

ARTICLE

THE PROMISE AND DANGER OF PRIVACY TO ACHIEVE EROTIC JUSTICE

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ABSTRACT

We are in the midst of a global backlash against LGBTQ rights. The United States and United Kingdom in particular are hot spots of anti-trans laws being passed and upheld by courts. Current constitutional protections for LGBTQ people, and sexuality more generally, are not sufficient. This Article examines case law on privacy and sexuality in the United States and England. This Article considers two alternate conceptions of privacy: (1) a classic view of privacy as based upon a strict separation between private and public spaces, and (2) a liberal-feminist interpretation of privacy in which the default state of individuals is in a private domain, regardless of where they physically are or what they are doing. In this latter view, individuals only move into the public (and therefore only lose rights to privacy) when they choose to cause harm. First examining US constitutional case law on anti-sodomy laws, abortion, birth control, and same-sex marriage, this Article concludes that the US Supreme Court has reasoned from both the classic and agential views of privacy. However, regardless of which conception of privacy is relied upon, this Article argues that US constitutional jurisprudence

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protects privacy only for relationships that resemble marriage. US constitutional jurisprudence has excluded societally disapproved sexual and gender orientations from legal protection well before its most recent explicitly anti-trans and anti-gay cases. The recent US Supreme Court cases on sexuality and gender have focused on harm, which is a new development in this area. This Article therefore turns to an area of case law where allegations of harm among consenting adults have long trumped privacy rights: BDSM. Looking to jurisprudence from the United States and England, this Article argues that these decisions have largely relied on agential privacy conceptions. Under this liberal-feminist view of privacy, we would expect the expansive protection of people in their lives so long as they do not cause harm. However, in applying this promising premise to cases involving BDSM, this view collapses in on itself. In such cases, private sexual relationships are adjudicated without account of privacy and prioritize harm as a primary consideration. English and US courts routinely make conclusory and vague findings of “harm” without any evidence and determine that these baseless harms are sufficient to remove any privacy rights. As such, this Article concludes that both agential and classical views of privacy can lead to punitive demonization of marginal sexualities. We see this today, in trans people’s very existence being considered a harm under current British and US law. As such, this Article urges that we move away from privacy arguments to achieve erotic justice.

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I. INTRODUCTION

The United States is in the throes of a major backlash to the rights gained by LGBTQ people over the twentieth century.¹ *Roe v. Wade* was overturned, and the decisions that explicitly protect gay and trans rights are increasingly being disregarded. Instead, US Supreme Court jurisprudence that once appeared to offer hope has, in practice, been used to restrict and undermine LGBTQ rights. In Britain, the situation for LGBTQ people has deteriorated over the past ten years. The United Kingdom is currently a hotspot of anti-trans laws, including removing access to gender-affirming medical care, education, and social services.² This anti-trans activism most recently culminated in the UK Supreme Court, which issued a unanimous ruling interpreting the terms “woman” and “sex” under the Equality Act 2010 to refer strictly to sex assigned at birth, which it referred to as “biological sex.”³ These movements

1. See Elena L. Cohen, *Justice in Erotic Spaces*, 32 CARDOZO J. EQUAL RTS. & SOC. JUST. 334 (2026) (citing Lester J. Feder, *Struggle Among Progress as Countries Restrict L.G.B.T.Q. Rights*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/world/global-lgbtq-rights.html> [<https://perma.cc/8BZP-YYN2>]); Charles M. Blow, *Yes, We're in an L.G.B.T.Q. State of Emergency*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/07/opinion/pride-lgbtq-laws.html> [<https://perma.cc/2EGF-VGZL>]; Josh Margolin & Teddy Grant, *Threats Against the LGBTQIA+ Community Intensifying: Department of Homeland Security*, ABC NEWS (May 15, 2023, 8:32 PM), <https://abcnews.go.com/US/threats-lgbtqia-community-intensifying-department-homeland-security/story?id=99338137> [<https://perma.cc/P6E7-7GYB>]; Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN (Apr. 6, 2023), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg> [<https://perma.cc/7ZH2-8JC2>]; Susan Miller, *'War' on LGBTQ Existence: 8 Ways the Record Onslaught of 650 Bills Targets the Community*, USA TODAY (Apr. 5, 2023, 1:45 PM), <https://www.usatoday.com/story/news/nation/2023/03/31/650-anti-lgbtq-bills-introduced-us/11552357002/> [<https://perma.cc/M2RR-X99T>]. An online tracker of anti-trans bills in the United States is available at <https://translegislation.com/> [<https://perma.cc/S4TA-YPW7>].

2. See Sarah Lamble, *Confronting Complex Alliances: Situating Britain's Gender Critical Politics Within the Wider Transnational Anti-Gender Movement*, 28 J. LESBIAN STUD. 504, 505 (2024) (noting that Britain is “home to one of the most coordinated and well-known anti-gender mobilizations in the world”); see also Ruth Pearce, Sonja Erikainen & Ben Vincent, *TERF Wars: An Introduction*, 68 SOCIO. REV. 677, 680–81 (2020); Dean J. Connolly et al., *Transphobia in the United Kingdom: A Public Health Crisis*, 24 INT'L J. FOR EQUITY HEALTH 155, 155–56 (2025); AMNESTY INT'L UK, *Like a Snowball: The Growth and Impact of the Gender Critical Movement in the UK* (May 2026), <https://www.amnesty.org.uk/knowledge-hub/all-resources/like-a-snowball/> [<https://perma.cc/697U-N2G2>] (removed from Amnesty International UK's website on July 24, 2026); see also TRIBUNAL TWEETS, *Amnesty International UK: Letters of Challenge* (July 16, 2026), <https://tribunaltweets.substack.com/p/amnesty-international-uk-letters> [<https://perma.cc/T93G-DUYV>].

3. Connolly et al., *supra* note 2, at 155 (noting that the decision “may now permit, or even compel, the legal exclusion of [trans] people from gender-congruent services—

against trans rights in the United States, United Kingdom, and many other countries are linked, “a contextual expression of a wider trans-exclusionary political climate with international dimension.”⁴ It is clear that current legal protections for LGBTQ people, and sexuality more generally, are insufficient to achieve erotic justice.⁵

including domestic violence refuges, hospital wards, and bathroom facilities—undermining access to essential care, support, and protection. This ruling will have potentially devastating consequences for the health, safety, and rights of [trans] communities.”). The plaintiffs in that case were bankrolled by J. K. Rowling, who posted a photograph of herself celebrating the decision smoking a cigar on her mega yacht, with the caption, “I love it when a plan comes together.” See Caroline Davies, *JK Rowling’s Journey from Harry Potter Creator to Gender-Critical Campaigner*, *GUARDIAN* (Apr. 18, 2025), <https://www.theguardian.com/books/2025/apr/18/jk-rowling-harry-potter-gender-critical-campaigner> [https://perma.cc/46CZ-E3Y7].

4. Pearce et al., *supra* note 2, at 680. Pearce further explains how the contemporary anti-trans movement is an extension of the prior debates around gender essentialism that rely on racist assumptions that white women are the most vulnerable class—as opposed to the vulnerability of Black trans people at the hands of white women. *Id.* at 680–81. See also Lamble, *supra* note 2, at 506 (“anti-gender campaigning is frequently tied to nationalism and white supremacy, via concerns about supposed imposition of ‘foreign’ values, and resistance to changing social norms deemed to[o] destructive to family and society.”); Cohen, *supra* note 1, at 345 (discussing Western racism in the global backlash to LGBTQ rights); Diego Garcia Blum & Timothy Patrick McCarthy, *Understanding the Implications of the UK Supreme Court’s Ruling Defining ‘Sex’ in the Equality Act*, *CARR-RYAN CTR. FOR HUM. RTS.* (Apr. 18, 2025), <https://www.hks.harvard.edu/centers/carr-ryan/our-work/carr-ryan-commentary/understanding-implications-uk-supreme-courts-ruling> [https://perma.cc/2PUG-K83Q] (commentary of Ian Lekus, Council for Global Equality). Lekus argues that the gender-critical movement serves a broader, heavily funded “anti-gender movement.” *Id.* He notes that J.K. Rowling financially backed the plaintiffs in *For Women Scotland*, and that the wider anti-gender movement is “backed by mega-rich Russian oligarchs, American evangelicals, and extreme-right Spanish and Latin American Catholic billionaires.” *Id.*

5. For a discussion of erotic justice, see Cohen, *supra* note 1 (citing Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 143, 148 (Carole S. Vance ed., 1984)). For other articles that use Gayle Rubin’s concept of the hierarchical valuation of sexuality to analyze constitutional law, see Elizabeth M. Toledo, *When Loving Is Not Enough*, 104 *CALIF. L. REV.* 769, 798–801 (2016); see also Anna High, *Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class*, 69 *ARK. L. REV.* 787, 793 (2016); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 *WM. & MARY J. WOMEN & L.* 313, 335 (2003); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *IOWA L. REV.* 1253, 1266 n.47 (2009); Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 *N.Y. CITY L. REV.* 161, 170 n.55 (2005); Dipika Jain & Kimberly Rhoten, *A Queer-Feminist Analysis of BDSM Jurisprudence in Common Law Courts*, 27 *BERKELEY J. CRIM. L.* 87, 133–34 (2022); Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 *B.C. L. REV.* 801, 854–56 (2023).

