SEX AS A FORM OF GENDER AND EXPRESSION AFTER *LAWRENCE V. TEXAS*

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The Supreme Court's decision in *Lawrence v. Texas*[1] has been touted in many circles as a significant gay rights opinion,[2] but it is much more than that. While it is certainly the first decision of the Court to recognize a constitutionally protected interest in same-sex intimacy,[3] it is even more significant as the first opinion from the Court to speak positively about sex without reference to procreation,[4] recognizing that sex can be a valuable form of "expression" that "can be but one element in a personal bond that is more enduring."[5] The reference is brief and unexplained, but has greater constitutional resonance when compared to the Court's prior relegation of sex to "myster[y]" and a "sensitive, key relation to human existence."[6]

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[1] Lawrence v. Texas, 539 U.S. 558 (2003).

[2] *See, e.g.*, *A Gay Rights Landmark*, N.Y. TIMES, June 27, 2003, at A26; Moni Basu, *Gay Sex Bans Overturned: Landmark ruling fuels hopes of equal treatment*, ATLANTA J.-CONST., June 27, 2003, at 1A; Lyle Denniston, *Historic Ruling; Court Reverses Gay Sex Ban Ruling Cites Right to Privacy*, BOSTON GLOBE, June 27, 2003, at A1.

[3] *See Lawrence*, 539 U.S. at 592-94 (Scalia, J., dissenting).

[4] *See* WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 29 (2d. ed. 2004) (explaining how the Court's decisions alluding to procreative activity in marriage evolved into procreative rights, rather than sexual autonomy rights); *see also* James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 L. & SEXUALITY 159, 162-63, 191-92 (2003) (explaining further efforts of courts to frame discussions of sex through comparisons to coital, marital "relations").

[5] *Lawrence*, 539 U.S. at 567.

[6] *See* Garland, *supra* note 4, at 161-63.

The Court's willingness to characterize sex as a possible form of expression is particularly remarkable, considering how little judicial and scholarly support the argument has found.[7] For some, it may be difficult to accept that sex could be communicative without a public audience,[8] even though the Court has held that private communication, such as a conversation, is protected by the First Amendment.[9] For others, only traditional coital sex expresses appropriate values,[10] even though it is precisely this attempt to monopolize conduct for a particular point of view that triggers strict scrutiny of conduct alleged to express ideas.[11] Or perhaps it is all that sex entails—the physical exertion, the concentration on technique, the sweat, the noises and curious silences, the pursuit of orgasm, the hope or fear of procreation, and frankly sometimes simply too much or too little going on wherever it all takes place—that just seems so unusual for "speech," making a mess of the idea of expression in the midst of sex, or at least sex as some know it.

But the Supreme Court has repeatedly made clear—twice now in the context of conduct used to express a sexual point of view[12]—that "a narrow, succinctly articulable message is not a condition of constitutional protection," and that a message may be protected even if it as abstract or perplexing as the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[13] And *Lawrence*'s

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[7] *See id.* at 164, 164 n.27, 195-203 (summarizing the scholarship and the law).

[8] *See, e.g.*, Toni M. Massaro, *Gay Rights Thick and Thin*, 49 STAN. L. REV. 45, 62-63 (1996) (claiming sex cannot be expressive because it involves a "wide range of private conduct" and criticizing First Amendment claims as a "popular tendency to treat gay and lesbian couples as spectacles . . . a parade, or . . . a soapbox oration").

[9] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 656 (2000) (holding that expression may be "private" and one need not "trumpet . . . views from the housetops" to claim First Amendment protection); *see also* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979) (private conversation with employer triggers First Amendment claim); Rankin v. McPherson, 483 U.S. 378 (1987) (same).

[10] *See* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066-67 (1994) (claiming that gays and lesbians can only "hope and imagine" that same-gender sex signifies "biological" unity and "cannot express" anything but pleasure and self-gratification).

[11] *See infra* notes 33, 144-147 and accompanying text.

[12] *Dale*, 530 U.S. at 655 (holding that, even if Scouts were promoting heterosexuality over homosexuality, and even if they were "teach[ing] *only* by example" of their heterosexual role models, their expression would be protected); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (holding that parade organizers can exclude lesbians and gay men because a preference for silence on sexuality includes a right not to endorse homosexuality).

[13] *Hurley*, 515 U.S. at 569.

brief but carefully qualified statement about the expressiveness of sex is entirely consistent with its expressive conduct doctrine, open to the idea that the parties might engage in sex to express a feeling or idea.[14]

The absence of such arguments may be precisely what has made it easy for courts to choke feelings and ideas from their portrayals of sex as mere conduct, striking at sexual nonconformists, often at the most vulnerable and intimate moments in our lives. In the days of *Bowers v. Hardwick*,[15] the Court had evidence before it that, for gays and lesbians, as for all people, sex can be an important means to express love and intimacy.[16] But, without the doctrinal development of First Amendment claims for sex, the Court demeaned sex as mere conduct.[17] Given that, the *Lawrence* majority's recognition of the thoughts and feelings injured by laws policing sex is not only a potential doctrinal watershed, it is utterly touching.

This Article elaborates on the theory of sexual expression floated in *Lawrence* in two ways. Part I summarizes generally why the Court's expressive conduct doctrine, aided by *Lawrence*, should permit future litigants to make expressive conduct and association claims for sex. But while *Lawrence* may effectively protect all private, noncommercial, consensual, adult sex between two adults from criminal prosecution, it leaves a great deal of sex, as well as a great deal of expression, unprotected from injury by government forces, as Part II of this Article details.[18] Of

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[14] Garland, *supra* note 4, at 195-203.

[15] 478 U.S. 186 (1986).

[16] *See, e.g.*, Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

[17] *Hardwick*, 478 U.S. at 196 (distinguishing sexual "conduct" from expression).

[18] Where practical, I have documented these claims with results from two leading national, demographically representative probability samples of sex in the United States: a survey by the National Center for Health Statistics, William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Sept. 15, 2005, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/ad/361-370/ad362.htm [hereinafter NCHS], and a survey from the National Health and Social Life, EDWARD O. LAUMANN ET. AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES (1994) [hereinafter NHSLS]. *See also* ROBERT T. MICHAEL ET. AL., SEX IN AMERICA: A DEFINITIVE SURVEY (1994) [hereinafter SIA]. While convenience samples of large populations are even less likely to be representative of the population in general, additional surveys are helpful, such as the Janus Report, SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR (1993) [hereinafter JANUS] and two of the largest national surveys of lesbians, gay men, and bisexuals, Janet Lever, *The 1994 Advocate Survey of Sexuality and Relationships: The Men*, THE ADVOCATE, Aug. 23, 1994, at 20 [hereinafter Lever, MSM] (sampling 5,300 of more than 13,000 responses) and Janet Lever, *Lesbian Sex Survey*, THE

particular note, *Lawrence*'s silence on the array of gender expression lost to the punishment of noncoital sex would be deafening but for the Court's brief suggestion that a liberty interest in sex should not depend on the gender of the parties involved.[19] While its substantive boosts to future First Amendment claims may lie primarily in depriving governments of arguments that noncoital sex is inherently harmful, *Lawrence*'s cryptic references to expression, I contend, virtually invite future First Amendment claims for sex.

Despite charges that expressive claims for sex romanticize it,[20] First Amendment arguments pose no threat of normalizing any view of sex, as Part III of this Article explains. Rather, recognition of sex as a form of expression not only requires openness to claims that sex can be important as a means to express sexually diverse points of view, but should also encourage more discourse about sex by requiring governments to justify sex regulation with more thoughtful reasoning rather than simply declaring sex "good" or "bad" on moral grounds. With lower courts already narrowing *Lawrence*,[21] First Amendment claims may be precisely what are required to flesh out the protection of sex in this way and give individuals full control of consensual sex and its meanings.

I. *LAWRENCE* AND THE PARTIAL LIBERATION OF SEXUAL EXPRESSION

A. The Pornographic, "Procreative" Vision of Sex in *Bowers v. Hardwick*

Defense of sex's value apart from procreation has fallen largely on gay Americans—and others heretofore considered "sex criminals." Once the Supreme Court recognized a right to private contraceptive use for married individuals[22] and extended that liberty to unmarried individuals,[23] the general need to defend penile-vaginal sex for its expressive qualities dissipated. Many states responded to these decisions by repealing laws criminalizing consensual sex to avoid further conflicts with this right to

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ADVOCATE, Aug. 22, 1995, at 23-24 [hereinafter Lever, WSW] (sampling 2,525 of more than 8,000 responses). For more data, see Garland, *supra* note 4, at 166.

[19] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[20] *Compare* Richard D. Mohr, *Responses to* Lawrence v. Texas*: the Shag-a-delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 365, 374-75 (2004) (arguing that *Lawrence* devalues other forms of affection), *with* MICHELANGELO SIGNORILE, LIFE OUTSIDE 47-62, 208-18 (1997) (describing how some gay men have championed pleasure over relational sex).

