court in *832 Corp.* argued, *Lawrence* "meant only to expand constitutional protection to other private settings 'required to safeguard the right to intimacy involved.'"[203] Of course, relying on this passage begs the question: who decides whether a setting is private? Clearly, the nightclub operators and their patrons felt that the club *did* provide measures necessary to safeguard their sexual activities. By siding with the municipality, the court *made* the nightclub a place not private enough for sex.[204]

Many other cases have followed this pattern. In *Fleck & Assocs., Inc. v. City of Phoenix*, an Arizona district court held that in order for *Lawrence* to protect a social club that offered facilities for men to engage in consensual sex, "the club and the activities that occur there must truly be private."[205] The court found the club not to be private because many people entered the club every day and there were no

[197] Prior to *Lawrence*, such prosecutions were quite common. Ball, supra note 139, at 32 n.112.

[198] 404 F. Supp. 2d 614, 623–24 (D.N.J. 2005).

[199] Id. at 622 (emphasis added).

[200] Id.

[201] 381 U.S. 479, 485 (1965).

[202] *832 Corp.*, 404 F. Supp. 2d at 622 (citing *Lawrence*, 539 U.S. at 564–65).

[203] Id. at 623 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66–67 n.13 (1973)).

[204] See id. at 624. Moreover, as discussed in Subsection III.A.1, a significant portion of the court's discussion involved *Lawrence*'s references to personal relationships. Carlos Ball has argued that "[p]art of the transgressiveness of public (or non-domesticated) sex lies in the fact that it is usually both anonymous and lacking in emotional commitment." Ball, supra note 139, at 8.

[205] 356 F. Supp. 2d 1034, 1039 (D. Ariz. 2005), *vacated and remanded*, 471 F.3d 1100 (9th Cir. 2006) (citing *Paris Adult Theatre I*, 413 U.S. at 66 ("The idea of a 'privacy' right and a place of public accommodation are, [in the context of sexual activities], mutually exclusive")).

stringent membership requirements.[206] However, access to the club was regulated in ways that indicate that its patrons were on notice as to the activities that went on within[207]—suggesting that, from the perspective of those engaging in sex, the club was sufficiently private to warrant protection. In two decisions handed down on the same day, a Virginia court held that *Lawrence* did not apply to cases in which defendants propositioned an undercover officer in a department store's public restroom, because the "proposed conduct involved a public rather than private location."[208] And in *People v. Graves*, the Supreme Court of Colorado sustained a charge of public indecency against a man who had been arrested when he was observed by an undercover officer "stroking another man's erect penis, through the man's pants, at an adult movie theater."[209] The court reiterated that the liberty interest recognized in *Lawrence* "does not extend to public places" like the theater in which the defendant was arrested.[210]

It is worth asking why the Court in *Lawrence* cabined its holding to homes and other traditionally private places. It is uncontroversial that sex should not be witnessed by those who would prefer not to or cannot consent.[211] However, no one can guarantee that sex within a home will never be observed by an unwilling third party, whether through a carelessly-left gap in a window shade or even the thin walls of apartment buildings.[212] Conversely, many public sex sites are sufficiently secluded or screened such that the likelihood that sex that occurs there will be witnessed by an unwilling third party is very low.[213] The idea of

[206] Id. at 1040–41.

[207] Id. at 1035, 1040 (discussing the club's explicit policy of renting rooms to its patrons for sex, its identification policy, and its membership fee requirements for admission).

[208] Singson v. Commonwealth, 621 S.E.2d 682, 689 (Va. Ct. App. 2005); see also Tjan v. Commonwealth, 621 S.E.2d 669, 672, 675 (Va. Ct. App. 2005) (finding that *Lawrence* does not apply because the Virginia sodomy statute applies to public sexual conduct, not the narrower privacy interest found in *Lawrence*).

[209] 368 P.3d 317, 320–21 (Colo. 2016).

[210] Id. at 328 n.12.

[211] Strahilevitz, supra note 192, at 688.

[212] Of course, one who deliberately exposes their sexual activity from within a home or analogous space would likely be subject to public indecency laws even post-*Lawrence.* See, e.g., Byous v. State, 175 S.E.2d 106, 107–08 (Ga. Ct. App. 1970); Wisneski v. State, 921 A.2d 273, 274 (Md. 2007).