As explained below, the major constitutional decisions on gay rights in the United States were grounded in a right to privacy. This is not surprising, as the need to protect privacy is considered a defining trait of modern liberal society.⁶ Yet privacy protections, as they currently exist, are often understood as adverse to gender and racial justice.⁷ A major project of the feminist movement has

6. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1093 (2002) [hereinafter Solove, *Conceptualizing Privacy*] (noting that “Supreme Court Justice Louis Brandeis spoke of the profound importance of establishing and safeguarding a right to privacy, describing such a right as ‘the most comprehensive of rights and the right most valued by civilized men.’” (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))); see also Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) (examining privacy and modern surveillance, and concluding that “[p]rivacy therefore is an indispensable structural feature of liberal democratic political systems.”); Anita L. Allen & Christopher Muhawe, *Is Privacy Really a Civil Right?*, 40 BERKELEY TECH. L.J. 1, 13–22 (2025) (discussing the history of privacy to protect rights, while exploring whether a right to privacy is a viable way to protect vulnerable communities in the age of artificial intelligence (AI)). Indeed, rights to privacy are a major issue for legislatures and courts to navigate with rapidly spawning contemporary technology. See Tammy Katsabian, *Employees’ Privacy in Internet Age: Towards a New Procedural Approach*, 40 BERKELEY J. EMP. & LAB. L. 203, 206–07 (2019) (calling for an additional layer of procedural privacy to create stable and predictable protections for employees in an age of “new and endless forms of privacy infringement.”); see generally Rachel Aridor-Hershkovitz, *Exploring the Application of the Contributory Infringement Doctrine to Combat Spyware Misuse: A Study on Privacy Protection in the Digital Age*, 88 ALB. L. REV. 555, 584 (2025) (describing privacy as “a cornerstone of individual autonomy” that “serves as a linchpin for safeguarding other fundamental rights” and arguing contributory infringement doctrine could bolster privacy protections by widening the scope of liability of spyware companies); Jeffrey L. Vagle, *Privacy’s Commodification and the Limits of Antitrust*, 77 ARK. L. REV. 51, 63 (2024) (describing privacy “as a means of protecting other things of value in society, including dignity, individual agency, psychological growth and health, and many other items core to a free society”); Paul Ohm, *Focusing Privacy Law*, 40 BERKELEY TECH. L.J. 391, 395–97; 416–22] (2025) (arguing for privacy laws that center individual rights and personal autonomy, and prevent physical, emotional and economic harms resulting from modern data exploitation); Tiffany C. Li, *Privacy As/And Civil Rights*, 36 BERKELEY TECH. L.J. 1265, 1295–96 (2021) (arguing that especially since *Roe* was overturned and in light of states where abortion is now legal and surveillance technology is flourishing, “digital privacy, health privacy, bodily autonomy, and equal protection are more intertwined than ever.”); Daniel J. Solove, *Privacy in Authoritarian Times: Surveillance Capitalism and Government Surveillance*, 67 B.C. L. REV. 51, 63–74 (2026) [hereinafter Solove, *Privacy in Authoritarian Times*] (discussing privacy as essential to combat authoritarian exercises of power and the various harms government surveillance poses to essential rights such as freedom of expression, freedom of the press, data security, etc.).

7. See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 45–48 (2017); SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 8–44 (2020); Alvaro M. Bedoya, *Privacy as a Civil Right*, 50 N.M. L. REV. 301, 306 (2020) (invasions of privacy and government surveillance are a “tool to stop marginalized people from achieving power”); Anita L. Allen, *Dismantling the “Black Opticon”: Privacy, Race, Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 910 (2022) (noting that commercial data practices impede the autonomy and agency

been to challenge the distinction between private and public spheres.⁸ Inequality and oppression are often reproduced when conduct deemed “private” is insulated from public scrutiny or legal intervention. This concern is reflected in the political left’s general

of African Americans through “excessive and discriminatory surveillance,” “targeted exclusion,” and “exploitative financial fraud” and that future data and privacy protections must address “digital era vulnerabilities of African Americans”); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 728 (1999) [hereinafter Allen, *Coercing Privacy*] (arguing that “[l]iberals may need to rethink the claims they have always made about the value of privacy. We are forced to be free. Liberal governments cannot permit us to sell ourselves into slavery. Are we forced to be private? Should we be?”).

8. See, e.g., Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S. I. Benn & G. F. Gaus eds., 1983) (“The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.”); Catharine A. MacKinnon, *Abortion: On Public and Private*, in TOWARD A FEMINIST THEORY OF THE STATE 184, 187–88 (1989) (arguing that US courts’ decisions on gender privacy based on the US Constitution hurt women by “enforcing male supremacy with capitalism; translating the ideology of the private sphere into the individual woman’s legal right to privacy as a means of subordinating women’s collective needs to the imperatives of male supremacy.”). MacKinnon concludes that privacy in the law “has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition. It has protected a primary activity through which male supremacy is expressed and enforced.” *Id.* at 194. See also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 43 (1992) (“Women feel that for too long we have been ignored, because we have been seen as private and unimportant. Furthermore, we feel that for too long our lives and our complaints have been ignored because they lacked visibility. We are now extremely reluctant to endorse a voluntary privateness, and to see it as a value. It seems right that the very language in which these suggestions are couched, the very naturalness of talking and thinking in these ways, are part of what we would want to rebel against.”); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110–33 (1989) (“If privacy itself is to carry the same value for all of us, women and men, then the families in which we enjoy it must make us all feel secure and equal. But, given the history of gender, we know that equality between the sexes, whether in the family or anywhere else, is unlikely simply to happen.” *Id.* at 116–17); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 327 (1993) (summarizing the different types of feminist critiques of privacy, and concluding that “[t]he point is not that everything should be public or that everything should be private; nor is mere tinkering around with the details of what belongs in the public category and what belongs in the private category likely to bring about significant and far-reaching improvement in the role and status of women. What the best versions of the feminist critique of the public/private distinction try to achieve is a rethinking of how the categories ‘public’ and ‘private’ are structured, a deeper analysis of how the status quo is maintained, and new approaches to theorizing social change.”); JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 217–28 (1993); Allen, *Coercing Privacy*, *supra* note 7, at 728 (“As a result of the feminist critique, we understand that the conditions of confinement, forced modesty, obedience, and unaccountability that once constituted the private sphere are not a model of privacy worthy of the name. Ironically, just when meaningful, unoppressive forms of privacy and private choice are becoming imaginable and available to women, privacy is losing its cache.”).

unease with the private sphere. Many on the left, especially since the twentieth century, have been critical of “the private” for many reasons. Concerns have included the concentrations of power in private hands, in part because of mass accumulations of private property; preferences for universalism (where privacy was seen as parochial and pre-modern); the view of matters discussed in secret as illegitimate (*e.g.*, the Vietnam War); and a general view that matters in public view are more democratic, fair, equal, and accountable.⁹

Many feminist legal critiques of privacy rely on the assumption that “private” versus “public” can be reduced to a strict division between two domains: the private household and the public body politic.¹⁰ This is the view (perhaps wrongly) attributed to Aristotle, and is the dominant way that privacy is understood in Western political thought.¹¹ This critique has merit, since privacy in the law is often found in physical places (like the marital bedroom) or in discrete areas of non-political activity (like marriage, child rearing, contraception, procreation, and education). These discrete areas where privacy rights have been found fit neatly within the “charmed circle of sex acts,” especially the focus on married couples who are procreative.¹² Sex is hierarchically valued in a system of oppression that more resembles sexism and racism than genuine ethics.¹³ One way to understand this structuring of sexuality and gender is through a “charmed circle.”¹⁴ “Good” sex within the charmed circle is that which is coupled, procreative, monogamous, in a relationship,

9. See, *e.g.*, Alan Wolfe, *Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 182, 188–89 (Jeff Weintraub & Krishan Kumar eds., 1997); but see Solove, *Privacy in Authoritarian Times*, *supra* note 6, at 89–90 (discussing the benefits and dangers of Fourth Amendment jurisprudence that equates privacy with secrecy).

10. See Daniela Gobetti, *Humankind as a System: Private and Public Agency as the Origins of Modern Liberation*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 103, 104 (Jeff Weintraub & Krishan Kumar eds., 1997).

11. See JUDITH A. SWANSON, *THE PUBLIC AND THE PRIVATE IN ARISTOTLE’S POLITICAL PHILOSOPHY* 1–2 (1992); see also SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 75 (1979).

12. Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 150, 152–53 (Richard Parker & Peter Aggleton eds., 2d ed. 2007).