[21] Williams v. Attorney Gen. of Alabama, 378 F.3d 1232 (11th Cir. 2004), *cert. denied sub. nom.* Williams v. King, 125 S.Ct. 1335 (2005).

privacy,[24] even though the Court had framed the right as the right to decide whether "to beget a child," rather than a right to sex—the avoidance of which could clearly prevent procreation as well as contraception could.[25] Half the states, though, either retained gender-neutral laws criminalizing oral and anal sex or passed gender-specific laws, primarily for the purpose of ensuring the illegality of sex when it was "homosexual," often resulting in spectacularly absurd attacks on lesbians and gay men.[26]

In the midst of the Court's decisions protecting controlled procreation, the Court's respect for sexual expression took a curious, pornographic turn when it not only protected private possession of explicit sex on film under the First Amendment, but also threw the weight of the United States' "whole constitutional heritage" behind the decision to do so.[27] That case—*Stanley v. Georgia*—reversed a criminal conviction for possession of "obscene" films.[28] Rejecting both morality and speculative

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[22] Griswold v. Connecticut, 381 U.S. 479 (1965).

[23] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[24] *See* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 537-39 (1992).

[25] *See Eisenstadt*, 405 U.S. at 453; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5, 694 n.17 (1977).

[26] *See* Hunter, *supra* note 24, at 538-40. Texas repealed laws criminalizing adultery, among other sex crime laws, *Lawrence v. Texas*, 41 S.W.3d 349, 361 (Tx. Ct. App. 2001), but passed a new law punishing oral and anal sex but only when engaged in by people of the same gender. President Bush, then Governor of Texas—who himself had a criminal record of violating laws designed to protect public morals—specifically defended the "morality" of giving gays and lesbians alone a criminal record as a "symbolic gesture." Chris Bull, *Who Is George W. Bush?*, THE ADVOCATE, Jul. 4, 2000, at 32; Alison Mitchell, *Bush Acknowledges an Arrest for Drunken Driving in 1976*, N.Y. Times, Nov. 3, 2000, at A25. As a result of Arkansas' rush to recriminalize homosexuality, Governor Bill Clinton signed poorly drafted legislation that made sex between two animals a crime. *See* WILLIAM B. RUBENSTEIN, TEACHER'S MANUAL: SEXUAL ORIENTATION AND THE LAW 31 (2d. ed. 1998) (noting the origins of the errors in former ARK. CODE ANN. § 5-4-122 (2000)). Clinton subsequently was impeached, in part based on similarly odd parsing of sexual categories under oath. *See* Maureen Dowd, *The Wizard of Is*, N.Y. TIMES, Sept. 16, 1998, at A29 (chastising Clinton for rationalizing that he did not have sex with Monica Lewinsky because he only had oral sex with her). In addition, Attorney General Bowers—who later confessed to engaging in criminal, adulterous relationship for more than a decade while in office—pledged to enforce Georgia's gender neutral sodomy law only against homosexuals. *See* Kevin Sack, *Georgia Candidate for Governor Admits Adultery and Resigns Commission in Guard*, N.Y. TIMES, June 6, 1997, at A29; Bowers v. Hardwick, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting); *id.* at 219-20 (Stevens, J., dissenting).

[27] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[28] *Id.*

claims of harm to the public as reasons to ban possession of sexual films,[29] the Court eloquently described Stanley's "right" as protecting the "spiritual nature" of his "feelings" and "his intellect," both as "conditions favorable to the pursuit of happiness." [30] The Court concluded that governmental intrusion "into the contents of his library" (of porn)[31] endangered not only his thoughts but his "emotions and sensations" and, thus, his right to "satisfy his intellectual and emotional needs" (for porn).[32]

Stanley's protection, of course, was limited, in no way changing the Court's persistently discriminatory hostility to public sexual expression. The Court, for example, has generally considered a governmental claim that expressive conduct is "offensive" talismanic of a reaction to an idea—as in *Texas v. Johnson*, where the Court invalidated a prohibition on burning the flag because the effort to preserve the flag as "a symbol" of patriotism amounted to little more than an effort to monopolize its use for a particular point of view, shielding the public from unpopular, contrary ideas.[33] In contrast, the Court's obscenity and indecency classifications have continued to ratify public anxiety about lustful, pleasurable sex,[34] thus protecting sex as expression only with some other cultural or social "value" added to it.[35] In fact, at least five members of the Rehnquist Court adhered in different contexts to the view that sexual expression has lesser value simply because it is unpopular.[36]

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[29] *Id.* at 566-67.

[30] *Id.* at 564-65.

[31] *Id.* at 565. By "porn," of course, I mean "pornography" and the works declared "obscene" by Georgia at issue in *Stanley*. I refer to the material in the colloquial only to note the oddly elevated respect the Court offered to such material but sweepingly denied to sex itself.

[32] *Id.*

[33] 491 U.S. 397, 405-08 (1989).

[34] *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as work "taken as a whole" that appeals to the "prurient interest"); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504-05 (1985) (holding that a statute would be constitutional as long as it does not reach a "normal" interest in sex but rather reaches a "shameful" one); FCC v. Pacifica Found., 438 U.S. 726, 731-32, 747-51 (1978) (upholding FCC regulations of indecency to prevent "patently offensive" speech from reaching certain segments of the "public").

[35] *See, e.g.*, *Miller*, 413 U.S. at 24 (speech not subject to obscenity ban if has some literary, artistic, political, or scientific value).

[36] Justice O'Connor, writing for Justices Kennedy, Rehnquist, and Breyer, adopted Justice Stevens' view that nude dancing was minimally valuable expression because "'few of us would march our sons or daughters off to war to preserve the citizen's right to see' specified anatomical areas exhibited at establishments like Kandyland." City of Erie v. PAP's A. M., 529 U.S. 277, 294 (2000) (quoting Young v. American Mini Theatres, 427 U.S.

Before *Lawrence*, the official effect of these decisions was to protect pornography and procreation, while refusing to address sex's value, even though sex is what connected these two presumably different outlets for desire.[37] The Court, in *Bowers v. Hardwick*, affirmed its pornographic-procreative dyad when it held that an alleged tradition of disrespect for same-sex intimacy barred a right to engage in it,[38] and that any liberty to engage in such sex could be overcome by the public assertion of an attempt—however fruitless—in advancing societal morality.[39] The *Hardwick* Court brushed aside all analogies of sexual liberty to the right protected in *Stanley*, holding that *Stanley*'s emphasis on books and films was "firmly grounded" in traditional First Amendment cases, while consensual (homo)sex—like the "possession . . . of drugs, firearms, or stolen goods," and "adultery, incest, and other sexual crimes"—was not.[40]

This pornographic-procreative vision of sex that *Lawrence* inherited is what makes the architecture of its response to *Hardwick* sweeping and dramatic. *Hardwick*'s crude and primitive conceptualization of sex constitutionalized archaic concepts about sexual expression and the roles of men and women in sex, degrading a line of the Court's most important judicial opinions on sex and weaving them into an aggressive statement on the superiority of "traditional" sex in the process. Given the work required to dismantle *Hardwick*, it is not surprising that the *Lawrence* majority would focus its efforts on reconnecting its core decisions on sex into a coherent doctrine to protect liberty and intimacy.[41] But the question *Lawrence* unanswered as a result is whether respect for sex embedded in its decision is mere poetry or, rather, a clue to how its protection of private sexual expression fits into a broader constitutional infrastructure.

50, 70 (1976)). Justice Stevens, in *PAP's A.M.*, relied on *Young v. American Mini Theatres* without retreating from his view of the minimal value of sexual expression. *Id.* at 319-23.

[37] This was the very argument that Michael Hardwick's attorneys made to the Court in *Hardwick*. *See, e.g.*, Brief of Respondent at 9-14, 16, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); *see also id.* at 11, 16 (explaining that the right not to procreate "can be vindicated . . . by simply refraining from sexual intercourse" and noting that it would be "ironic" if sexual "fantasies," and not sex itself, could be protected by *Stanley*, given that the publication of sex is what makes it obscene). Even conservative scholars have accepted this argument. *See* RICHARD A. POSNER, SEX AND REASON 345 (1992)

[38] 478 U.S. 186, 190-95 (1986).

[39] *Id.*

[40] *Id.* at 195-96.

[41] Lawrence v. Texas, 539 U.S. 588, 574, 577-78 (2003).

B. The Potential for Protecting Sex as Expression after *Lawrence*

Despite its respect for protecting sex, *Lawrence*'s passing reference to expression may seem superficial. The majority opinion makes no reference to *Stanley v. Georgia*, much less the First Amendment.[42] It protects the sex at issue in the case whether it is expressive or not.[43] And its qualified respect for sex in private suggests, as *Griswold* had years earlier, that sex is too intimate to contemplate in detail, much less to explore for the ideas it conveys.[44] But *Lawrence*'s inclusion of sex among constitutionally protected liberties is anchored on the notion that sex involves "intimate and personal choices" that "define one's own concept of existence"—the virtues of intimate and expressive associations protected by the First Amendment.[45] These are, in fact, the very virtues that the Court invoked to protect the Boy Scouts' right to teach by example their private views on sex,[46] the right "to enter into . . . private relationships," and "to associate for the purpose of engaging in protected speech."[47]

The majority's lack of elaboration on the expressiveness of sex is hardly a sign that the Court's reference was a lyrical flourish. In First Amendment cases, the Court generally leaves parties engaged in expressive conduct to define that expression. On this point, *Spence v. Washington* is the law, requiring that the party seeking protection for expressive conduct must "inten[d] to convey a particularized message" with it and show that "the likelihood [is] great that the message would be understood by those who viewed it,"[48] even if the behavior might be viewed outside its context as "bizarre."[49] Thus, *Lawrence*'s central premise—that "[liberty], as a general rule, should counsel against attempts by the State, or a court, to

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[42] *Id.* at 578-79 (grounding the decision in due process).