[213] Pat Califia, Public Sex: The Culture of Radical Sex 76 (1994) (referring to sex in these locations as "quasi-public sex," because, given the measures taken to "screen[] out the uninitiated," "[i]f people are going to see what is going on in these places, they must intrude"); see also Strahilevitz, supra note 192, at 683–84 (noting that for some public

contextual privacy is not new territory for the courts, which "have been willing to protect privacy within controlled environments: [o]ne can expect privacy against outsiders, while not expecting privacy with respect to insiders."[214] And a functionalist rather than formalist privacy inquiry is familiar from the realm of Fourth Amendment law, where, for instance, courts are quite willing to label public bathrooms, especially bathroom stalls, as private,[215] but typically take the opposite view when individuals assert a privacy right to engage in sex in a bathroom.[216]

The troubling reality is that much public sex would go undetected "but for the aggressive investigative tools used by" law enforcement.[217] One lawyer who represented men charged with soliciting sex in public places claimed that, "[i]n four years of practicing law, I've *never* seen a [public sex] case based on the complaint of a citizen (not a cop) who got propositioned when he didn't want to be."[218] Public sex statutes are "enforced disproportionately against queer and transgender individuals,"[219] and especially gay men.[220] Numerous studies, news articles, settlements, and judgments have documented the "considerable evidence that law enforcement officials frequently target consenting and uncompensated male on male sexual solicitation and conduct in public places—frequently by conducting extensive and expensive investigations—while paying little attention to the same conduct when the sexual actors in question are of different sexes."[221]

This disparate treatment persists because there is still stigma attached to gay sex, and *Lawrence* did nothing to reduce this stigma when that sex occurs outside of the bedroom.[222] There may indeed be non-

locales, like gay bars and bathhouses, naïve passersby are warned about what they will see if they enter).

[214] Strahilevitz, supra note 192, at 683.

[215] Ball, supra note 139, at 43 n.150.

[216] See supra note 208 and accompanying text; see also Ball, supra note 139, at 43 n.150.

[217] Ball, supra note 139, at 49 (emphasis omitted). Pat Califia has described public sex sites as "contested territory where police battle with perverts for control." Califia, supra note 213, at 74.

[218] Califia, supra note 213, at 77.

[219] Madeline Porta, Not Guilty by Reason of Gender Transgression: The Ethics of Gender Identity Disorder as Criminal Defense and the Case of PFC. Chelsea Manning, 16 CUNY L. Rev. 319, 355 (2013).

[220] Ball, supra note 139, at 49 n.166.

[221] Id.

[222] Katherine Franke has compared *Lawrence* to *Stanley v. Georgia*, 394 U.S. 557 (1969) "in which the Court tolerated obscenity at the price of demeaning it, characterizing it as 'a base thing that should nonetheless be tolerated so long as it takes place in private.'" Franke,

discriminatory arguments in favor of regulating public sex, including the "unwilling gazer" concern, as well as potential public health risks. But critics worry that the *Lawrence* approach suggests that Garner and Lawrence's sexual behavior was tolerated "precisely because it [wa]s hidden from view . . . reinforc[ing] the idea that such sex is shameful and debasing."[223]

3. Sex Toys

Only two circuits have ruled on whether the right protected by *Lawrence* encompasses the use of sex toys by consenting adults: the Eleventh, which answered the question "no" in *Williams v. Attorney General of Alabama*,[224] and the Fifth, which answered "yes" in *Reliable Consultants v. Earle*.[225] *Reliable Consultants* is discussed in more depth in Part IV. This section analyzes the holding in *Williams*. Arguably, the *Williams* holding was at least in part the result of *Lawrence*'s emphasis on romance and respectability,[226] as well as the fact that, while many sex toys are used in the context of loving relationships, our culture has traditionally relegated them to the domain of the obscene.[227] It is prudent to note at the outset that the Eleventh Circuit plainly did not agree with *Lawrence* and was prepared to do whatever was necessary to distinguish it, resulting in a decision that is difficult to parse.[228]

Williams was an action challenging the constitutionality of an Alabama statute prohibiting the sale of "any device designed or marketed as useful primarily for the stimulation of human genital organs."[229] It relied on a prior Eleventh Circuit case applying *Lawrence*,

supra note 76, at 1407 (quoting Michael J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 Cal. L. Rev. 521, 537 (1989)).

[223] Ball, supra note 139, at 7.

[224] 378 F.3d 1232, 1250 (11th Cir. 2004).

[225] 517 F.3d 738, 740 (5th Cir. 2008).

[226] Sunstein's argument, that *Lawrence* was premised on social approval of homosexuality, suggested that social disapproval of sex toys could play a role in courts' interpreting *Lawrence* to exclude that right. Sunstein, supra note 129, at 48–49, 63–64 ("Is there something wrong with certain sources of sexual pleasure within constitutionally protected relationships?").

[227] See infra text accompanying notes 238–240.