13. See Cohen, *supra* note 1, at 347 (citing Rubin, *supra* note 12, at 158).

14. *Id.*

and/or in private.¹⁵ “Bad” sex, or sex outside of the charmed circle, is unmarried, promiscuous, casual, and/or in public.¹⁶ In this way, the distinction between “charmed” societally-sanctioned sex versus “cursed” sex maps clearly onto the Aristotelian division of public and private.

However, modern political and legal theory has also developed different views of privacy,¹⁷ including conceptions that are not concerned with protecting particular places, but with safeguarding individual agency. Under this theorization of privacy, the default is that individuals are in a private domain, regardless of where they are physically located or what they are doing.¹⁸ Individuals only move into the public when they choose to cause harm.¹⁹ This harm-based view of privacy developed from natural law theory in the seventeenth and eighteenth centuries. John Locke’s work conveys privacy as agential.²⁰ In his work, privacy operates to insulate every individual.²¹ According to this approach, a privacy bubble follows every individual around, wherever the person goes. Individuals’ bubbles interact, overlap, and grow as they form relationships.²² The bubble may only be punctured when harm is threatened or done, and can be recreated once the harm is repaired or the wrongdoer has compensated the injured party.²³ Further, harm can only be done intentionally, and only after an actor who is capable of assessing risks decides whether to injure.²⁴ The bubble may also be permeated insofar as an individual is required to care for the common good.²⁵ How easily the privacy bubble may be permeated depends on how broadly one conceives “harm.” For Locke, piercing the privacy bubble required physical

15. *Id.* at 346–47.

16. *Id.* at 347.

17. For an explanation of the different ways that privacy has been conceptualized within the law, see Solove, *Conceptualizing Privacy*, *supra* note 6, at 1099–119. Solove divides conceptions of privacy into seven main categories: (1) the right to be let alone, (2) limited access to the self, (3) secrecy, (4) control over personal information, (5) personhood, (6) intimacy, and (7) a pragmatic approach, for which Solove advocates. *Id.* at 1092–93.

18. Gobetti, *supra* note 10, at 106.

19. *Id.*

20. *Id.* at 116–24.

21. *Id.* at 122.

22. *Id.* at 124.

23. *Id.*

24. *Id.* at 125.

25. *Id.* at 124–25.

harm.²⁶ For John Stuart Mill, psychological harm was sufficient.²⁷ Under this alternate conceptualization of privacy in modern political theory, the private domain encompasses every act a person engages in, so long as they do not choose acts that harm others.²⁸ It is an “ambulatory” theory of privacy, in that privacy moves with a person as they navigate and interact with society in their daily life. One’s privacy travels with them, whether they are in a home, on a sidewalk, in a grocery store, or in a courthouse. As explained below, because this type of privacy is not focused on discrete areas that need to be pre-approved by a court or in literal private spaces, it could be part of a feminist recovery of sexual privacy law.

In the United States, protections for sexual acts have historically been grounded in the Supreme Court’s substantive due process jurisprudence, and have involved adjudication of anti-sodomy laws, abortion, birth control, interracial marriage, and same-sex marriage.²⁹ The Court frequently described this protected liberty, which derives from the Fourteenth Amendment’s guarantee that no state shall deprive a person of “life, liberty or property without due process of law,” as a “right to

26. *Id.* at 124.

27. *Id.*

28. *Id.*

29. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

privacy.”³⁰ This has also been phrased as a “freedom from unwarranted governmental interference.”³¹

The “right to privacy” has mainly developed in the context of cases focusing on the legality of birth control and restrictions on abortion.³² From these decisions, the US Supreme Court has identified two privacy rights protected by the Due Process Clause: decisional autonomy and bodily integrity.³³ The status of these

30. U.S. CONST. amend. XIV. For an explanation of how the US Supreme Court has found rights to privacy via the term “liberty” in the US Constitution, see 16B C.J.S. *Constitutional Law* § 1167 (1985) (“The constitutional right of privacy limits its protection to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.”); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65–66 (1973) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). See also *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684 (1977) (noting that implicit to the liberty interests protected by the Fourteenth Amendment Due Process Clause is a right to privacy includes “the interest in independence in making certain kinds of important decision.”). See, e.g., *Carey*, 431 U.S. at 685 (citing, *inter alia*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (declaring the right to make decisions about child rearing and education); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that compulsory sterilization of a person convicted of certain crimes violates the Equal Protection Clause); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). See also Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 720–39 (2010) (explaining the history of “the right to privacy from its early years as a key figure in the Warren Court’s cautious embrace of unenumerated constitutional rights; to its role in creating a right to an abortion; and finally, to its abandonment by its opponents and, eventually, its initial supporters.” *Id.* at 720).

31. *Eisenstadt*, 405 U.S. at 453 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). See also *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1091–93 (1998) (surveying decisions where courts have determined whether governmental interference reached the level of unwarranted.).

32. See, e.g., *Griswold*, 381 U.S. at 484–86; *Eisenstadt*, 405 U.S. at 453; *Roe*, 410 U.S. at 152–53; *Casey*, 505 U.S. at 851–53; *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 593–94 (2016); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

33. See, e.g., *Roe*, 410 U.S. at 158–66 (holding a pregnant individual has a distinct liberty interest to choose to have an abortion prior to fetal viability); *Griswold*, 381 U.S. at 484–86 (holding that Connecticut’s ban on contraceptives was “repulsive to the notions of privacy surrounding the marriage relationship” and therefore unconstitutional); *Casey*, 505 U.S. at 851 (explaining that the right granted in *Roe* was the freedom to make “personal choices” that are “central to personal dignity and autonomy”; and further, that any

protections is unclear after *Dobbs*.³⁴ In *Dobbs*, the Supreme Court held the Constitution does not prohibit states from regulating or criminalizing abortion.³⁵ The plurality decision framed the previously conceived “right” to an abortion as an error that was neither “deeply rooted in this Nation’s history and tradition” nor “implicit in the concept of ordered liberty.”³⁶ The *Dobbs* Court did not see any vested or consistent privacy interest at stake, pointing to the *Casey* opinion’s “abandonment” of privacy rights, iterated in *Roe*, for substantive due process.³⁷ But “decisional autonomy” protects certain major life decisions, which should be made without governmental interference and has been interpreted to include decisions such as whom to marry (*Loving v. Virginia*;³⁸ *Obergefell v. Hodges*³⁹), whether to have a child (*Roe v. Wade*,⁴⁰ overruled by *Dobbs*⁴¹), and who one has sexual relations with (*Lawrence v. Texas*⁴²), while “bodily integrity” refers to the right to make major decisions about one’s body without governmental interference.⁴³ In the case of physician-assisted suicide, the Supreme Court declined to extend the “right to bodily integrity” to an individual’s decision to end one’s life (*Washington v. Glucksberg*).⁴⁴ In overruling *Roe*, the *Dobbs* Court primarily relied on *Glucksberg*.⁴⁵

unnecessary laws that created obstacles in exercising this autonomy imposed an undue burden on the right to make intimate choices about one’s own body. *Id.* at 878).

34. See Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, & Reproductive Justice*, 65 ARIZ. L. REV. 385, 390 (2023) (noting that “[a]lthough the immediate concern in *Dobbs* is abortion, the Court’s methodology could have far-reaching results. The Court’s narrow and backward-looking tradition analysis is inconsistent with doctrinal approaches the Court utilized in cases finding fundamental rights to sexual privacy, same-sex marriage, and contraceptive use. While the majority disclaims an interest in overturning these precedents, its effort to distinguish these rights from abortion is unconvincing.”).

35. *Dobbs*, 597 U.S. at 302.

36. *Id.* at 231 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

37. *Id.* at 280.

38. 388 U.S. 1, 2–12 (1967).

39. 576 U.S. 644, 675–81 (2015).

40. 410 U.S. 113, 162–63 (1973).

41. *Dobbs*, 597 U.S. at 215.

42. 539 U.S. 558, 588 (2003).

43. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–75 (1992).

44. 521 U.S. 702, 722–23 (1997).

45. See Hutchinson, *supra* note 34, at 389 (“Drawing heavily from the ruling in *Glucksberg v. Washington*, *Dobbs* centralizes the ‘deeply rooted’ formulation above all other doctrinal descriptions of fundamental rights.”).

Many prominent judges and scholars, however, have argued that privacy was the wrong foundation for these decisions, and that they would have rested more securely on ideas of equality, personal autonomy, or anti-slavery constitutional doctrines.⁴⁶ Some scholars note how privacy is now used to *deny* these same rights.⁴⁷ Others, discussed in detail below, argue that privacy can be re-conceptualized in a way that can protect sexual rights.⁴⁸

This Article joins in the conversation about privacy, gender, and sexuality. It does so by expanding the focus from decisions explicitly about sexual orientation, and instead looking to an area

46. For example, Ruth Bader Ginsburg argued a decade before being appointed to the Supreme Court that *Roe v. Wade*'s focus on a "medical autonomy" view fueled the anti-abortion movement. *Roe v. Wade* located constitutional protection for abortion in a right to privacy and a liberty interest to be free from unwarranted governmental intrusion. Because *Roe*'s mandate was protected under this guarantee of liberty, a government complies with the Constitution as long as it does not actively intrude. The government does not need to affirmatively help people have abortions, because abortions are an area of privacy from the government. Ginsburg argues that had the US Supreme Court focused on equality of women (or a broader view of autonomy, as "woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society and the state as an independent, self-sustaining, equal citizen,") then the decision would have been much less controversial and would have led to better access to abortion for women. With hindsight, an alternate holding may have preserved the judgment from having been overruled. See Wolfe, *supra* note 9, at 191–92 (citing works by Ruth Bader Ginsburg, Kathryn H. Snedaker, Andrew Koppelman, and Jean Cohen).