[43] *Id.* at 567 (summarily stating that sex can be expression "in a personal bond" between two people).

[44] *Compare Lawrence*, 539 U.S. at 562, 567-68 (describing sex as something adults can choose to do "in the confines of their home" and emphasizing that the decision protects "private lives" not "public conduct"), *with* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (claiming that "a right of privacy older than the Bill of Rights" deemed law enforcement's examination of "the sacred precincts of marital bedrooms" repulsive).

[45] 539 U.S. at 567-68.

[46] Boy Scouts of Am. v. Dale, 530 U.S. at 647-48, 658 (approving Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

[47] *Duarte*, 481 U.S. at 544.

[48] 418 U.S. 405, 410-11 (1974).

[49] *Id.* at 410.

define the meaning of the relationship or to set its boundaries absent injury"—is a principled nod to the Constitution's protection of individuals' abilities to define the meaning of their expressions and associations.[50]

Lawrence's second affirmation of First Amendment principles is more subtle, rejecting *Hardwick*'s primitive assumption that expressive conduct may not be protected because it is criminal. Under its modern expressive conduct doctrine, the Court has promised that the First Amendment cannot protect "limitless variety of conduct" as expression, even though it has never detailed what the precise limits of the protection are.[51] Just as its earlier First Amendment cases had suggested that individuals could not engage in criminal conduct to express a particular point of view,[52] *Hardwick* invoked that limit by distinguishing protected expression from same-gender sex on the ground that the sex at issue was merely one of many "conduct crimes."[53] Since *Hardwick*, of course, the Court's First Amendment decisions have implicitly rejected the view that government could remove any conduct or association from First Amendment protection simply by criminalizing it or making it otherwise illegal.[54] But *Lawrence*'s prohibition of the criminalization of consensual adult sex, while attributing expressive qualities to it, makes clear that *Hardwick*'s reasoning to the contrary is flatly wrong.[55]

Lawrence's most substantive contribution to First Amendment claims comes from its effects, and the presumption that consensual adult sex—oral, anal, or otherwise—is not inherently harmful.[56] The recognition that a variety of sex occurs extensively and legally without harm should

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[50] *See Lawrence*, 539 U.S. at 567.

[51] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[52] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[53] Bowers v. Hardwick, 478 U.S. 186, 195 (1986); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575-77 (1991) (Scalia, J., concurring).

[54] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that New Jersey law making discrimination on the basis of sexual orientation illegal interferes with the right to discriminate); City of Erie v. Pap's A. M., 529 U.S. 277, 283, 289 (2000) (plurality opinion) (holding that nude dancing is entitled to First Amendment protection even where an ordinance banned public nudity as a "summary offense"); *Glen Theatre*, 501 U.S. at 563-66 (1991) (similarly permitting a First Amendment defense for conduct made a misdemeanor by law rather than automatically precluding such consideration).

[55] The NHSLS, for example, found that the majority of Americans had one partner in the year prior to the study. *See* NHSLS, *supra* note 18, at 189. It also found that, while large majorities of Americans considered giving and receiving oral sex appealing, overwhelming majorities found sex with more than one person at one time unappealing. *See* SIA, *supra* note 18, at 146-47; *see also* NCHS, supra note 18, at 19-20, 25.

[56] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

undermine governmental assertions of a need to place burdens on sex for public welfare. In turn, then, it should be exceedingly difficult for government to explain objections to sex in other contexts without reference to the *relationship* of the parties involved in other contexts—for example, simply because of its homosexual, non-marital, or even commercial character. If expression can be found in these sexual associations, exclusion of that expression from protection because it does not express support for an "enduring bond" is hardly consistent with the First Amendment's prohibition on viewpoint discrimination, much less *Lawrence*'s reluctance to define or devalue relationships by moral disapproval of consensual sex.

Lawrence by no means ensures success for a First Amendment claim for sex. Its primary doctrinal contribution to First Amendment claims is the withdrawal of *Hardwick* from the arsenal of judges who used it to deny protection for expressive associations and conduct.[57] But *Hardwick*'s ghost may still haunt uses of *Lawrence* in First Amendment claims, especially among judges who regret *Hardwick*'s demise. The challenge *Lawrence* poses to courts in considering First Amendment claims, then, is whether courts will follow it in the spirit of openness to sexual expression in the same way they used *Hardwick* to deny sexual freedom, or whether they will narrow protection for sex to *Lawrence* as the only protection it deserves.

II. THE NEED FOR FIRST AMENDMENT CLAIMS AFTER *LAWRENCE*

A. The Limits of *Lawrence* in Protecting Expression

For all of its virtues, *Lawrence* is not without its limits, and the string of words the majority deployed to stave off criticism of its holding demonstrates just that. *Lawrence* expressly recognizes a liberty interest in sex between only two adults.[58] It explicitly disclaims any protection for public sex, sex for money, and any sex where "injury"—undefined—"might" occur.[59] And, at its most narrow, it only bars *criminal* punishment for sex, perhaps even where government uses the penalty to make a moral example of sex that poses no public harm.[60]

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[57] *See, e.g.*, notes 69, 71-72, 79-80 *infra* and accompanying text. For more on sodomy laws upheld by *Hardwick* and the damage they inflicted, see WILLIAM N. ESKRIDGE & NAN D. HUNTER, *supra* note 4, at 782-83; Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

[58] *Lawrence*, 539 U.S. at 562, 578.

[59] *Id.* at 578.

[60] *Id.* at 562, 578.

As the scholarly debate over its meaning attests,[61] *Lawrence*'s lack of clarity about the nature of the right it recognized may already be promoting its narrowing. Because *Hardwick* barred recognition of a "fundamental right to homosexual sodomy" and held that morality was a rational basis for suppressing sexual liberty, *Lawrence*'s emphatic overruling of *Hardwick* may have overruled *Hardwick* on both grounds.[62] But the Court also declined to declare sexual liberty a fundamental right,[63] which would presumably require strict scrutiny for any effective penalty on the right, including a discriminatory burden. [64] As the majority's conservative critics have already insisted, *Lawrence*'s failure to carefully articulate the right under the court's modern fundamental rights jurisprudence permits reading its reversal of *Hardwick* as only concerning *Hardwick*'s second holding—effectively rendering only morality insufficient to justify the criminalization of private, consensual, adult, noncommercial sex.[65]

For gays and lesbians, *Lawrence*'s ambiguities may only blur the outer edges of its limited redress for the damage that *Hardwick* inflicted. *Hardwick*'s repeated euphemistic references to the Constitution's lack of protection for "homosexual conduct" left radically unclear whether only "sodomy" or *any* sexualized act between members of the same sex could be criminalized. [66] Despite *Lawrence*'s benign effort to explain that laws targeting such "conduct" effectively targets gays and lesbians as people, it did so declaring that certain forms of "conduct"—namely oral and anal

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[61] *See, e.g.*, Arthur S. Leonard, Lawrence v. Texas *and the New Law of Gay Rights*, 30 OHIO N.U.L. REV. 189 (2004); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103 (2004); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003); Laurence H. Tribe, Lawrence v. Texas*: the "Fundamental Right" That Dare Not Speak its Name*, 117 HARV. L. REV. 1893 (2004).

[62] 539 U.S. at 577-78 (adopting Justice Stevens' view that all intimate decisions from *Griswold* forward are part of the same right, and that *Hardwick* "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.") (citations omitted).

[63] *Id.* at 586 (Scalia, J., dissenting).

[64] *Compare id.* at 565, 574 (majority opinion) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972), *and* Romer v. Evans, 517 U.S. 620 (1996) (denial of liberties based on sexuality is generally irrational)), *with* Saenz v. Roe, 526 U.S. 489, 505 (1999) (holding that a "discriminatory classification" can act as a penalty on a fundamental right), *and* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of [a fundamental] right. . . is unconstitutional.").

[65] Williams v. Attorney Gen. of Alabama, 378 F.3d 1232 (11th Cir. 2004), *cert. denied sub. nom.* Williams v. King, 125 S. Ct. 1335 (2005).