[228] Karthik Subramanian, It's a Dildo in 49 States, but It's a Dildon't in Alabama: Alabama's Anti-Obscenity Enforcement Act and the Assault on Civil Liberty and Personal Freedom, 1 Ala. C.R. & C.L. L. Rev. 111, 126 (2011).

[229] *Williams*, 378 F.3d at 1233 (quoting Ala. Code § 13A–12–200.2 (Supp. 2003)).

Lofton v. Secretary of Department of Children and Family Services.[230] *Lofton*, which upheld a Florida statute that forbade gays from adopting children, held that *Lawrence* had not made sexual privacy a substantive due process right because it did not use fundamental rights language.[231] *Williams* reiterated that "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right."[232]

The *Williams* majority immediately encountered difficulty, however, defining with precision the right at issue in the case. To start, the court clarified that the statute did not "criminaliz[e] private consensual sexual conduct," but rather the sale of an item that could be used in the course of such conduct.[233] Crucially, the court argues, "[t]here is nothing 'private' or 'consensual' about the advertising and sale of a dildo."[234] A few pages later, however, the opinion concedes that

> [b]ecause a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.[235]

Yet, after the case was remanded to the district court and returned to the Eleventh Circuit, the court held that "the activity regulated here is *neither* private *nor* non-commercial."[236] Acknowledging the inconsistency, the court in a footnote added that the prior decision "connected the sale of sexual devices with their use only in the limited context of framing the scope of the liberty interest at stake under the fundamental rights analysis of *Washington v. Glucksberg*."[237] The court's vacillation in defining the right at issue illustrates its anxiousness to downplay the potentially emotionally intimate or personal uses of such devices.

[230] Id. at 1236–37; Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004).
[231] *Lofton*, 358 F.3d at 815–17.
[232] *Williams*, 378 F.3d at 1236 (quoting *Lofton*, 358 F.3d at 817).
[233] Id. at 1237–38 n.8.
[234] Id.
[235] Id. at 1242.
[236] Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007).
[237] Id. at 1322 n.6; Washington v. Glucksberg, 521 U.S. 702 (1997).

Moreover, in admonishing the lower court for using contemporary moral standards as a basis for finding a right to sexual privacy,[238] the Eleventh Circuit once again tied the use of sex toys to other practices with dubious social approval. The Eleventh Circuit dismissed as irrelevant the district court's invocation of "social science data respecting premarital intercourse, marriage and divorce rates, . . . the Kinsey studies, the 'imagery and implements of adult sexual relationships [that] pervade modern American society,' the availability of 'pornography of the grossest sort,' and the 'widespread marketing of Viagra.'"[239] These associations emphasize the opprobrium that still lingers around what the court refers to as "twentieth century sexual liberalism,"[240] making it all the easier for it to interpret *Lawrence* as narrowly as possible.

Unfortunately, the dissent in *Williams* falls into the same dichotomy begun with *Lawrence*. Rather than posit that sex toys should not need to be respectable or a tool for romance to be entitled to constitutional protection, the dissent retreats into the same value-based reasoning as *Lawrence*. It echoes *Lawrence*'s famous reframing of the issue, arguing that the "case is not, as the majority's demeaning and dismissive analysis suggests, about sex or about sexual devices."[241] If it is not about those things (and if it would be demeaning if it were), it must instead be about "the tradition of American citizens . . . to be left alone in the privacy of their bedrooms and *personal relationships*."[242] The dissent later emphasizes, "[a]s *Lawrence* demonstrates, sexual intimacy is inevitably demeaned, and its importance to the private life of the individual trivialized, when it is reduced to a particular sexual or physical act."[243] Ultimately, both the majority and the dissent in *Williams* operate within the harmful, assimilationist dichotomy of *Lawrence*: either sex toys deserve no protection because they are not necessary to a loving relationship, or they deserve that protection only because they could be.

[238] Williams v. Att'y Gen., 378 F.3d 1232, 1243 (11th Cir. 2004) (noting its "lack" of "legal significance"). The district court decision, *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1259 (N.D. Ala. 2002), was handed down before *Lawrence*.

[239] Williams v. Att'y Gen., 378 F.3d 1232, 1243 (11th Cir. 2004).

[240] Id.

[241] Id. at 1250 (Barkett, J., dissenting).

[242] Id. (emphasis added).

[243] Id. at 1255.

4. BDSM

BDSM is a range of sexual activities between consenting adults that can involve the infliction of modest amounts of pain for mutual enjoyment.[244] Practitioners of BDSM take the management of these risks very seriously; the community's credo is "safe, sane, consensual."[245] People who engage in BDSM are a part of the queer community.[246] Obviously, there are LGBTQ people in the BDSM community, but more broadly, although the two groups are nowhere near perfect analogues, the BDSM community has also been marginalized on the basis of its members' sexual practices.[247] The emerging term "kink-shaming"—to devalue someone on the basis of their fetishes[248]—suggests that there is an allegorical sameness of oppression between the groups.