47. See Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719, 1722–23 (2019) ("[I]n state legislatures across the country, lawmakers are considering bills with the stated purpose of safeguarding women's and children's privacy by forbidding people from using a bathroom that does not accord with their 'biological sex.' These measures have names like the Student Privacy Protection Act and are supposed to protect young women's dignity and physical integrity. Proponents claim that these bills are a necessary, or even an emergency, response to a threat created by the LGBT community's demand for protection from discrimination in employment and public accommodations: the threat that such antidiscrimination protections will facilitate men entering women's bathrooms."). Hazeldean explains how this logic falls apart once examined, in that these "attempts to exclude transgender women from women's facilities do not protect women's privacy or safety. Indeed, these efforts are not only unhelpful to women's interests, they are harmful. Excluding transgender women from women's bathrooms on privacy grounds hurts all women, including cisgender women. It does so by reifying dangerous sex stereotypes that have been used to exclude women from public life and to justify sexual violence. Efforts to exclude transgender people from facilities that accord with their gender identity are better understood as struggles to oppose LGBT rights and maintain traditional sex and gender roles rather than as a defense of privacy. Far from protecting women and girls, the privacy arguments being made to oppose LGBT rights perpetuate negative stereotypes about women and men, undermining sex equality and making people more vulnerable to discrimination, mistreatment, and assault.").

48. See *infra* Part II.

that some people campaigning for trans rights might not deem as worthy of academic inquiry: bondage, discipline, domination, submission, sadism, and masochism (“BDSM”). My goal is to use the law in pursuit of erotic justice, which “is both a critique of the legal principles that rank sexual acts and repress the people who engage in them, and also a commitment to building new legal frameworks that promote dignity, autonomy, and sexual expression.”⁴⁹

The Article proceeds as follows. Part II explores the concept of “privacy.” This Part discusses how protections for sexual acts and gay people in the United States have been grounded in substantive due process jurisprudence. This type of due process analysis is based on the concept of privacy, and more specifically, the right to be free from unwarranted governmental intrusion. This area of law has been developed through the Supreme Court’s constitutional adjudication of anti-sodomy laws, abortion, birth control, and same-sex marriage. This Part explains how the Supreme Court cases on sex and marriage use both a classic Aristotelian view of privacy, and also a more robust agential view of privacy. This Part further explains how, regardless of what type of privacy the Supreme Court uses, and especially after the Court’s overruling of *Roe* and subsequent abortion cases, these cases only protect relationships to the extent that they resemble marriage. Privacy has not been able to stop the current proliferation of anti-trans legislation in the United States and United Kingdom, and has not factored into the countries’ high courts’ review of these laws. Instead, in these most recent cases, claims of harm have been used to overcome guarantees of privacy. Part III therefore looks to prior case law in the United States and United Kingdom where claims of harm outweighed privacy rights: BDSM. Because of the ease of using public harm or an objective standard of harm to justify legal sanctions, case law on BDSM in the United States and Britain espouses a commitment to robust privacy for sexual acts, but denies protection in practice. This is true despite consent being foundational to BDSM and to Western legal thought. In these cases, much like the cases specifically about LGBTQ rights, only people in monogamous and heterosexual marriages are spared civil and

49. Cohen, *supra* note 1, at 383.

criminal liability. As such, this Article concludes that appeals to privacy are a trap in the search for erotic justice.

II. *PRIVACY IN CONSTITUTIONAL DECISIONS ON LGBTQ RIGHTS*

The Supreme Court's decision in *Lawrence v. Texas*, and its gloss on this case in *Obergefell v. Hodges*, clarify where and how the Court locates liberty rights related to same-sex sexual conduct. In doing so, those cases suggest both a potential for protecting other types of sexual conduct and reveal the limits of that protection. In *Lawrence*, the Supreme Court overruled its prior decision *Bowers v. Hardwick*,⁵⁰ holding that a Texas anti-sodomy law that criminalized sexual relations between people of the same sex violated a constitutionally protected right to privacy.⁵¹ While holding that privacy has a tangible spatial dimension, in which consenting adults are protected in literal "private" spaces like a bedroom, the Court held that the type of decisional autonomy protected by the US Constitution includes a more "transcendent" dimension, in which the autonomy of the self to engage in certain "intimate" conduct is protected.⁵² The decision in *Lawrence* recognized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."⁵³

Additionally, the *Lawrence* Court noted that "[t]he condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" and that "for many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."⁵⁴ Yet the Court continued that "[t]hese considerations do not answer the question before us," as the "issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law" and the Court's "obligation is to define the liberty of all, not to mandate our own moral code."⁵⁵

50. 478 U.S. 186, 192–96 (1986).

51. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

52. *Id.* at 562, 567.

53. *Id.* at 559.

54. *Id.* at 571.

55. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

Instead, the Court looked to one's right to define one's own life, holding that who one has sex with is part of one's personhood and identity in the world.⁵⁶ At this most abstract level, although it excluded non-adults outright, the majority opinion in *Lawrence* would seem to protect other sex acts outside of the charmed circle. Cursed sexuality might be protected under *Lawrence's* rationale, because the Court argues that majority determinations of what is "bad" cannot be a legitimate basis for regulating sexual acts.⁵⁷

Therefore, insofar as the disapproval of some cursed sex acts (like sex outside of marriage) is based solely on societal disapproval, reading *Lawrence* at a surface level might signify that these damned sex acts deserve constitutional protection. However, despite the exciting avenues opened by the *Lawrence* Court in some of its more grandiose statements on sexual tolerance, the opinion also produces and reinforces a sexual hierarchy through its emphasis on protected areas and places. The Court explicitly tied its protections to persons in marriage-like relationships (committed, non-casual, coupled), whose actual sex acts are also in their private homes.⁵⁸ The majority of the Court characterized the Texas anti-sodomy law as "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."⁵⁹ The majority opinion opined that sex is not just "sex," but conduct which is one element in a bond that is more "enduring."⁶⁰ The Court repeatedly referred to sex as "intimate conduct."⁶¹ In its holding, the majority opinion wrote that:

[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.⁶²

Because of this focus on intimate sex in committed relationships and in homes, *Lawrence* allowed certain

56. *Id.* at 558.

57. *Id.* at 602.

58. *Id.* at 567.

59. *Id.* at 558.

60. *Id.* at 567.

61. *Id.* at 562, 567, 605.

62. *Id.* at 567.

homosexuals engaged in certain acts (*i.e.*, couples in private) to be let into the charmed circle. As such, *Lawrence* firmly entrenches its view of privacy into subject area (“enduring” marriage-like relationships) and physical spaces (“their homes”).

Following from *Lawrence*, the Supreme Court’s decision on same-sex marriage in *Obergefell v. Hodges* held that substantive due process guarantees the right to marry as one of the fundamental liberties the Constitution protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples.⁶³ The *Obergefell* Court’s reasoning shows a move from subject matter and location-based privacy, to a more agential view of privacy as something that all individuals carry around them in the many interactions of their daily lives. However, despite this move to a more expansive form of privacy, the decision ultimately participates in the production and exclusion of disfavored sex acts, in particular, through its focus on procreative unions of two people.⁶⁴

Specifically, in *Obergefell*, the Supreme Court held that the right to marry is fundamental for at least four reasons: first, because the right to marry the person of one’s choosing is inherent to the concept of individual autonomy; second, marriage protects the most intimate association between two people; third, marriage safeguards children and families by according legal recognition to building a home and raising children; and fourth, marriage, has historically been recognized as the keystone of social order.⁶⁵ Because there are no differences between a same-sex union and an opposite-sex union with respect to these four principles of liberty, the exclusion of same-sex couples from the right to marry (a right already declared fundamental in *Loving v. Virginia*) violates the US Constitution’s Due Process Clause.⁶⁶ The *Obergefell* Court also held that prohibiting same-sex marriage violates the Equal Protection Clause, following its jurisprudence beginning with *Loving v. Virginia*, under which marriage rights have traditionally been addressed through both parts of the Fourteenth Amendment as issues of equality and liberty.⁶⁷ In short, for liberty and equality to

63. *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

64. *Id.* at 656–57.

65. *Id.* at 655–69.

66. *Id.* at 671–72.

67. *Id.* at 672–73.

hold, marriage to the person of one's choosing must be guaranteed by the US Constitution.