[66] Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

sex—characterize the "homosexual lifestyle."[67] Consequently, *Lawrence* may actually reinforce one of *Hardwick*'s most dangerous legacies—sanctioning discrimination against gays and lesbians as people as a means to reach any "homosexual conduct" deemed harmful to the public. The Court's decision in *Romer v. Evans*—declaring anti-gay laws unconstitutional for discriminating on the basis of a "bare desire to harm"[68] sexual minorities—still permits courts that consider claims of harm from same-sex intimacy credible to characterize discrimination against gays and lesbians as motivated by something other than dislike and a desire to harm a class of people.[69]

Indeed, several cases from the *Hardwick* era had forecast long before *Lawrence* how governments could target the "effects" of sexual expression to elude charges that they were punishing sex or suppressing expression. In 1997, for example, the Eleventh Circuit Court of Appeals upheld the dismissal of Robin Shahar from employment with the office of the Attorney General of Georgia on the grounds that she had told her colleagues that she had planned to marry a woman in a religious ceremony.[70] The Court of Appeals deployed *Hardwick* twice to deny Shahar relief—first to doubt that she could make an expressive association claim because *Hardwick* evidenced a tradition of hostility to protection of sodomy,[71] and second to assert that Shahar, as a lesbian holding herself out as married, presumably engaged in sodomy,[72] such that her presence on the Attorney General's staff would compromise the public's perception that she was enforcing Georgia's sodomy law, among others, against gays and lesbians.[73]

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[67] *Lawrence*, 539 U.S. at 578.

[68] *Romer*, 517 U.S. at 632.

[69] In fact, the Court has declined to review numerous discriminatory anti-gay laws rationalized away by lower courts as reflecting something other than "dislike" of lesbians and gay men. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3399 (U.S. Jan. 10, 2005) (holding that preferences for male and female role models in parenting justifies ban on even single gay Floridians because gays and lesbians are not permitted to marry and will not couple with a member of the opposite sex); Equality Found. of Greater Cincinnati v. Cincinnati, 128 F.3d 289 (6th Cir. 1989) (upholding ban on protections from discrimination for gays and lesbians on grounds of administrative cost-savings is not a *Romer* violation), *cert. denied*, 525 U.S. 943 (1998). For more, see cases cited *infra* notes 70-81.

[70] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

[71] *Id.* at 1099-1100, 1100 n.2.

[72] *Id.* at 1105 n.17.

[73] *Id.* at 1104-05, 1105 n.16.

In a similar vein, the Alabama Supreme Court in 1998 upheld the removal of a child from a lesbian mother's custody because she (1) exchanged rings with her partner; (2) "kiss[ed] and show[ed] romantic affection" for her partner in her child's presence; and (3) explained to her daughter that she and her partner "love each other the way that the child's father and stepmother love each other."[74] Though Alabama's sexual misconduct law explicitly proscribed only oral and anal sex—and though the mother did not engage in those acts,[75] the Alabama Supreme Court held that the law's primary purpose was to make "all homosexual conduct criminal,"[76] such that the mother's mere presence with her partner and outward expressions of affection exposed her daughter to a "criminal lifestyle."[77]

Though perhaps rhetorically more subtle in its approach—using the euphemism of "obscenity" to regulate and refer to devices that symbolize and facilitate disapproved sex—Alabama further targeted sexual expression without regard to sexual orientation through a ban on the sale of sexual aids.[78] The ban provoked a federal court challenge in 1999, brought by married heterosexual couples, among others, who claimed that sexual aids improved their intimacy, and, in turn, their marital communications and relationships.[79] As in *Shahar*, the Eleventh Circuit declined to protect the lost expression, citing *Hardwick* twice—first to claim that regulation of

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[74] *See Ex parte* J.M.F., 730 So. 2d 1190, 1192, 1196 (Ala. 1998).

[75] Alabama law proscribed only oral and anal sex between unmarried persons as "deviate sexual intercourse." ALA. CODE § 13A-6-65(a)(3) (1975) (proscribing consensual deviate sex); ALA. CODE § 13A-6-60(a)(3) (1975) (defining deviate sex as oral and anal sex). The Alabama Court of Appeals accepted J.B.'s claim that she read the law and did not engage in those forms of sex, explaining broadly that J.B. did not engage in intimate activities that were unlawful. *See* J.B.F. v. J.M.F., 730 So. 2d 1186, 1188 (Ala. Civ. App. 1997), *rev'd sub. nom. Ex parte* J.M.F., 730 So. 2d 1190 (Ala. 1998).

[76] *See J.M.F.*, 730 So.2d at 1196 (citing *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1988)). The Alabama Supreme Court in *D.W.W.* claimed that "conduct inherent in lesbianism is illegal" without explaining how being lesbian violates a law that proscribes only oral and anal sex. *Ex parte* D.W.W., 717 So. 2d at 796.

[77] *J.M.F.*, 730 So. 2d at 1196 n.5.

[78] ALA. CODE § 13A-12-200.2(a)(1) (amending obscenity provisions of Alabama law); *see also* Williams v. Pryor, 41 F. Supp. 2d 1257, 1264-65 (N.D. Ala. 2002) (explaining Alabama's claim that sexual aids encourage a particular interest in sex and contravene the state's belief that orgasm should only be achieved between two people, rather than autonomously), *rev'd*, 240 F.3d 944 (11th Cir. 2001), *remanded to* 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev'd sub nom.* Williams v. Attorney Gen. of Alabama, 378 F. 3d 1232 (11th Cir. 2004), *cert. denied sub nom.* Williams v. King, 125 S. Ct. 1335 (2005).

[79] *Williams*, 41 F. Supp. 2d at 1264-65.

public morals was legitimate,[80] and, second, to claim that the statute would be constitutional because Alabama could constitutionally "apply it" only to "homosexuals."[81] Though the Court subsequently withdrew this second claim, it demanded articulation of a right that would compel the state to allow commercial state support for sex.[83]

While it is disturbingly noteworthy that these cases have arisen in a particular region of the United States—one where courts make the same unfounded assumptions about the sexual practices of gays and lesbians that *Hardwick* and *Lawrence* did[82]—it is equally noteworthy that *Lawrence* has had little impact on cases of this sort. The Eleventh Circuit specifically declined to provide post-*Lawrence* relief in two of the cases mentioned above, having already written the third with an eye toward ensuring its vitality in the event of *Hardwick*'s demise.[83] Similar cases beyond the Eleventh Circuit reinforce fears that the problems they pose are national in scope.[84]

Indeed, one of the clearest examples of the national implications of *Lawrence*'s limits comes from sex regulation in the United States Armed Forces, where gay men, bisexuals, and lesbians can still be separated from service for any "homosexual conduct."[85] In a nation governed by *Hardwick*, with no federal right to consensual sex, service members had been limited in First Amendment claims to challenging military use of their statements

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[80] Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).

[81] Williams v. Pryor, 229 F.3d 1331, 1341 (11th. Cir. 2000), *withdrawn*, 240 F.3d 944, 949 (11th Cir. 2001). The withdrawn opinion is available in Westlaw under the original citation.

[82] The best available data shows that significant percentages of lesbian women and gay men do not favor oral or anal sex or use sex toys. *See* Lever, WSW, *supra* note 18, at 24, 26; Lever, MSM, *supra* note 18, at 20.

[83] The Court rejected a federal court expressive association challenge for the mother in *Ex parte* J.M.F. on the grounds that she had a remedy to the custody burdens in state court. *See* Doe v. Pryor, 344 F.3d 1282 (11th. Cir. 2001). The Court also reversed a finding that the sex toy ban violated *Lawrence*. *See* Williams v. Pryor, 378 F.3d 1232 (11th Cir. 2004). The *Shahar* Court indicated before *Hardwick*'s demise that the conflict created by an openly lesbian attorney working for an anti-gay state was not limited to sodomy laws. *See* Shahar v. Bowers, 114 F.3d 1097, 1104-05, 1105 n.16 (11th Cir. 1997).

[84] On the question of sexual aids, see PHE, Inc., v. State, 877 So. 2d 1244 (Miss. 2003); Yorko v. State, 690 S.W.2d 260 (Tex. Crim. App. 1985); *see also* Pierce v. State, 239 S.E.2d 28, 29 (Ga. 1977). On the question of custody, see ESKRIDGE & HUNTER, *supra* note 4, at 1171-72. On public employment cases, see, for example, Marcum v. McWhorter, 308 F.3d 635, 641 (6th. Cir. 2002) (citing *Hardwick* to doubt an expressive association claim for adulterous relationship); Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984); *see also* ESKRIDGE & HUNTER, *supra* note 4, at 111.

[85] 10 U.S.C. § 654(a)-(b) (2005).

of their sexuality as a basis for discharge. With "homosexual conduct" proscribable, federal courts routinely sanctioned use of that speech as evidence of harmful conduct.[86] While *Lawrence* has begun to bar criminal sanctions for private sexual conduct in military service,[87] the government still maintains that *Lawrence* poses no bar to the discharge of service members for privately saying "I love you" to someone of the same gender or engaging in "homosexual conduct" to express that point.[88]

The lesson of these cases is clear. For all people, where the mere possibility of "taboo" sex becomes public knowledge, no matter how slightly and asexually it is revealed, sex in private may be burdened by governmental hostility to it. And for sexual minorities—especially those whose "bonds" are "enduring," such that their relationship is more obvious to the public—allegations of "injury," undefined by *Lawrence*, will continue to permit sexual regulation for the "protection" of children, the reputation of a workplace, or military cohesion. Thus, even post-*Lawrence*, governments may still attack the very sex *Lawrence* protected through attacks on relationships that express its existence, begging for something more to protect those relationships.