Those who engage in BDSM do so at risk of criminal prosecution. The Model Penal Code allows criminal charges involving serious bodily injuries such as assault and battery to be rebutted with a defense of consent if "the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law."[249] Yet for people prosecuted for similar crimes in a BDSM setting, "the vast majority of courts have determined that consent is no defense."[250]

[244] Kaplan, supra note 106, at 116–17; Monica Pa, Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex, 11 Tex. J. Women & L. 51, 61 (2001).

[245] Stacey May Fowles, The Fantasy of Acceptable "Non-Consent": Why the Female Sexual Submissive Scares Us (and Why She Shouldn't), *in* Yes Means Yes!: Visions of Female Sexual Power and a World Without Rape 117 (Jaclyn Friedman & Jessica Valenti eds., 2008); Kaplan, supra note 106, at 117 ("The consent requirement is the 'first law' of BDSM."); Pa, supra note 244, at 61 (explaining that consent must be unequivocal, voluntary, informed, ongoing, and capable of being withdrawn at any time).

[246] Cameron & Kulick, supra note 56, at 28; Sullivan, supra note 19, at 153.

[247] Kaplan, supra note 106, at 115–16.

[248] Kink shame, Urban Dictionary, www.urbandictionary.com/define.php?term=kink%20shame [https://perma.cc/3FXP-F66Q] (last visited December 8, 2016).

[249] Model Penal Code § 2.11(2)(b) (Official Draft and Explanatory Notes 1985). What constitutes "other concerted activity" is decided on a case-by-case basis. Kaplan, supra note 106, at 123.

[250] Kaplan, supra note 106, at 118. Understandably, some commentators fear that a consent defense for BDSM activity would be exploited by domestic violence abusers to evade prosecution. See Cheryl Hanna, Sex Is Not a Sport: Consent and Violence in Criminal Law, 42 B.C. L. Rev. 239, 271 (2001). However, such a defense could be constructed to leave a heavy burden on the defendant and a strong presumption of nonconsent. See, e.g., Vera Bergelson, The Right to Be Hurt: Testing the Boundaries of Consent, 75 Geo. Wash. L. Rev. 165, 212–13 (2007). At a minimum, it is worth considering how to balance the need to prosecute intimate partner violence with the protection of the right to consensual BDSM.

In the prosecution of a man captured on film whipping another man, a California court held that "consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling."[251] A Massachusetts court found that a victim's consent was immaterial in a BDSM prosecution because "as a matter of public policy . . . one may not consent to become a victim of an assault and battery with a dangerous weapon."[252] In a Nebraska BDSM case, the court noted that *Lawrence* does not protect "*any* conduct which occurs in the context of a consensual sexual relationship," specifically exempting situations involving "injury to a person."[253] As recently as 2016, the Eastern District of Virginia held that *Lawrence* does not encompass the right to engage in consensual BDSM.[254]

Judgments against BDSM seem to stem directly from the activity's perceived difference from approved forms of sexuality and romantic affection.[255] Courts have referred to sadomasochism as a form of "deviant sexual behavior."[256] While *Lawrence* did not address BDSM directly,[257] its emphasis on social norms and respectability could be construed to position sadomasochism as beyond the zone of constitutionally-protected intimacy.[258] Under this standard, someone could face criminal prosecution for engaging in fully consensual, careful, and moderate sadomasochistic sex.

But there is a disturbing caveat to this topic: many of the criminal cases in which defendants claim that they were engaging in consensual BDSM in actuality appear to be nonconsensual. In fact, each of the

[251] People v. Samuels, 250 Cal. App. 2d 501, 506, 513–14 (Ct. App. 1967).

[252] Commonwealth v. Appleby, 402 N.E.2d 1051, 1053, 1060 (Mass. 1980).

[253] State v. Van, 688 N.W.2d 600, 615 (Neb. 2004).

[254] Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 632–34 (E.D. Va. 2016).

[255] Luis E. Chiesa, Consent is Not a Defense to Battery: A Reply to Professor Bergelson, 9 Ohio St. J. Crim. L. 195, 203 (2011); Keith M. Harrison, Law, Order, and the Consent Defense, 12 St. Louis U. Pub. L. Rev. 477, 486–87 (1993); Kaplan, supra note 106, at 122.

[256] State v. Collier, 372 N.W.2d 303, 306 (Iowa Ct. App. 1985); see also Kaplan, supra note 106, at 124–25, 137 (suggesting that courts focus only on the transgressive sexual qualities of BDSM rather than its potential ability to strengthen romantic relationships).