The *Obergefell* opinion shows a different view of privacy from *Lawrence*—a privacy that follows a person so long as they do not cause harm with their actions.⁶⁸ The Court addresses, and rejects, the argument that gay marriage harms people in straight marriages.⁶⁹ The Court here is explicit that it is looking to a harm principle, writing that “these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.”⁷⁰ Instead, the Court finds that it is people denied the ability to marry someone of the same sex who are harmed—both tangibly and by being subordinated. The Court writes that:

[B]y virtue of their exclusion from that institution [of marriage], same sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.⁷¹

The Court later continues that “[e]specially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”⁷²

However, this no-harm-based conception of privacy is deeply woven into the Court's view of marriage as the ultimate public good, as has been recognized by many queer commentators.⁷³

68. *Id.* at 679.

69. *Id.*

70. *Id.* at 679.

71. *Id.* at 670.

72. *Id.* at 675.

73. See Chelsea Moore & Emma Rodman, “It Would ‘Mean Little’ Absent Governmental Recognition”: *Theorizing State Power and the New Jurisprudence of Dignity*, 18 L. CULTURE & HUMAN. 698, 710 (2019); see also Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249, 251 (2020) (“In writing about *Obergefell v. Hodges*, others have

Indeed, with statements such as the “nature of marriage is that, through its enduring bind, two persons together can find other freedoms, such as expression, intimacy and spirituality,” the Court produces and reinforces the idea that the only path to a “full promise of liberty” is state-sanctioned marriage between (exactly) two adults.⁷⁴ As such, the *Obergefell* opinion is a “heavy-handed endorsement of a specific conception of the good intimate life—one that positions marriage, romantic love, monogamy, parenting, and the nuclear family as standards to which all Americans ought to aspire.”⁷⁵ Because the opinion endorses acts within the charmed circle, “it ends up demeaning queer-identified and other non-assimilationist lesbian, gay, bisexual, and heterosexual individuals and has potentially exacerbated, rather than tempered, the conflict surrounding LGBTQ rights in the United States.”⁷⁶ More recent Supreme Court decisions, including *Dobbs* and *Masterpiece Cakeshop*, throw into question how long *Obergefell* will be good law—especially as Justice Kennedy authored both *Obergefell* and *Masterpiece Cakeshop*.⁷⁷

noted that eventual success was premised on this carefully crafted image of sameness, assimilation, and respectability because it allowed the interests of same-sex couples in seeking marriage rights to converge with the Court’s interests in affirming the heteronormative institution of marriage” (citing Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CALIF. L. REV. CIR. 117, 122–25 (2015); Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 214–24 (2017))).

74. See *Obergefell*, 576 U.S. at 666; see also Teemu Ruskola, *Notes on the Neutered Mother, or Toward a Queer Socialist Matriarchy*, 67 EMORY L.J. 1165, 1166 (2018) (Ruskola discusses the relationship between Martha Fineman’s “The Neutered Mother” and queer theory’s critique of marriage. Fineman’s theory suggests law and society privileges marriages as sexual relationships necessary for family creation rather than caregiving. Although *Obergefell* extended marriage to same-sex couples, it did not decentralize the idea that “privileged sexual coupling” is between only two people); Marc Spindelman, *Obergefell’s Dream*, 77 OHIO ST. L.J. 1039, 1041 n.10 (2016) (string citing to queer critiques of *Obergefell*).

75. See Cyril Ghosh, *Marriage Equality and the Injunction to Assimilate: Romantic Love, Children, Monogamy, and Parenting in Obergefell v. Hodges*, 50 POLITY 275, 278 (2018); see also Cohen, *supra* note 1, at 369–80 (discussing how *Obergefell* and other court decisions that reinforce marriage as a prerequisite to a complete humanity are harmful to those outside the charmed circle).

76. See Ghosh, *supra* note 75, at 277.

77. See Ho, *supra* note 73, at 267–68; see also Kyle C. Velte, *The Precarity of Justice Kennedy’s Queer Canon*, 13 CONLAWNOW 75, 76 (2022); Ronald Collins, *The Campaign to Overrule Obergefell*, SCOTUSBLOG (June 8, 2026), <https://www.scotusblog.com/2026/06/the-campaign-to-overrule-obergefell/> [<https://perma.cc/XMN8-BLX5>] (questioning “[w]hat if a future case with ‘good’ facts, no procedural hurdles, and a new legal argument

The most recent US Supreme Court cases on LGBTQ issues, *Mahmoud v. Taylor* and *United States v. Skrmetti*, do not engage with the idea of privacy at all, despite the emphasis on privacy in *Obergefell* and *Lawrence*. In *Mahmoud*, the Court held that public schools must allow parents to opt children out of curriculum that includes LGBTQ storybooks that allegedly conflict with the parent's religious beliefs.⁷⁸ In *Skrmetti*, the Court upheld Tennessee's ban on gender-affirming care for trans minors, refusing to apply a heightened standard of scrutiny.⁷⁹ Neither opinion discusses privacy at all. This might be surprising, since the United States operates from a system of precedent, and the major cases to look at LGBTQ rights have been grounded in privacy, as discussed above. These new cases, especially *Skrmetti*, instead ground themselves in the concept of harm. The majority in *Skrmetti* repeatedly makes the unsubstantiated, vague claim that there are "potential harms associated with using puberty blockers and hormones to treat transgender minors."⁸⁰ The majority finds that Tennessee had a legitimate objective with its anti-trans law because it was intended to protect minors from physical and emotional harm by encouraging minors to "appreciate," rather than become "disdainful of," their sex.⁸¹ The dissent also focuses on harm. Justice Sotomayor explains the well-documented harm in not allowing minors to access gender-affirming care⁸² and the true reason for Tennessee's law: a desire to harm trans people.⁸³

came before the court? What then? And what if that case were the end product of a well-orchestrated campaign analogous to that waged in *Dobbs v. Jackson Women's Health Organization* to overrule *Roe v. Wade*?"

78. *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025).

79. *United States v. Skrmetti*, 605 U.S. 495, 510 (2025).

80. *Id.* at 505.

81. *Id.* at 517.

82. *Id.* at 581 (Sotomayor, J., dissenting) ("If left untreated, gender dysphoria can lead to severe anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality. Suicide, in particular, is a major concern for parents of transgender teenagers, as the lifetime prevalence of suicide attempts among transgender individuals may be as high as 40%. Tragically, studies suggest that as many as one-third of transgender high school students attempt suicide in any given year.").

83. *Id.* at 601 (Sotomayor, J., dissenting) (explaining how "[t]ransgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence" (citing Kevin Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 556–57 (2016); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 328–37 (1999) (cataloging state consensual sodomy laws, 1610–1988))). See also Ido Katri & Maayan Sudai, *Intersex, Trans and the Irrationality of Gender-Affirming-Care Bans*, 134 YALE

However, as case law in a different area of sexuality shows, the appeal of harm to (often enthusiastically consenting) people is a successful way to deny these same people their right to their own privacy.

III. *PRIVACY AND HARM IN CONSENSUAL SEX*

Comparing jurisprudence on cursed sex acts from the United States and England highlights the possibilities and limitations of privacy-based approaches to erotic justice. Looking to case law on BDSM shows that courts before and after *Obergefell* have sanctioned ambulatory views of protective privacy. However, these cases also show that the threshold to demonstrate harm, and therefore pierce a privacy bubble, is often overcome with unsubstantiated appeals to public harm.⁸⁴ Because of the ease of using public harm to justify legal sanctions, case law on BDSM in the United States and England espouses a commitment to robust privacy for sexual acts, then denies this privacy in practice. As such, even jurisprudence that starts with ambulatory views on privacy ultimately reinforces oppression by consistently finding that certain sexual acts or actors caused public harm, and therefore justify loss in rights to privacy.

“BDSM” is an umbrella term, referring to a large array of sexual activities including bondage, discipline, domination, submission, sadism, and masochism.⁸⁵ Also referred to as “kink,” BDSM acts may cause pain, humiliation, and other physical and emotional sensations through the use of physical or emotional power.⁸⁶ BDSM is incredibly varied. BDSM activities are often referred to as “play,” and BDSM encounters as “scenes.”⁸⁷ The person “giving” the particular act is often called a “top,” “dominant,” or “domme,” and the person receiving is referred to as a “bottom,” “submissive,” or “sub.”⁸⁸ BDSM has recently become

L.J. 1521, 1531 (2025) (arguing that bans on care for trans minors is “reflects social biases, not medical facts, and fails to address the specific needs and interests of trans and intersex minors.”).

84. See discussion of UK BDSM cases *infra* Section III.A.

85. See Morgan Schumann, Note, *Pain, Please: Consent to Sadoomasochistic Conduct*, 2018 U.I.L.L.REV.1177, 1179.

86. *Id.*

87. *Id.* at 1179, 1186.