B. *Lawrence* and its Silence on Sex as Gender Expression

Though reviewing a statute that punished sex for the gender of the parties involved, none of the justices in *Lawrence* who voted to strike down the law openly declared that it discriminated on the basis of sex. The Court could have invoked its sex discrimination jurisprudence to show that each defendant could have escaped guilt "but for" his sex, or it could have aligned Texas' law with other laws that have impermissibly fixed roles for men and women[89] and made overbroad generalizations about the abilities

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[86] *See* Pruitt v. Cheney, 963 F.2d 1160, 1163-64 (9th Cir. 1991); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989). Though they masked their use of *Hardwick*'s logic by incestuously citing each other, courts have continued to follow this reasoning. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996) (citing *Pruitt* and *Ben-Shalom*); *see also* Philips v. Perry, 106 F.3d 1420, 1427 (9th Cir. 1997) (citing *Thomasson*).

[87] *See* U.S. v. Bullock, No. 20030534, at 4-5 (A. Ct. Crim. App. Nov. 30, 2004) (unreported), *available at* http://www.sldn.org/templates/law/record.html?section=95&record=1961; *see also* United States v. Barber, No. 20000413, at 11-12 (A. Ct. Crim. App., Oct. 27, 2004) (unreported), *available at* http://www.sldn.org/templates/law/record.html?section=95&record=1960.

[88] *See* James Allon Garland, Introduction, *Don't Ask, Don't Tell: 10 Years Later*, 21 HOFSTRA LAB. & EMP. L.J. 325, 343 (2004); Symposium, *Don't Ask, Don't Tell: 10 Years Later: Service Member Experiences Roundtable*, 21 HOFSTRA LAB. & EMP. L.J. 483, 514 (2004). For more on *Lawrence*'s weaknesses here, see Diane H. Mazur, *Re-framing the Debate: Is "Don't Ask, Don't Tell" Unconstitutional after* Lawrence*? What It Will Take to Overturn the Policy*, 15 J. LAW. & PUB. POL'Y 423 (2004).

[89] J.E.B. v. Alabama, 511 U.S. 127, 131 (1994).

and preferences of both sexes.[90] But the majority bypassed equal protection grounds entirely,[91] despite claiming that Texas' law stigmatized and invited discrimination against "homosexual persons."[92] And Justice O'Connor, one of the Court's strongest gender stereotyping critics, voted against the law because it targeted people with a "same-sex sexual orientation . . . mak[ing] homosexuals unequal in the eyes of the law."[93]

The oversimplifications inherent in the justices' stated rationales should have been obvious. The leading scientific studies of sexuality in the United States show that not only "homosexual people" engage in sex with and are attracted to people of the same gender,[94] but that twenty-five to fifty percent of people having sex with members of the same gender concurrently have sex with members of the opposite gender.[95] Moreover, the most well-regarded study of sexuality in the United States before *Lawrence* showed that overwhelming numbers of men and women who

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[90] United States v. Virginia, 518 U.S. 515, 533 (1996).

[91] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[92] *Id.* at 575.

[93] *Id.* at 581.

[94] The NCHS study found that of the respondents who did not identify as heterosexual, a total of three times as many men (7.5%) identified as bisexual (1.8%), something else (3.9%), or refused to identify (1.8%) as those who identified as gay (2.3%). NCHS, *supra* note 18, at 3. More than four times as many women (8.4%) identified as bisexual (2.8%), something else (3.8%), or refused to identify (1.8%) as identified as lesbian (1.3%). *Id.* Moreover, in a lifetime, the percentage of men who had sex with men was more than twice the percentage of men who identified as gay and fifty percent greater than the number of men who identified as both gay and bisexual. *Id.* at 26. The number of women who had sex with women was four times the number of women who identified as lesbian. *Id.* at 3. The Janus Report confirmed these results, finding that five percent of men and three percent of women identified as bisexual, while only four percent of men and two percent of women identified as homosexual. JANUS, *supra* note 18, at 70. These results are confirmed by other findings that nine percent of men overall and five percent of women have frequent or ongoing sex with members of the same sex. *Id.* While the NHSLS found smaller numbers of "bisexuals" than gays and lesbians, it also found that the percentage of men who had only or mostly same gender attraction (3.1%) was virtually identical to the percentage of men who had some attraction to men as well as women (3.2%). NHSLS, *supra* note 18, at 311. For women, the percentage that had only or mostly attraction to women was much smaller (0.9%) but three times that percentage (3.5%) had some attraction to women. *Id.*

[95] According to the NHSLS, during the last year before the study took place, a quarter of the men and women who had sex with someone of the same gender also had sex with someone of the opposite gender. NHSLS, *supra* note 18, at 311. When expanded to the five year period prior to the study, more than half of the men and sixty percent of the women who had sex with someone of the same sex also had sex with someone of the opposite gender. The NCHS similarly found that only little more than half the men who had sex with men in the prior year (1.6% compared to 2.9% total) did so exclusively with men.

desire same-sex intimacy do not act on it, raising the possibility that stigma may restrict those choices.[96] The Court's oversight, therefore, is not merely semantic.[97] Laws such as Texas' "homosexual conduct" law actually affected all "men who have or wish to have sex with men" and "women who have or wish to have sex with women," a class that the *Lawrence* majority and Justice O'Connor ignored. By disregarding that class, the Court effectively failed to clarify the rights of men and women who have same-gender sex by not imposing established burdens on governments that insist on mass conformity to fixed gender roles in sex.

Given that only one state supreme court has overturned anti-gay laws on sex discrimination grounds[98]—in the context of same-sex marriage, no less—it is certainly possible that the majority and Justice O'Connor avoided the argument because of its politically volatile consequences.[99] In doing so, though, both opinions beg sex discrimination analysis. The majority's disapproval of laws restricting sex both generally *and* with gender requirements should mean that government has no interest in assigning gender roles in sex. And if Justice O'Connor is correct that parties engaged in oral and anal sex are similarly situated without regard to

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[96] *See* NHSLS, *supra* note 18, at 311.

[97] Presumably, the liberty interest recognized by *Lawrence* permits all individuals—not just people of "homosexual" orientation—to engage in same-gender sex. *See Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). While the Court might comfort itself with the *Hardwick*-esque notion that individuals who have same-sex sex are "homosexual" because they are "in a homosexual relationship," such imposition of identity lacks any support from credible authorities as an appropriate descriptor of human sexuality. The standard mode of identifying sexual orientation is reliance on individuals' statements of attraction and identity. *See* NCHS, *supra* note 18, at 14; NHSLS, *supra* note 18, at 290-91. The majority's and Justice O'Connor's acceptance of the mere existence of people with "homosexual" orientation—with no facts to support it—suggests that the justices knew this to be true. But if available data is correct, the number of people who experiment in same-sex sex but maintain a heterosexual identity is also significant. Substantial historical and empirical evidence indicates that many people may experiment in same-sex sex to confirm a preference for *heterosexuality*. *See* NHSLS, *supra* note 18, at 311 (showing that rates of same-gender sex are highest after puberty and decline after age eighteen); *see also* NCHS, *supra* note 18, at 2, 21-22 (finding highest rates for all males and females occurred in fifteen to twenty-four year-old age group). Imposing "homosexual" identities on such people is illogical.

[98] Baehr v. Lewin, 852 P.2d 44, 58-69 (Haw. 1993).

[99] *See Lawrence*, 539 U.S. at 578 (holding that the decision did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *see also id.* at 585 (O'Connor, J., concurring) ("[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

"orientation,"[100] she must agree that sex is not different because of the gender of those engaged in it.

Indeed, the arguments Texas made to deny its discrimination on the basis of gender collapse under both Kennedy's and O'Connor's conceptualizations of sexual liberty, exposing an opposition to homosexuality drawn from an obsession with gender roles. Texas' core argument that prohibitions on oral and anal sex evolved from a code of social mores[101] fractures under Kennedy's historical explanation of the belief behind those mores—that only coital sex was moral[102]—in other words, that men should only vaginally penetrate women and women should only be vaginally penetrated by men. Under O'Connor's novel concept of "same-sex sexual orientation," Texas' selective decriminalization of sex was not a neutral interest in stopping sex acts, but an opposition to *people* who deviate from fixed roles to have sex with members of the "same sex."[103]

Texas' scheme, therefore, nakedly fixed sex role for both genders, disregarding the fact that many individuals both have the ability to have sex with people of the same gender and the preference to do so, just as gender-neutral bans on oral and anal sex aimed at forcing all people into gendered heterosexual sex. Texas' response to this argument—that only invidious subordination of one biological sex constitutes sex discrimination—is not only entirely inconsistent with the conservative Supreme Court's equal protection jurisprudence,[104] but with its sex discrimination jurisprudence as well.[105] Just as it is impermissible for the government to fix roles jointly for

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[100] *Id.* at 581.

[101] Lawrence v. Texas, 41 S.W.3d 349, 357-60 (Tx. Ct. App. 2001).

[102] *See Lawrence*, 539 U.S. at 570.

[103] *Id.* at 581.