[257] The Court did cabin off at least nonconsensual sexual violence from its decision, holding that in general, courts and legislatures should not attempt "to define the meaning of the [personal, sexual] relationship or to set its boundaries *absent injury to a person* or abuse of an institution the law protects." *Lawrence*, 539 U.S. at 567 (emphasis added).

[258] Kaplan, supra note 106, at 137.

above-cited cases appear, despite the defendants' claims, to be instances of nonconsensual assault, rape, or battery. The disciplinary action in the Virginia case arose when a woman alleged that her former partner had raped her, including instances in which he continued their BDSM encounters after she had "safeworded" (meaning, after she had affirmatively withdrawn her consent).[259] The Nebraska case involved a BDSM relationship from which the victim early on withdrew his consent, only to be held against his will and tortured.[260] In the Massachusetts case, the victim maintained that his relationship with the defendant was not consensual; at one point, he was beaten so badly with a baseball bat that he was hospitalized for a fractured kneecap.[261] And, in an Iowa case, a defendant raised a consent defense based on BDSM despite the victim's testimony that the defendant imprisoned, assaulted, and raped her.[262] Yet the appeals court ignored the victim's lack of consent and proceeded to analyze the defendant's claim, ultimately holding that BDSM is not an activity for which consent can be raised as a defense under the applicable assault statute.[263]

This is a disquieting situation for those who prize safety and consent as well as the freedom to engage in consensual sadomasochism. The first question it raises is why instances of genuinely consensual BDSM are seemingly not being criminally prosecuted. One factor must be that most instances of consensual BDSM are not reported to the authorities. Another possible factor is prosecutorial discretion. However, since that discretion by its very nature could easily swing in the opposite direction, it is not a comforting notion; the legal standard remains broad and clearly encompasses consensual behavior. Certainly, actual prosecution does not have to occur for there to be a chilling effect.[264]

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[259] *Rector & Visitors*, 149 F. Supp. 3d at 610.

[260] State v. Van, 688 N.W.2d 600, 608–12 (Neb. 2004).

[261] Commonwealth v. Appleby, 402 N.E.2d 1051, 1053–54 (Mass. 1980).

[262] State v. Collier, 372 N.W.2d 303, 304–05 (Iowa Ct. App. 1985).

[263] Id. at 305–07.

[264] In July 2000, for instance, police raided a BDSM party in Massachusetts with up to forty participants. Steve Lenius, BDSM Party Raid in Massachusetts, Leather Life (Aug. 11, 2000), http://leathercolumn.blogspot.com/2000/08/bdsm-party-raid-in-massachusetts.html [https://perma.cc/8ENV-THQD]. One participant was charged with assault and battery for "consensually spanking another woman with a wooden spatula," though the charges were eventually dropped. Kaplan, supra note 106, at 115. While the highly-publicized raid generated some delightful headlines ("Spank Bust Ripped as Bum Rap," Michelle Chihara, Paddleboro, Nerve: Dispatches (last visited May 7, 2017), https://web.archive.org/web

Secondly, even if no one is ever prosecuted for consensual BDSM, the question remains why courts have repeatedly posited hypothetical consent merely to reinforce that it is not a defense to assault charges arising from BDSM. It saps power from an individual's refusal of consent to hold that such nonconsent was essentially optional and would not have altered the legal outcome. On the other hand, it entirely removes individuals' ability to freely give their consent to others. Of course, in the context of non-BDSM rape prosecutions, courts routinely have difficulty understanding or acknowledging that victims did not consent.[265] The result is a criminal justice system that at times makes it impossible *not* to consent to "regular" sex, and impossible to consent to kinky sex.

It all comes back to respectability and what is expected of sex. Discomfort with nontraditional sex explains why courts are unwilling to grapple with the nuance of consent in a BDSM setting. Rather than challenging this discomfort, *Lawrence* used the trappings of tradition to affirm a right to sexual intimacy. Unfortunately, the narrowness of that right has left large swaths of the queer community unprotected.

B. Nonmarriage

By valuing marriage in and of itself, the gay rights cases devalued nonmarriage,[266] the collection of alternative legal statuses and rights associated with nonmarital relationships. Prior to *Obergefell*, progress had been made toward building out the legal structure of nonmarriage—what Professor Melissa Murray calls a "jurisprudence of nonmarriage."[267] For instance, *Eisenstadt v. Baird* protected the right of nonmarried couples to use contraceptives,[268] and *Stanley v. Illinois* held that state custody laws cannot refuse to recognize "family relationships unlegitimized by a marriage ceremony."[269] Additionally, starting in the 1980s, municipalities and later states introduced alternative statuses such

/20010526173738/http://www.nerve.com:80/Dispatches/Chihara/Paddleboro/ [https://perma.cc/SGK9-Y6AN]), the legal precedent remains troubling.