88. *Id.* at 1180–81.

more mainstream, in part because of the *Fifty Shades of Grey* books and movies, and inclusion in other popular media.⁸⁹ BDSM is not explicitly illegal in the United States or England.⁹⁰ However, as the case studies below show, BDSM practices can lead to civil or criminal liability under laws against sexual assault, assault and battery generally, obscenity, prostitution, forced imprisonment, and coercion. BDSM practices also face the legal gaze in divorce and child custody cases.

Crucial to the discussion below as to how public harm has been used to eviscerate the liberatory possibilities of BDSM laws is an understanding of consent. Consent underlies both BDSM, and Western political thought and the laws crafted under its traditions. Consent is conventionally understood as the most important defining feature of BDSM—what separates fun and play from “real” sexual violence.⁹¹ Articles for those interested in BDSM include “BDSM 101: Consent, consent, consent,”⁹² and magazines like *Glamour* announce that, following a study on the topic, “Members of the BDSM Community Are Basically Consent Experts.”⁹³ Even those who criticize the foundational role of consent in BDSM still acknowledge its longtime primacy in alternate sexual acts and communities.⁹⁴

89. *Id.* at 1192; see also Gigi Engle, *Consent and BDSM: What You Should Know*, TEEN VOGUE (July 1, 2017), <https://www.teenvogue.com/story/bdsm-consent> [<https://perma.cc/ZRG8-EHPC>] (providing an introductory guide to the nuances and boundaries of consent in BDSM); Phoenix R. Crane and Molly E. Ireland, *Dominants, Submissives, and Bottom-up Text Analysis: Exploring BDSM Roles Through Romantic and Erotic Narratives*, 60 J. SEX RES. 452, 452–53 (2023).

90. See Ummni Khan, *A Woman's Right to Be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, 18 TUL. J.L. & SEXUALITY 79, 102 (2009); see also Elizabeth Mincer, *Fifty Shades and Fifty States: Is BDSM a Fundamental Right? A Test for Sexual Privacy*, 26 WM. & MARY BILL RTS. J. 865, 866–67; 874–75 (2018) (explaining that while BDSM is not technically illegal, it is often criminalized through other legal mechanisms).

91. See, e.g., Engle, *supra* note 89.

92. Meg-John Barker, *BDSM 101: Consent, Consent, Consent*, REWRITING THE RULES (Feb. 13, 2015), <https://www.rewriting-the-rules.com/sex/bdsm-101-consent-consent-consent/> [<https://perma.cc/GFC7-H5WC>].

93. Suzannah Weiss, *Members of the BDSM Community Are Basically Consent Experts*, GLAMOUR (Oct. 31, 2016), <https://www.glamour.com/story/study-shows-bdsm-community-most-aware-of-consent> [<https://perma.cc/8CMX-VFZS>].

94. See, e.g., JOSEPH J. FISCHER, *SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE* 3–4 (2019). Fischer argues that we should move away from the primacy of consent in sexual politics because of two main problems: (1) the unduly (he uses the term “ridiculous”) redefinitions of consent as only enthusiastic-type sexual experiences, and (2) how this

Consent is also fundamental to Western modern legal thought. Both Thomas Hobbes and John Locke based their accounts of the social contract and political legitimacy on consent. Locke's *Two Treatises of Government* centers consent as the necessary condition for political legitimacy.⁹⁵ Although his meaning of "consent" is debated, Locke's core view is typically summarized as the idea that a government is legitimate only where the people being ruled consented to being governed.⁹⁶ So, too, is consent crucial to Hobbes' political theory: both as the trait that confers legitimacy/authority on governments and as the main reason why people are obligated to follow laws (of legitimate governments).⁹⁷ Indeed, the social contract, in which individuals living in Hobbes' dangerous and violent state of nature agree to a government as their way out, functions because each person consented.⁹⁸ And, although theorists, like Locke, have spent centuries criticizing and explaining the social contract, there is still wide agreement that it was based upon at least formal appeals to consent.

Western common law, developed in England and brought to the United States as a then-colony, followed this Lockean/Hobbesian/Millian focus on consent and the ability to act so long as it does not harm. In the seventeenth century, criminal law's focus switched its view of primary victim from the person directly injured to society as a whole—which is why criminal cases are brought in the name of the People (*e.g.*, *The People of the State of California v. Orenthal James Simpson*) in the United States, or in the name of the Crown (*Rex* if there is a king, and *Regina* if there is a queen at the time charges are brought) in England.⁹⁹ By the eighteenth century, all crimes in English jurisprudence had been re-conceived of as public wrongs.¹⁰⁰ Along with this transition of crimes from private to public harm, the previous default law that

consent-as-enthusiasm makes sex either "awesome" or "rape," which leaves unaddressed the "immiserating sex too many people, typically women, endure."

95. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 146–47 (Rod Hay ed., 2000).

96. See, *e.g.*, John Dunn, *Consent in the Political Theory of John Locke*, 10 *HIST. J.* 153, 155–58 (1967).

97. See Dunn, *supra* note 96, at 158.

98. See *id.*

99. See Vera Bergelson, *Consent to Harm*, 28 *PACE L. REV.* 683, 686 (2008).

100. See, *e.g.*, *id.*; see also MARKUS D. DUBBER, *AN INTRODUCTION TO THE MODEL PENAL CODE* 175–76 (2d ed. 2017) (both citing to and explaining the continued tradition of William Blackstone's 1769 *Commentaries on the Laws of England*).

consent was an absolute defense was modified—such that consent was only a defense to the extent that the public was not injured.¹⁰¹ Explained in depth in the context of British BDSM case law below, an injured man could not be a ready soldier for the King (or the government, in the case of Vietnam War-era court decisions in the United States).¹⁰² If someone is injured to the point that they cannot serve the state (in these cases, literally military service), the person's private injury becomes a public harm, and threatens to weaken the entire country.¹⁰³

Consent—and its limitations—remain at the forefront of contemporary English and US criminal law. First published in 1962, and left largely untouched since then, the Model Penal Code was designed as a reference for states in the United States. Under the Tenth Amendment of the US Constitution, each state has “police powers” jurisdiction to make rules concerning the health, safety, morals and welfare of their public—resulting in different acts being legal in different states.¹⁰⁴ The Model Penal Code was a decade-long project attempting to create a uniform criminal law for the entire country, based upon its drafters’ distillation and analysis of three centuries of US criminal law in every state (and the English common law upon which US jurisprudence was built).¹⁰⁵ Since its publication, at least forty states have changed their criminal laws to reflect at least parts of the Model Penal Code.¹⁰⁶

In its definitions of “crime” and “consent,” the Model Penal Code is clearly modeled after Hobbesian/Lockean seventeenth- and eighteenth-century views. The Code defines crime in part as “conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual *or public interests*.”¹⁰⁷ The specific interests identified in the Code are also predominantly focused on

101. See Bergelson, *supra* note 99, at 686.

102. See *infra* Section III.A (discussing *R v. Brown*).

103. See Bergelson, *supra* note 99, at 687.

104. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

105. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320–25 (2007).

106. See Dubber, *supra* note 100, at 5–6.

107. MODEL PENAL CODE § 1.02 (A.L.I., Proposed Official Draft 1962) (emphasis added).

the public: gambling, narcotics, alcoholic beverages, “public order and decency,” “the existence or stability of the state,” “public administration,” etc.¹⁰⁸ The Code also includes an entire section on consent.¹⁰⁹ As of 2019, subsection one of the section on consent states that “[i]n [g]eneral” the:

Consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negates an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.¹¹⁰

The second subsection limits this general availability of consent as a defense in only one substantive area: “consent to bodily harm.”¹¹¹ In the case of bodily injury, consent is only to be considered a defense in three situations: (a) the bodily injury consented to or threatened by the conduct consented to is not serious; (b) 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; or (c) the consent establishes a justification for the crime (as described elsewhere in the Code, with examples being self-defense or to prevent a greater harm).¹¹²

As explained through the case studies below, the formulation of all crimes as a harm to the public, as opposed to an individual, combined with the ease of showing such harm, severely limits the ability of a theory of privacy founded in harm to have liberatory possibility.

A. “*Done for Love*” or “*Evil and Violent*”: BDSM Law in England

BDSM practices have been litigated in several high-profile cases in England: *R v. Brown*,¹¹³ *R v. Emmett*,¹¹⁴ and *R v. Wilson*.¹¹⁵ Although *Brown* and *Wilson* formally announce a potential privacy

108. See Dubber, *supra* note 100, at 175–76.

109. MODEL PENAL CODE § 2.11 (A.L.I., Proposed Official Draft 1962).

110. *Id.*

111. *Id.* § 2.11(2).

112. *Id.* § 2.11(1).

113. *R v. Brown* [1993] UKHL 19, [1994] 1 AC 212 (appeal taken from Eng.).

114. *R v. Emmett* [1999] EWCA (Crim) 1710 (Eng.), <https://www.bailii.org/ew/cases/EWCA/Crim/1999/1710.html> [<https://perma.cc/BN9K-U9XP>].