[104] The Texas Court of Appeals, *Lawrence*, 41 S.W.3d at 357-58, like the Supreme Court *Lawrence* dissenters, 539 U.S. at 600 (Scalia, J., dissenting), falsely claimed that interracial "conduct" restrictions that followed a but-for reasoning were struck down as race discrimination because they reflected White Supremacy. The Court in *Loving v. Virginia* actually held that impermissible race-based treatment of individuals could not be otherwise justified by White Supremacy, not that White Supremacy was the reason race-based treatment was impermissible. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967). The Court's jurisprudence, of course, also holds that a benign motive does not validate race discrimination. *See* Adarand Constrs., Inc., v. Pena, 515 U.S. 200, 226 (1995). The Court's invalidation of laws punishing sex based on the race of the members also made no mention of White Supremacy whatsoever. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

[105] Sex discrimination frequently harms both sexes at once. For example, exclusion of women from a jury burdens men with service and demeans women. *See* J.E.B. v. Alabama, 511 U.S. 131 (1994). Military regulations denying women access to combat, for example, impair women's promotion in service while subjecting men to the draft and risk of death.

men and women in domestic and professional arenas,[106] a fixed sex role in sex is just as unconstitutional when it disregards the true abilities and preferences of men and women.[107]

Whatever the implications of these conclusions for notions of equality, they undermine the theory that individuals who have same-gender sex are "homosexuals expressing affection for homosexuals," or that sex that takes the gender of the partner into account is not in some way a form of gender expression.[108] A lesbian, for example, seeking pleasure with someone of the same biological sex would mostly likely not seek sex with a gay male simply because he is "homosexual." In fact, the best available data shows that sex for lesbians and gay men encompasses wildly varying conceptualizations of what it means to be men and women, with no clear gender pattern emerging for a "typical homosexual."[109] While the practical

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Compare Schlesinger v. Ballard, 419 U.S. 498 (1975), *with* Rotsker v. Goldberg, 453 U.S. 57 (1981). Gender segregation denies men and women the benefit of co-education, United States v. Virginia, 518 U.S. 515, 533 (1996), and can disadvantage one sex with access while stereotyping the other. Miss. Univ. of Women v. Hogan, 458 U.S. 718, 725 (1982). Anti-subordination theory simply oversimplifies sex discrimination. *See* Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (sorting men and women into groups based on veneration of women is the historic cause of sex discrimination).

[106] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279-80 (1979) (rejecting the notion that a man should be the provider for his family with a woman as his dependant); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (rejecting the notion that a man should be head of a household with his wife subordinate); *Hogan*, 458 U.S. at 730 (rejecting the notion that women should be nurses and men doctors); *Virginia*, 518 U.S. at 531-32, 534 (repudiating Goesaert v. Cleary, 335 U.S. 464, 531, 534 (1948) (holding women can be barmaids only if their fathers or husbands run the bars and watch over them as workers)).

[107] Michael M. v. Sonoma County Superior Ct., 450 U.S. 464, 469-70 (1981).

[108] Heterosexual sex, socially centering around penile-vaginal sex, is one area where sex scripts fall most clearly into gender patterns. *See* Edward O. Laumann & Yoosik Youm, *Sexual Expression in America, in* SEX, LOVE AND HEALTH IN AMERICA: PRIVATE CHOICES AND PUBLIC POLICIES 116-29 (Edward O. Laumann & Robert T. Michael eds., 2001); JANUS, *supra* note 18, at 63-64.

[109] Lesbian relationships, for example, fall into no clear butch-femme patterns. *See, e.g.*, Lever, WSW, *supra* note 18, at 27-28. The controversy deemed the "dildo debates" provides another example—for some women using a sexual aid permits them to assume a "masculine" role in sex, while for others assuming such a role is offensive. The debate fractures even further along political lines—when support for or objection to use of dildos of color often takes on racial overtones. *See* Heather Findlay, *Freud's "Fetishism" and the Lesbian Dildo Debates, in* OUT IN CULTURE: GAY, LESBIAN AND QUEER ESSAYS ON POPULAR CULTURE 328, 329-36 (Alexander Doty & Corey K. Creekmur eds., 1994). For some gay men, the notion that being penetrated in sexual intercourse is "feminine" has ancient roots, while others embrace being penetrated not only for pleasure but as a part of the strength of their masculinity. *See, e.g.*, CHARLES SILVERSTEIN AND FELICE PICANO, THE NEW JOY OF GAY SEX 4, 20 (1992). These feelings are reflected in historic assumptions about being penetrated as a sign of femininity and homosexuality as gender inversion. *See, e.g.*, DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY

difficulties in summarizing these gender complexities may have only assured the Court that it was correct in principle in refraining from defining a "homosexual relationship," its brief reference to the irrelevance of gender to liberty is a weak reflection of the varieties of gender expression it failed to disclose.

III. PREVIEWING EXPRESSIVE CONDUCT AND ASSOCIATION CLAIMS AFTER *LAWRENCE*

Individual sexual scripts vary, influenced by personal desires and fantasies, the nuances of interpersonal relationships, and the cultural contexts in which they arise.[110] As a result, emotional, cultural, religious, and even political differences affect the ideas people bring to sexual encounters and preclude easy generalizations about the meanings people attach to sex. This not only suggests a sophisticated awareness in the *Lawrence* majority's reluctance to define the meaning of relationships; it also precludes a simple preview of First Amendment claims for any particular message attached to sex, except to note that if the *Lawrence* dissenters are correct—that most laws against sex are "sustainable only in light of [*Hardwick*'s] validation of laws based on moral choices"[111]—virtually any First Amendment claim for private sex that passes the *Spence* test should prevail, as morality is not a basis for regulation of private sexual expression.[112]

Under *Spence*, of course, it is irrelevant that some individuals, including judges, may not be able to conceptualize or understand expression in sex, as the intent of those who engage in sex to express a feeling or idea should be evaluated in light of the understanding of those "likely to view" that expression, not a court or the general public. Still, in light of the Rehnquist Court's minimizing the "value" of sexual expression for its lack of popularity, it bears noting that scientific evidence shows that overwhelming majorities of Americans engage in sex to express love and to feel loved in return.[113] By no means does this indicate that sex for pleasure,

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RIGHTS IN CULTURE AND LAW 289-94 (1998); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940, at 112-23 (1994).

[110] The term "sexual script" is a common sociological and psychological term that connotes the complex variables that affect the way individuals express sexual desire in life and individual encounters. *See, e.g.*, Jenna Mahay et. al., *Race, Gender, and Class in Sexual Scripts*, *in* SEX, LOVE AND HEALTH IN AMERICA, supra note 108, at 197, 198-99.

[111] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

[112] See the discussion of *Spence*, *Dale* and the Court's recent expressive conduct cases, *supra* notes 12-14, 33, 48-51 and accompanying text.

[113] The most well-respected, nationally representative study of sex in the United States shows that large majorities claim to feel more loved because of sex, and prefer having

even outside monogamous relationships, lacks expression. Sexual contact can show an understanding of a partner's needs or appreciation of a part of the body.[114] Group sex can celebrate the rejection of social mores,[115] and even autonomous sex can have educational and other creativity values.[116]

If governmental forces cannot explain their objections to sexual acts otherwise made legal by *Lawrence* without reference to the relationship in which those acts occur, courts should strictly scrutinize the governmental burdens on the affected relationships as associational interference. The *Dale* Court gave just that scrutiny to the Scouts for both their members' "sexual conduct" and "illegal conduct"—protecting the Scouts' ability to privately express a morality of sex by role-modeling heterosexuality and otherwise "disassociating" with gay people,[117] such that New Jersey's discrimination

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sex only when in love. *See* SIA, *supra* note 18, at 123, 234. This conclusion is reinforced by evidence that overwhelming majorities of Americans are either engaged in partnered relationships or are seeking them. *See* JANUS, *supra* note 18, at 143, 385-86. Again, this is not a heterosexual phenomenon, but is true of lesbians and gay men. *See* Garland, *supra* note 4, at 183-84, 162 n.16 and accompanying text; Lever, WSW, *supra* note 18, at 29. Americans also reported that affection for a partner substantially outranked pleasure as the primary reason that they first engaged in sex. *See* SIA, *supra* note 18, at 93. Americans consistently reported higher levels of physical and emotional satisfaction in sex when partnered. *Id.* at 125. This is so even if these feelings may be encouraged by social myths and practices that reward those beliefs. *Id.* at 112-13.

[114] For example, substantial data shows that significant numbers of women who engage in oral sex do not enjoy it but do so to please their partners. *See* SIA, *supra* note 18, at 153. The same holds true for many men who allow themselves to be penetrated in anal sex by other men. *See* Lever, MSM, *supra* note 18, at 22. For elaboration on how sex can show that a part of the body may be pleasing to touch or taste, see Garland, *supra* note 4, at 184.