[265] See, e.g., Anne M. Coughlin, Sex and Guilt, 84 Va. L. Rev. 1, 5 (1998).

[266] A term I am borrowing from Melissa Murray, supra note 6.

[267] Id. at 1211. A number of cases have "explicitly acknowledged that departures from the marital family form [have] occurred and that, in some circumstances, these departures would be entitled to constitutional protection." Id. at 1223.

[268] 405 U.S. 438, 440, 454–55 (1972).

[269] 405 U.S. 645, 651 (1972).

as domestic partnerships and civil unions to "function as an alternative to marriage for formalizing and recognizing relationships."[270] While these statuses were generally "associated with efforts to secure rights for same-sex couples," they were equally valuable to those who, for whatever reason, sought to affirmatively avoid marriage.[271]

Unfortunately, *Obergefell* "gestures toward the repudiation" of nonmarriage jurisprudence.[272] In comparison to marriage's transcendent profundity, *Obergefell* paints marriage alternatives as "undignified, less profound, and less valuable" and "suggests that the prospect of willingly being unmarried is utterly unimaginable."[273] Even *Lawrence* struggled in "dealing with nonmarriage *as* nonmarriage," instead attempting "to render nonmarital sex intelligible . . . by likening Lawrence and Garner to a married couple," and "undermin[ing] the decision's possibilities for nonmarriage."[274] *Obergefell* suggests that "in a world where all couples have access to the most 'profound commitment,' there is no obligation to acknowledge or respect relationship statuses that are 'somehow less[]' than marriage."[275]

Post-*Obergefell*, access to nonmarital statuses and the rights of nonmarried couples are at risk.[276] History provides one such warning: when Vermont[277] and Washington[278] legalized same-sex marriage, they eliminated their civil union statuses soon after. Connecticut, Delaware, New Hampshire, and Rhode Island all required existing civil unions to convert into marriages when they legalized same-sex marriage.[279] Arizona required its state employees to marry their domestic partners if they wanted them to retain health insurance after same-sex marriage became legal in the state in 2014.[280] Moreover, many states that sought to prohibit same-sex marriage either through statute or amendments to their constitutions also blocked nonmarriage statuses that they feared

[270] Murray, supra note 6, at 1241.
[271] Id. at 1240 (describing these alternatives as "specifically understood [to be] *nonmarital* statuses").
[272] Id.
[273] Id. at 1210, 1216.
[274] Id. at 1228.
[275] Id. at 1244 (quoting *Obergefell*, 135 S. Ct. at 2594, 2600).
[276] Matsumura, supra note 155, at 1518.
[277] Murray, supra note 6, at 1243.
[278] Matsumura, supra note 155, at 1511.
[279] Murray, supra note 6, at 1243.
[280] Matsumura, supra note 155, at 1510–11.

would be used as an alternative.[281] *Obergefell* struck down those restrictions on marriage, but the nonmarriage bans could remain—especially given *Obergefell*'s pro-marriage value language.[282] By venerating marriage, *Obergefell* "forecloses the possibility of further developing the jurisprudence of nonmarriage to provide more robust constitutional protections for life outside of marriage,"[283] and suggests that states could indeed have "a legitimate basis for promoting marriage and its many benefits over nonmarital alternatives."[284]

This pressure on romantic relationships to take the form of marriage runs contrary to the recognition that the choice whether to marry "is an important act of self-definition in that it expresses individual preferences and taps into an institution with greater social meaning."[285] There are many reasons individuals may prefer not to marry,[286] including a desire to resist restrictive gender roles,[287] to "unhook economic benefits from marriage and make basic health care and other necessities available to all,"[288] or simply to affirm the value of alternative family and relationship structures.[289] Many likely hoped that the Court would affirm "a more pluralistic legal landscape in which marriage and a range of other options for relationship recognition might happily coexist."[290] Unfortunately, *Obergefell*'s emphasis on marriage—rather than the unjust exclusion of same-sex couples from marriage—has left nonmarriage jurisprudence on vulnerable ground.