115. *R v. Wilson* [1996] 2 Crim. App. 241 (Eng.).

right that might protect cursed sex acts, in practice, privacy only functions to protect sex acts that occur within the charmed circle. Instead, English case law allows vague and unsupported claims of “public harm” to trump sexual privacy rights when cursed sex acts are at play. In practice, only those in married, monogamous, and heterosexual relationships have been protected by English privacy case law.

R v. Brown, also known as “the Spanner Case,” began in the late 1980s, when the “Obscene Publications Squad,” a special unit of the British police, came across a homemade video in Manchester, while investigating an unrelated matter.¹¹⁶ The video showed acts including beating, as well as acts involving excrement and branding between men.¹¹⁷ The appellants were all middle-aged men, although some of those who participated in the video were under the age of twenty-one when they were first introduced to BDSM.¹¹⁸ The video was filmed at one man’s home, who was charged with (and pleaded guilty to) the crime of “keeping a disorderly house.”¹¹⁹ The film was created to be seen by only those who had participated in it and by other people in their local BDSM scene.¹²⁰ Despite this, one man was charged with (and pleaded guilty to) publishing an obscene article.¹²¹ Alleging that the video showed (non-consensual) torture and that they had in their possession other films with the same persons showing murder, the Squad launched an elaborate and expensive investigation, titled “Operation Spanner.”¹²² After spending years and millions of pounds, interviewing hundreds of people, and even digging up the garden of one of the men in the video to look for a corpse, the police concluded that all of the activities in the video had been consensual, no one was murdered, and no one suffered any injury requiring medical attention.¹²³

116. See Chris White, *The Spanner Trials and the Changing Law on Sadomasochism in the UK*, 50 J. HOMOSEXUALITY 168, 168–89 (2006).

117. *Brown*, [1993] UKHL 19 at 8.

118. See Khan, *supra* note 90, at 105.

119. Three other men were charged with, and pleaded guilty to, aiding or abetting the keeping of a disorderly house. *Brown*, [1993] UKHL 19 at 31.

120. *Id.*

121. *Id.* at 32.

122. White, *supra* note 116, at 168–69.

123. See Khan, *supra* note 90, at 103–04.

However, despite finding that all acts in the film were by consenting adults who were not seriously injured, sixteen men were arrested, charged with, and ultimately convicted of assault (in addition to the “disorderly house” and “obscene” publication charges), under England’s 1861 “Offences Against the Person Act.”¹²⁴ This Act criminalizes inflicting “grievous” (serious) bodily harm and “actual” (less serious) bodily harm.¹²⁵ By 1993, England had decriminalized consensual sex in private between two men both over the age of twenty-one, under the Sexual Offences Act 1967.¹²⁶ Sex with more than two men at a time was still illegal under the Sexual Offences Act 1967, as was disseminating and encouraging homosexual activities,¹²⁷ but carried significantly lower possible jail times than the assault provisions under which the men were charged.¹²⁸

Both the tops and bottoms in the video were arrested then convicted for the same charges on the theory that the bottoms were accessories to their own assaults.¹²⁹ At their original trial, the judge ruled that the bottoms’ consent was not a defense to the assault for any of the men, and the men pleaded guilty, some receiving fines and others prison sentences between six months and four years.¹³⁰ On appeal, their convictions were affirmed by the Court of Appeal but the sentences lowered to three months and three years—yet with a warning to future BDSM practitioners that they would face much tougher sentencing.¹³¹

124. Three of the arrestees were also charged with “wounding,” of which they were also convicted. *Brown*, [1993] UKHL 19 at 1.

125. *Id.* at 1–2, 31, 51.

126. In 1994, the age of consent for men having sex with each other was lowered to eighteen years old, and was again reduced to sixteen years old in 2000 (making the age of consent the same for gay and straight sex). See *Regulating Sex and Sexuality: The 20th Century*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/sexuality20thcentury/> [https://perma.cc/5K84-CTMT] (last visited July 31, 2026).

127. Almost all of the Sexual Offences Act of 1967 was repealed by the Sexual Offences Act of 2003, including the criminalization of sex between more than two men. See *id.*

128. One possible reason why the men were not charged under the Sexual Offences Act of 1967 is that by the time the police concluded their murder investigation, the statute of limitations under that law had run.

129. *Brown*, [1993] UKHL 19.

130. See Khan, *supra* note 90, at 104.

131. See generally *Brown*, [1993] UKHL 19.

The men again appealed, and the House of Lords affirmed that consent is not a defense to the crimes of committing actual or grievous bodily injury, and upheld the men's convictions in a 3–2 decision.¹³² None of the judges in the House of Lords viewed the videos at issue.¹³³ Writing the first opinion of the Court's judgment, Lord Templeman focused heavily on harms to the public and the need to keep the peace.¹³⁴ He began by stating that in some cases of otherwise-lawful activity (if no injury resulted), the consent of the person who is injured does render the action legal.¹³⁵ For example, Lord Templeman cites to surgery, "ritual circumcision," tattooing, ear-piercing, and violent sports such as boxing that are legal, despite causing injuries.¹³⁶ Lord Templeman then continued with the long history of the legality of dueling and sport fighting (except in the case of "maiming," because the King would lose the services of an "able bodied citizen for the defence of the realm"), which was lawful because these activities "inculcated bravery and skill and physical fitness."¹³⁷ However, "prizefighting" was not legal in England, because prizefighting injures the participants and the public.¹³⁸ The public is injured in two ways under English prizefighting precedent: "both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds."¹³⁹ As such, for Lord Templeman, a person cannot legally consent to an act that "creates a breach of the peace," because the government has the right to "protect the public and keep the peace."¹⁴⁰ For example, using drugs and assisting suicide are illegal because they are "harmful to society" generally.¹⁴¹

In determining what is "harmful to society" and should be illegal, versus what should be legal, Lord Templeman provided a

132. *See id.*

133. Lord Mustill noted in his dissenting opinion: "The House has been spared the video tapes, which must have been horrible." *Id.* at 19, 30–31.

134. *Id.* at 19, 6–8.

135. *Id.* at 2–3.

136. *Id.*

137. *Id.* at 3.

138. *Id.* at 3–4.

139. *Id.* at 12.

140. *Id.* at 4.

141. *Id.* at 7.

list of activities from precedent that are (rightly) legal in England: “Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc.”¹⁴² According to the prior court, these “exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.”¹⁴³ It is self-explanatory how “reasonable surgical interference” may be needed in the public interest, and as described above, the Court credits sports with “inculcating bravery and skill and physical fitness.” However, the Court did not elaborate as to the public need for “dangerous exhibitions.” In fact, BDSM could likely be understood as a “dangerous exhibition.” Further, the cited precedent explicitly stated that “it is immaterial whether the act occurs in private or in public.”¹⁴⁴ As such, Templeman’s own precedent would seem to support the legality of BDSM.

However, applying public interest and breach of the peace principles to the facts in *Brown*, Lord Templeman found that the videotaped acts “were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.”¹⁴⁵ Because the tops were “middle aged men” and the bottoms were “youths” (although all over twenty-one years of age at the time of filming), Lord Templeman quoted the High Court’s discussion of the “corruption of youth”—including its note that happily, one of the “youths” in the video “has now it seems settled into a normal heterosexual relationship.”¹⁴⁶ Further, because of the “bloodletting” and “excrement” in the video, Lord Templeman argued that there were concerns of HIV/AIDS transmission and infections.¹⁴⁷

Most persuasive for Lord Templeman, though, is that sado-masochism is “violence which is inflicted for the indulgence of

142. *Id.* at 5 (citing Attorney General’s Reference (No. 6 of 1980) [1981] 1 QB 715).

143. *Id.*

144. *Id.* at 4–5.

145. *Id.* at 7.

146. *Id.*

147. *Id.* at 8.

cruelty,” and “sex is no excuse for violence.”¹⁴⁸ “I am not prepared,” Lord Templeman held, “to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty.”¹⁴⁹ For Templeman, these men were correctly convicted of assault (including being accomplices in their own assaults) and sent to prison for years because of the strong public interest: “Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized.”¹⁵⁰

Agreeing with Lord Templeman that the convictions should be affirmed, Lord Jauncey also focused on how BDSM is against the public’s interest and has a tendency to breach the peace.¹⁵¹ Basing his decision on the proposition that English case law holds that “injuries should not be inflicted in public where they might give rise to a breach of the peace,” Lord Jauncey strained to explain how the acts on a videotape, all of which occurred in someone’s home and without spectators present, were “public” acts that threatened the peace.¹⁵² In order to do this, Lord Jauncey repeatedly characterized the sex acts as “conducted in *secret*”—as opposed to acting “in private.”¹⁵³ Instead of the “privacy” of a marital bedroom, these men were in “secret”: hiding their shameful acts from society, as if this “secrecy” is a tacit admission that they, too, knew their BDSM was wrong. As such, even when sex acts occur in Aristotelian literal private spaces, unless they are shielded by marriage or outweighed by other charmed sexualities, even bedrooms will not qualify for protection.