[115] To note but two famous examples: sex parties at the Burning Man Festival historically broke down inhibitions as a response to sexual repression, despite their outward appearance to some as "a giant dumb naked group-sex romp" or "some sort of overblown self-important masturbatory quasi-tribal jamboree masquerading as sensual adventure." Mark Morford, *Naked Dancing Fire Whales: Big dumb druggie rave in the desert, or intense spiritualized communal art adventure? Yes*, Sept. 4, 2002, http://www.sfgate.com/cgi-bin/article.cgi?file=/g/a/2002/09/04/notes090402.DTL (last visited Nov. 20, 2005); *see also* Chuck Squatriglia & Meredith May, *Burning Man at 20*, S.F. CHRON., Sept. 5, 2005, at B1; Scott Simmie, *Burning with Creativity*, TORONTO STAR, Sept. 3, 2005, at A18. New York's SPAM party—a mixed lesbian, gay, and transgendered party—is organized to encourage queer unity, which is often broken by cultural divides among lesbians, gay men, and transgendered people, and to promote the appreciation of sex with all genders as well. It is gaining increasing notoriety. *See, e.g.*, Michael Musto, *La Dolce Musto*, VILLAGE VOICE, May 31, 2005, at 10.

[116] Regarding fantasy, see NHSLS, *supra* note 18, at 134 ("[I]t should not be concluded from the absence of a specific partner that autoerotic activities are without social content . . . .").

[117] Boy Scouts of Am. v. Dale, 530 U.S. 640, 656-61 (2000) (explaining how New Jersey expanded its anti-discrimination law, perhaps because of changing public views on homosexuality, but holding that the Scouts had a right to disassociate in violation of that law

ban could be seen as "directly and immediately affect[ing] associational rights."[118] It stands to reason, then, that when government appears to express no opinion on a particular viewpoint made by sexual expression or association—just as New Jersey claimed viewpoint neutrality when it banned discrimination—government actions still may interfere with associational rights, even sexual ones.

Particularly where government objects to the outward expression of a relationship on the assumption that sex is part of it, defenders of sex should suffer no barriers to aligning the injuries done to relationships with those done to the Scouts. The symmetry between *Lawrence* and *Dale* on this point is telling. Not only did the *Dale* Court correctly decline to approve the Scouts' associational interests based on similarities to those of associations protected by tradition,[119] the Court also conceded that the Scouts' associational conduct was effectively considered immoral in New Jersey, deeming morality irrelevant to the Scouts' First Amendment claim.[120] Though no claim of infringement on associational rights was before the Court in *Lawrence,* it similarly rejected morality as a rational basis for Texas' interference with homosexual *relationships* through its attempt to criminalize sexual acts.[121] While *Lawrence* thus recognized a liberty interest to engage in sex *without* regard to expression, its parallels with *Dale* permit the inference that individuals may seek a First

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to express a point of view); *see also id.* at 655-56 (accepting the Scouts' claim for a need to discriminate even when it did not "revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation" to bolster its expression). This is the only coherent explanation of *Dale*'s claim that the Scouts could not only "teach by example" in ways that would be burdened by including gay males, but not others, who disagreed with the Scout's teachings. For further explanation, see Garland, *supra* note 4, at 217-26.

[118] *Dale*, 530 U.S. at 659.

[119] The Court has used tradition as a way to suggest that the Constitution *might* limit protection for intimate associations, but not for expressive associations; otherwise, the Constitution would not protect new and innovative modes of expression. *Compare* Roberts v. U.S. Jaycees, 468 U.S. 609, 618-20 (1984) (stating that, "[w]ithout precisely identifying every consideration that may underlie this type of constitutional protection," the right of intimate association may include those protected by tradition), *with id.* at 622 ("[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

[120] *Dale*, 530 U.S. at 659-60.

[121] Lawrence v. Texas, 539 U.S. 558, 567 (2003) (asserting that, although the "statutes . . . purport to do no more than prohibit a particular sexual act," they "seek to control a personal relationship").

Amendment claim for private sex when governments make further attacks on sexual, expressive, and associational interests.[122]

Without reliance on tradition or popular acceptance, the *Dale* Court's streamlined test for recognition of expressive associations requires that claimants meet only three criteria for that recognition: (1) they must associate for some purpose, even a recreational one;[123] (2) within the association, they must merely "engage in expressive activity that could be impaired" by law, even if the expression is *not* the primary purpose of the association, and even if it is conveyed silently, privately, and only by example;[124] and (3) they must offer minimal evidence that they have expressed a point of view by association—to which a court must defer both on the content of expression and the degree to which regulation impairs it.[125] None of those criteria bar a First Amendment claim for sexual associations; in fact, it is doubtful that the Scouts' silent sexual expression would have qualified for First Amendment protection at all if these criteria were not law.[126]

The combined effect of *Dale* and *Lawrence* on expressive association claims thus has enormous potential for further liberation of sexual expression, requiring a compelling reason for governmental interference with affected associations.[127] In the United States military, for example, the government's claims that its interest lies in "sexual conduct" has already become less credible with *Lawrence*'s increasing protection of private sex, even in barracks, from criminal prosecution. If that "conduct" can occur in private without harm, courts should require the military to

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[122] *See, e.g.*, *Dale*, 530 U.S. at 657, 648 (noting that New Jersey applied law to a "private entity without even attempting to tie the term 'place' to a physical location" as an example of how public law has increased the risk to "the First Amendment rights of organizations"; expression is protected "whether it be public or private").

[123] *Id.* at 655-56.

[124] *Id.* at 648, 655-56.

[125] *Id.* at 651, 653.

[126] For elaboration on this theory, see Garland, *supra* note 4, at 226-36.

[127] The Court has made clear that when a law directly objects to how individuals associate or disassociate, traditional First Amendment scrutiny of such a law is required. *See Dale*, 530 U.S. 640, 648, 659 (2000). While the *Lawrence* Court did not address First Amendment claims, the majority recognized that "conduct" regulations can really be objections to "relationships" when the "conduct" proscribed is permitted in other associations—for example, when oral sex is permitted in heterosexual relationships but not homosexual ones—for if the conduct is not harmful in lawful relations or associations, the notion that it becomes harmful in other relations or associations may be suspect as pretext for simply trying to make the relations and associations unlawful. *See infra* notes 45-47, 56-57 and accompanying text (analyzing *Lawrence*).

offer compelling reasons why discharging gay, bisexual, and lesbian service members for private sex is not only necessary but something other than an assault on sexual expression—particularly when gay, bisexual, and lesbian personnel work in non-combat positions at stateside facilities, such as military hospitals or administrative offices, and live in private residences where no one can observe their sexual expressions of affection.[128] Indeed, in *Dale*'s terms, military policy inexplicably bars all such expression *regardless* of its impact on other services members and immediately interferes with the targeted service members' associational rights—not only for *privately* and verbally saying "I love you" to someone of the same gender, but also for expressing that affection through private sex. While courts are likely to continue to defer to Congress and military leadership in upholding government responses to expression of sexuality that actually reaches military units, a more principled application of that deference should make discharges for private sexual expression much more difficult.[129]

Outside the military context, courts should be even more suspicious of governmental conduct that interferes with sexually expressive, associational rights. Courts should require government employers that object to their employees' associations with their partners to prove harm to the workplace or the reputation of the office, rather than rely on speculative claims of potential damage and assumptions that the employees are engaged in illegality.[130] Courts should be equally reluctant to order divorced parents not to visit their sex partners in the presence of the children without proof of harm to the children at issue.[131] Even in cases where government refrains from directly interfering with particular expressive associations, claims that sex is obscene—especially when condemned as autonomous—should rightly be recognized as First Amendment judgments favoring particular

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[128] For detailed analysis, see Mazur, *supra* note 88.

[129] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (accepting as "reasonable" the line drawn between conformity required where conduct is visible and freedom where conduct is not); *id.* at 513 (Stevens, J., concurring) (same); *see also* Chappell v. Wallace, 462 U.S. 296, 304 (1983) (noting that service members cannot be "stripped of basic rights" in service).

[130] *See* Shahar v. Bowers, 114 F.3d 1097, 1123-26 (11th Cir. 1997) (Kravitch, J., dissenting) (explaining how the Court misapplied precedent); *id.* at 1126-30 (Birch, J., dissenting) (same).

[131] *Compare* J.B.F. v. J.M.F., 730 So. 2d 1186, 1187 (Ala. Civ. App. 1997) (noting that, without proof of harm to the child, a custody and visitation order prohibiting a parent from cohabiting with "a person to whom she is not related by blood or marriage" in the presence of the child is unwarranted), *with Ex parte* J.M.F., 730 So. 2d 1190, 1192, 1196 (1998) (claiming that mere exposure to expressions of affection of "criminality" added to speculation of harms from gay parenting warrants custody change and visitation restriction).

forms of relationship expression; this is precisely what the Louisiana Supreme Court recognized when it used First Amendment analysis to reason that sexual aids have therapeutic or other expressive values and cannot be considered obscene.[132]

Where courts are more deferential to government in claims that sex regulation targets "conduct" rather than associations or expression, the scrutiny required by the Supreme Court's expressive conduct doctrine may still guarantee protection for sex in ways that *Lawrence*, so far, has not. The most conservative justices of the current Supreme Court have either abandoned the assertion that public morality would withstand intermediate scrutiny to justify suppression of expressive conduct or have conceded that it is not the law,[133] even for sexual expression deemed marginal in constitutional value.[134] As for private sexual expression, *Stanley* is still the law, such that speculative claims of "secondary effects" caused by expression cannot serve as a basis for regulation of the expression in question.[135]

Though First Amendment claims for expressive conduct pose no risk of the legalization of violent sexual expression,[136] defenders of sexual expression should be prepared to concede that an array of taboo sex may warrant First Amendment protection as much as sex in more socially accepted relationships. It is, of course, true that random sex with strangers

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[132] State v. Brenan, 772 So. 2d 64 (La. 2000).