C. Polyamory

The values blocking polyamorous[291] marriage are not difficult to parse—*Obergefell* repeatedly stressed that it applied only to *two-person*

[281] Murray, supra note 6, at 1244–45.
[282] Id. at 1244–47.
[283] Id. at 1240.
[284] Id. at 1248.
[285] Matsumura, supra note 155, at 1533.
[286] See supra text accompanying notes 61–79.
[287] Matsumura, supra note 155, at 1516; see also Elizabeth S. Scott, A World Without Marriage, 41 Fam. L.Q. 537, 538 (2007) ("[M]arital roles continue to be gendered in ways that leave many women dependent and vulnerable. Thus, it is not surprising that many feminists have little enthusiasm for marriage.").
[288] Polikoff, supra note 61, at 1549.
[289] Id.; Matsumura, supra note 155, at 1516.
[290] Murray, supra note 6, at 1242.
[291] "'[T]he custom or practice of engaging in multiple sexual [or, for some, romantic] relationships with the knowledge and consent of all partners concerned.'" Aviram &

unions. For good reason: several Justices were concerned about this particular possibility. Chief Justice Roberts' dissent argued that the majority's holding left little standing in the way of legalizing polygamy (postured, in his dissent, as a bad thing),[292] and Justice Alito asked about the issue repeatedly throughout oral argument.[293] Sensing the potential for backlash, gay advocates chose to "distinguish same-sex marriage from multiparty marriage" as a strategic matter, meaning that "both sides in the debate over same-sex marriage . . . agree[d] on one thing: whatever happens with gay marriage, multiparty marriage should remain impossible."[294]

Those who engage in polyamory are a part of the LGBTQ community. At least one study "revealed a high percentage of people involved in" polyamorous relationships to be involved "with partners of both sexes," and an overall "high percentage of same-sex relationships in the poly community suggests that there may be some amount of overlap in poly and LGBT communities."[295] Given how closely traditional views of heterosexuality often track the "one-drop rule,"[296] some traditionalists do not even consider polygamy, an arrangement involving one husband and multiple wives who are ostensibly not involved with each other, fully "straight." More importantly, like those who engage in BDSM, those in polyamorous relationships suffer parallel oppression from both mainstream culture and mainstream gay right

Leachman, supra note 6, at 297 (quoting Robyn Trask & Alan M., Loving More (2003), http://www.lovemore.com/home/what-is-polyamory/ [http://perma.cc/55HN-2MSZ]. The term can serve as an alternative to "polygamy," which can have unwanted religious, misogynist, or abusive connotations. See D. Marisa Black, Study Note: Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law, 8 J.L. & Fam. Stud. 497, 500 (2006).

[292] *Obergefell*, 135 S. Ct. at 2621–22 (2015) (Roberts, C.J., dissenting).

[293] Jack B. Harrison, On Marriage and Polygamy, 42 Ohio N.U. L. Rev. 89, 140–41 (2015).

[294] Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. Rev. L. & Soc. Change 277, 280–81 (2004).

[295] Aviram & Leachman, supra note 6, at 299.

[296] The term, "one-drop rule," originated in the racist belief that anyone with one drop of non-white blood is not white. The author does not subscribe to or endorse that racist belief. But some sexual traditionalists have applied an analogous purity requirement to heterosexuality, which is how the term is being utilized in this piece. See Katherine Francys Lambrose, Getting Back to Sex: The Need to Refine Current Anti-Discrimination Statutes to Include *All* Sexual Minorities, 39 Stetson L. Rev. 925, 947 n.138 (2010) (analogizing societal views of bisexuals to the "one-drop rule" in racial discrimination).

activists.[297] For these reasons, the polyamorous and queer communities are historical allies.[298]

Yet, ironically, polyamorous marriage advocates may end up pursuing the same value-centric approach that resulted in the decisions met with such skepticism by feminists and queer theorists. Whereas gay advocates argued that gay marriage was "essentially similar" to straight marriage—"in love, intimacy, sharing of responsibilities, economic partnership, and a joint project of raising children"—polyamorous advocates may argue that "the right to marry more than one person is nothing but a subset of the more general right to marry."[299] After all, polyamorous marriages can provide many of the same virtues extolled in *Lawrence* and *Obergefell*: "the ability to share love and intimacy; the benefits of long-term commitment; the economic and practical stability of the household; the ability to distribute responsibilities and chores among the different partners; and the child-rearing goals for some relationships."[300] While state governments may have "legitimate interest[s]" in forbidding polyamorous marriage based in logistics and child-care concerns,[301] some commentators believe that *Obergefell* will not ultimately stand in the way.[302] Even if it does, and poly advocates decide to pursue an anti-marriage agenda that adopts a radical queer approach as discussed in Part I, "the incredible cultural and social resonance marriage has in defining what relationships are worthy of legal protection," as embodied in *Lawrence* and *Obergefell*, may make it "an impossible subject for poly activists to avoid."[303]

IV. SIGNS OF HOPE

There are signs of hope, however. While *Lawrence* and *Obergefell* betray a troubling reliance on certain values, as discussed in Part II, they also contain language that queer activists could use to press for broader inclusion—to preserve rights for more "than merely the respectable few."[304]

[297] Aviram & Leachman, supra note 6, at 306–07.
[298] Id. at 301–02.
[299] Id. at 315.
[300] Id.
[301] Id.
[302] Harrison, supra note 293, at 150–51.
[303] Aviram & Leachman, supra note 6, at 330.
[304] Ruskola, supra note 6, at 240.

While *Lawrence* does paint a romantic picture of the plaintiffs, it also urges, quite independently, that there are "spheres of our lives and existence, outside the home, where the State should not be a dominant presence."[305] It looks to "emerging awareness" to bolster its finding that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[306] The majority takes guidance from *Griswold* and *Eisenstadt*,[307] cases protecting contraceptive access first for married couples and later for unmarried persons, respectively—a case study, potentially, in how the Court can treat its own precedent, and use a narrow, traditionalist approach as a springboard for a later, broader one. Lastly, where *Lawrence* could have relied solely on the Equal Protection Clause,[308] thus leaving open the possibility that people of any sexuality could be subject to regulation of their sex lives, the majority's very reliance on substantive due process is a promising sign for the vitality of a privacy interest in sex itself.

Obergefell, for its soaring traditionalist rhetoric, also venerates "the decision *whether* and whom to marry"[309] and the "freedom to marry, or not marry."[310] The decision whether to marry is key, the opinion tells us, because it is "inherent in the concept of individual autonomy."[311] The opinion also recognizes that James Obergefell and John Arthur's relationship was "a lasting, committed relation" even before they married, and later takes an admirably unvarnished look at the history of marriage, including coverture and other harmful aspects of the institution.[312] Had it taken the last step of acknowledging that many queer folk (and many heterosexuals, for that matter) do not wish to marry, the opinion would have more fully represented the LGBTQ community, while still addressing the gross injustice of barring same-sex couples from marriage. Yet there remains fruitful language nonmarriage and poly advocates can use to support their causes.

An excellent case study is the Fifth Circuit's decision in *Reliable Consultants v. Earle*, which challenged a sex-toy ban similar to the one

[305] *Lawrence*, 539 U.S. at 562.
[306] Id. at 572.
[307] Id. at 564–65.
[308] Id. at 574–75.
[309] *Obergefell*, 135 S. Ct. at 2599 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)) (emphasis added).
[310] Id. (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).
[311] Id.
[312] Id. at 2594–95.

at issue in *Williams v. Attorney General of Alabama*.[313] To start, the Fifth Circuit "defined the right much more broadly,"[314] as not merely "a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'"[315] While the court seemed to agree with *Lawrence* that *Bowers*' sole focus on sex was "demean[ing],"[316] the opinion is refreshingly free of references to relationships or emotional intimacy. Instead, the court repeatedly framed the right at stake not as a romantic one, but as a crucial freedom from government interference.[317] The focus was on how intolerable government involvement in these realms would be, not what individuals must do to merit this type of privacy.[318] It was an unconstitutional burden, the opinion argued, to prevent an "individual who wants to legally use a safe sexual device during private intimate moments *alone or with another*" from doing so.[319] The opinion made note of the fact that "many people in Texas, both married and unmarried, use sexual devices as an aspect of their sexual experiences"[320]—married *and* unmarried, and *experiences* rather than *enduring bonds*.

This hopeful language, while often interwoven with the same troubling value judgments explored in this Note, provides fodder for queer activists to press for broader rights protections. By highlighting *Lawrence*'s respect for privacy and *Obergefell*'s veneration of individual autonomy, queer activists can reframe values such as romance, marriage, and respectability not as requirements, but as mere options within a framework guided by the ultimate value of individual liberty.

CONCLUSION

With *Obergefell* and even *Lawrence* being relatively recent decisions, the opinions' impact will no doubt continue to develop in nuanced and unexpected ways. The prospect of losing this hard-won progress is ever-present. If gay and queer advocates can unify, however, around the idea

[313] See discussion of *Williams* in Part III.A.3.

[314] Subramanian, supra note 228, at 131.

[315] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008) (quoting *Lawrence*, 539 U.S. at 567).

[316] Id. at 743 (quoting *Lawrence*, 539 U.S. at 567).

[317] Id. at 743–44.

[318] Id.

[319] Id. at 744 (emphasis added). The opinion also uses "intimate" clearly as a euphemism for sex, rather than to suggest emotional intimacy.

[320] Id. at 742.

that no one should lose constitutional protection no matter how far they deviate from the "respectable," there is a path forward that will welcome us all.