[133] Justice Rehnquist defended the use of morality in *Barnes*, citing *Hardwick* and claiming that morality was "unrelated" to free expression. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569-70 (1991). However, in *PAP's A.M.*, he joined a plurality opinion and made no mention of morality as a basis for the law. City of Erie v. PAP's A. M., 529 U.S. 277, 282-302 (2000). Indeed, in *PAP's A.M.*, Justices Scalia and Thomas argued that the plurality had abandoned this view. *Id.* at 307, 310 (Scalia, J., concurring) (disagreeing with plurality and arguing a contrary view that morality is a rational basis for the law).

[134] The *Barnes* and *PAP's A.M.* pluralities claimed that nude dancing only contained minimal expressive value, but, unsurprisingly, failed to explain why other than by claiming "we think it is." *See Barnes*, 501 U.S. at 565-66; *PAP's A.M.* 529 U.S. at 289.

[135] Shifting pluralities of the Court have certainly held that local governments can justify regulation of sexual expression on the claim that the expression causes harmful secondary effects, even without proof of those effects. *See Pap's A. M.*, 529 U.S. at 292-302. However, three of the Justices who once endorsed that view already seem to have retreated from it. *See* Garland, *supra* note 4, at 199, 199 n.175. In fact, despite fracturing over the degree of protection the Constitution affords to public sexual expression—and despite the public nature of that expression—a strong majority of the justices remaining on the Court have respected precedent granting protection to sexually expressive conduct. As the *Pap's A.M.* plurality explained, eight members of the Court in *Barnes* agreed that nude dancing enjoyed constitutional protection. 529 U.S. at 285.

[136] Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (explaining that actual violence caused by speech can always justify its suppression).

sought for no purpose other than pleasure will likely have difficulty transcending the "mere sex" protected by *Lawrence*.[137] But neither should pleasure and recreation preclude a First Amendment claim, given the lengths to which the Supreme Court has gone to find a modicum of expression in the Scouts' predominantly recreational association and the grudging protection it has given to nearly-nude dancing—both of which were morally suspect in the contexts in which they arose.

Consequently, governmental burdens on adulterous relationships should be hard to justify for their "public effects," with most states openly abandoning attempts to stop them by repealing laws against adultery or treating them as "dead letter" law.[138] Similarly, regulations that attack prostitution to "save" sex for relationships ignores the expression it generates—from fantasy role playing, to exploration of sexuality—raising serious First Amendment questions,[139] especially if the "secondary" effects of violence and coercion associated with commercial sex prove to be caused by the underground market prostitution bans create.[140] Even in group sex, many adults not only associate to celebrate deviation from sexual norms but consider engaging in sex with multiple partners essential to expressing discomfort with desire suppressed by the monopolization of sex by romantic, monogamous relationships.[141] Unless *Dale* stands for nothing

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[137] The Court denied an expressive association claim to recreational dancing without expression. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

[138] For a comprehensive summary, see MODEL PENAL CODE § 213.6 note on adultery and fornication (Official Draft 1962 and Revised Comments 1980) (explaining arbitrary enforcement of "dead letter" laws maintained solely for "morality"). This is particularly true since there is growing social evidence that adultery is a mere symptom of marital breakdown, not its cause. *See id.* For more recent data, see NHSLS, *supra* note 18, at 105.

[139] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-63 (1973) (claiming the law can honor "sensitive . . . relationship[s]" by banning "crass commercialization" of sex). Five members of the Rehnquist Court have claimed that regulation of prostitution "'on its face. . . is not at all'" related to expression. *See PAP's A.M.*, 529 U.S. at 291 (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 (1991) (Souter, J., concurring)). However, the Court has otherwise held that government claims of regulating speech as commerce devalue expression. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Health Relations, 413 U.S. 376, 385 (1973) (holding that, "if a newspaper's profit motive were determinative," then all expression would be subject to regulation).

[140] For a comprehensive discussion of this perspective without regard to expression claims, see Sylvia Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523 (2000).

[141] For examples of objections to group participation and observation of sex for varied reasons, see City of New York v. New St. Mark's Baths, 497 N.Y.S.2d 979, 982-84 (1986) (surveying the law to conclude that regulation of semi-private spaces used "predominately . . . for . . . gratification" during the onset of the AIDS crisis requires little

more than preferential treatment for the Scouts' view of sexuality—something the Court denied when it insisted that a particular moral view of sex did not determine its judgment[142]—courts after *Lawrence* have no justification for treating unpopular sexual expression as having minimal value. Indeed, the *Dale* Court defended its protection for the Scouts by reasoning that "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[143]

It is not difficult to imagine, of course, that courts will resist comparing the Scouts to taboo sexual associations, even though the Supreme Court apparently had little trouble comparing the Scouts to the Ku Klux Klan.[144] But the Court's expansive protection for the Scouts' use of their leaders' sexual behavior as role modeling invites sexual comparisons. And the Court's tolerance for expressive conduct that denigrates patriotism, advocates racism, and objectifies women should make clear that the only possible reason for denying sex the liberty to express "offensive" messages is that courts have their own point of view on sex—as something sacred and not appropriate to convey contrary feelings and ideas. Social science observers have long recognized that the essence of sexuality is the expression of individual feelings and ideas,[145] and the time for American judges to shed their shame and moralizing about sex is essential to locating protection for sexual expression where it belongs—under the First Amendment.

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scrutiny, despite the questionable science behind the regulation); State v. Bonadio, 415 A.2d 47, 52 (Pa. 1980) (Roberts, J., dissenting) (explaining how Pennsylvania's prosecution of sex was justified because it allowed multiple parties to observe and participate in sex); Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir. 1976) (en banc) (involving a third person in sex with a marital couple made the relationship "public" and not worthy of comparison to a marital relationship); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (suggesting that sexual relationships taking place in a private, albeit commercial, space such as a hotel for less than ten hours did not have the value of traditional relationships under an intimate association claim). The Supreme Court of Canada, recognizing the need to protect private sexual expression, recently extended protection to private clubs that facilitate sex with multiple partners. Regina v. Labaye, 2005 S. Ct. Can. 80; *but see* Regina v. Kouri, 2005 S.Ct. Can. 81 (disallowing Labaye protections for sex clubs with a lack of an effective shield to public exposure)

[142] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

[143] *Id.* at 660.

[144] *Cf. id.* (comparing the protection afforded to the Scouts and the Klan).

[145] Edward O. Laumann & Yoosik Youm, *Sexual Expression in America*, *in* SEX, LOVE AND HEALTH IN AMERICA, *supra* note 108, at 109-10.

IV. CONCLUSION

While history has proven that government has been remarkably unable to promote a morality of sexuality, it has shown how the slightest of government actions have wrought havoc on expression, particularly in ways that harm minorities. Governmental endorsements of racial and sexual prejudices have encouraged not only expression endorsing those prejudices, but violence and discrimination against minorities as well.[146] *Lawrence*'s recognition of the dangers of governmental stigmas on sexual minorities may simply be another incremental step away from this history in the Court's efforts to safeguard individuals from the ratification of bigotry. But its recognition that government can damage the meaning and intimacy associated by condemnation of sex may well make it a landmark in the law of sexual expression, where shame, prudishness, self-righteousness, and panic have all dominated the Court's rhetoric and decisionmaking preceding it.

Lawrence's legacy, of course, may be marred by future courts and their judges, who may act as bulwarks to the hope that *Lawrence* offers for tolerance of different points of view about sex. Ideally, judges and lawmakers would let go of fears that First Amendment claims for sexual expression risk popularizing it any more than the First Amendment alone has popularized the Klan, which thrived on governmental endorsements, not mere tolerance for expression.[147] But if government officials are to face those fears, then it may take First Amendment claims to make them do so. As Judge Posner has admitted in the context of sex, "the less that lawyers know about a subject, the less that judges will know; and the less that judges know, the more likely they are to vote their prejudices."[148] Shielding sex in the privacy of homes—constraining the spirit of *Lawrence*—may do little more than ensure that full varieties of sexual expression not only

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[146] For more on the link between governmental discrimination and its capacity for engendering bias-motivated violence, see James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & SEXUALITY 1 (2001). For extensive discussion of citizen violence against gay men for alleged sexual propositions, see *id.*

[147] It is worth noting that BIRTH OF A NATION (David W. Griffith Corp. 1915), with its racist images of primitive, barefoot, and drunken African-Americans taking over Southern legislatures and chasing white women, faced massive censorship until Woodrow Wilson endorsed the film as "true." The endorsement not only freed the film from censorship, but promoted its popularity and is credited with fueling the violent revival of the Ku Klux Klan. Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 711-12 (2002); Peggy Cooper Davis, *The Constitution of Equal Citizenship for a Good Society: Introducing Robert Smalls*, 69 FORDHAM L. REV. 1695, 1705-06 (2001).

[148] *See* POSNER, *supra* note 37, at 347.

remain secret, but relegated to the shifting margins of the Constitution's protections.