Despite being conducted “in secret,” the men’s acts still threatened the public, according to Lord Jauncey, because of possible hospital expenses (had anyone needed to go to a hospital, which they did not), the “payment of some benefit” (if someone had been injured such that they could not work, again, which did not happen), the possible spread of HIV/AIDS (again, which did not happen) and the corruption of youth (referencing, like Lord Templeman, the youth who was now in a “normal heterosexual

148. *Id.* at 8–9.

149. *Id.* at 8.

150. *Id.* at 9.

151. *Id.* at 11–14.

152. *Id.* at 10.

153. *Id.* at 10, 18 (emphasis added).

relationship").¹⁵⁴ These conjectural, unrealized harms were sufficient for Lord Jauncey to declare a breach of the peace such that these men were justly convicted.

Taking a different approach, but still upholding the convictions, Lord Lowry found that the correct test is whether there is "good reason" to make an exception to assault laws for BDSM, such as those for "manly diversion[s]" such as boxing.¹⁵⁵ Lord Lowry answered this question in the negative in a value-laden, adjective-filled opinion.¹⁵⁶ Because, according to Lord Lowry, homosexual BDSM did not constitute a "manly" diversion (which, clearly, the men involved here would have disagreed with), but rather "perverted," "depraved," and likely to "get out of hand" (because we all know how sexual desire works), Lord Lowry's duty as a judge was to ensure the activity is illegal.¹⁵⁷ The homophobia in Lord Lowry's opinion is explicit: in addition to his constant use of the term "buggery" in regard to legal sex between men (in 1993), he smugly implies that Parliament's decision to "legalize" buggery had resulted in the spread of AIDS.¹⁵⁸

According to Lord Lowry:

[B]oth those who will inflict and those who will suffer the injury wish to satisfy a perverted and depraved sexual desire. Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation of the prohibitions in sections 20 and 47 can only encourage the practice of homosexual sado-masochism and the physical cruelty that it must involve (which can scarcely be regarded as a 'manly diversion') by withdrawing the legal penalty and giving the activity a judicial imprimatur. As well as all this, one cannot overlook the physical danger to those who may indulge in sado-masochism. In this connection, and also generally, it is idle for the appellants to claim that they are educated exponents of "civilised cruelty." A proposed general exemption is to be tested by considering the likely general effect. This must include the probability that some sado-masochistic activity, under the powerful influence of the

154. *Id.* at 11, 18.

155. *Id.* at 29.

156. *See id.*

157. *Id.* at 29.

158. *Id.* at 19, 29–30.

sexual instinct, will get out of hand and result in serious physical damage to the participants and that some activity will involve a danger of infection such as these particular exponents do not contemplate for themselves. When considering the danger of infection, with its inevitable threat of AIDS, I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of AIDS.¹⁵⁹

Lord Lowry also explicitly responded to the argument that criminalizing BDSM violates privacy, especially since “buggery” was legalized in the 1967 Act.¹⁶⁰ In a very short paragraph, Lord Lowry writes that the 1967 Act does not change the fact that BDSM is illegal under the 1861 assault laws and “there is *no legal right to cause actual bodily harm*.”¹⁶¹ This narrow framing of the rights at stake here (the right to cause actual bodily harm) is reminiscent of the similarly narrow framing in the US case of *Bowers v. Hardwick*, in which the privacy interest at stake in legalizing gay sex was framed by the majority as a “right to engage in homosexual sodomy.”¹⁶²

Such framing already includes moral and legal conclusions—in this case, that the sex acts are “sodomy,” which is a term defined by law and denounced by the Bible.¹⁶³ As would be expected by framing that classifies and denigrates the conduct at issue, the courts in *Brown* and in *Bowers* ruled that there is *no right to engage in homosexual sodomy*, and therefore the sexual conduct at issue could be constitutionally criminalized. Only in *Lawrence v. Texas*, ten years after *Brown*, did the US Supreme Court announce that it had been wrong to view the issue as “simply the right to engage in certain conduct,” because this “demeans” individuals and because the criminalization of those acts “touch[es] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”¹⁶⁴ As such, it concluded that the proper framing of the right in question should have been as a general right to liberty and

159. *Id.* at 30.

160. *Id.* at 19.

161. *Id.* at 30 (emphasis in original).

162. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

163. *Id.* at 211–12 (Blackmun, J., dissenting); *id.* at 215–16 (Stevens, J., dissenting).

164. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

respect for private lives—and the question of whether it should be protected was answered in the affirmative.¹⁶⁵

In his dissenting opinion in *Brown*, Lord Mustill emphasized privacy, arguing at the very beginning that “[i]n my opinion it should be a case about the criminal law of private sexual relations.”¹⁶⁶ Before turning to the privacy of sex, Lord Mustill began his opinion by focusing on the public, opining that outsiders would view the video with “horror, amazement, incomprehension, perhaps sadness,” and “very few could read even a summary of other activities without disgust.”¹⁶⁷ The sex acts at issue were repugnant to public morality.¹⁶⁸ Yet, although these acts were at odds with public morality, they were also *not illegal* in England at the time, nor should they be made illegal because of the right to privacy.

Lord Mustill pointed out that there was no law criminalizing BDSM in England at the point this case arose, and indeed the men were not charged with any sex crimes.¹⁶⁹ They were charged with assault, under a statute about offenses *against* the person, precisely because their sex acts were legal.¹⁷⁰ As agreed upon in the majority opinion, the harms here were not against the BDSM bottoms (*i.e.*, against an individual); instead, any harms here were against the public.¹⁷¹ As such, the men could only be charged with offenses against the public, and not offenses against persons.¹⁷²

Lord Mustill further argued that the emphasis on whether or not consent was a defense to these assaults was misplaced.¹⁷³ As a threshold matter, Lord Mustill argued against the possibility of any general theory of consent and violence, because “all the instances of the consensual infliction of violence are special” and because there are many types of consent.¹⁷⁴ Beyond that, Lord Mustill argued that consent is the wrong way to understand why we allow

165. *Id.* at 578.

166. *Brown*, [1993] UKHL 19 at 30.

167. *Id.*

168. *Id.* at 31.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 32–35.

173. *Id.* at 33.

174. *Id.*

some types of assault.¹⁷⁵ Instead, it is the context of the entire situation which explains legality—pointing to being arrested, being bumped on the subway, or a child being “reasonably punished” by their parent as situations where there is no crime, but the person being injured did not consent.¹⁷⁶

Lord Mustill also probed the distinction between illegal prizefighting versus other legal activities—with prizefighting often leading to serious injuries and to riots among the mass of people who gathered, while “manly sports and exercises . . . tend to give strength, activity and skill in the use of arms, and are entered into merely as private recreations among friends.”¹⁷⁷ Based on this, one would expect boxing to be illegal: it is for money, not for recreation or for personal improvement, and its aim is solely to inflict serious injury. Yet, Lord Mustill argues, boxing is legal in England because it is a “special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.”¹⁷⁸

Under Lord Mustill’s view of how society interacts with activities, the public (and thus criminal law) “does not concern itself with these activities, provided that they do not go too far.”¹⁷⁹ In his view, what is “too far” for society, and therefore criminal, changes over time:

[A]s the general social appreciation of what is tolerable and of the proper role of the state in regulating the lives of individuals changes with the passage of time, so we shall expect to find that the assumptions of the criminal justice system about what types of conduct are properly excluded from its scope, and about what is meant by going ‘too far’, will not remain constant.¹⁸⁰

Here, for Lord Mustill the videotaped BDSM acts should be legal both under English case law on violent acts (*e.g.*, legal boxing versus illegal prizefighting) and public policy concerns.¹⁸¹ As to the former, Mustill points to five main factors as to why the activity in this case is legal under English assault case law: first, there was no

175. *Id.*

176. *Id.* at 33–34.

177. *Id.* at 39.

178. *Id.* at 40.

179. *Id.* at 42.

180. *Id.*

181. *Id.* at 40, 48.

serious injury; second, the participants were in private; third, there was consent; fourth, the activities were not for profit; and fifth, the acts were not based in animosity, rage or hostility, but for sexual desire.¹⁸² Although a clear case for legality could be made here under prior cases, applying these five factors to other BDSM situations or to strip clubs would likely lead to a different result. Consider acts at a for-profit outdoor BDSM festival, which might lead to bruising or scarring (either intentionally or unintentionally), with crowds cheering the paid participants on. Or consider a spanking in a strip club, leading to a large bruise. Or the US cases described below, which took place within marital homes but did result in serious injuries. Although the factors for consent and sexual desire/absence of rage would be in favor of legality in each, Mustill's other factors would not. Strip clubs are not "private" places, are certainly for profit, and what comprises a "serious" injury is not explained.

The BDSM festival example would also not be in private and would be for profit, and also possibly involve "serious injury." The US cases would be closer, but there, injuries did result (and in the *Twyman* case discussed below, the acts may actually have been performed out of animosity, and not for sexual desire).¹⁸³ As such, English precedent on violent acts in general may have exonerated the men at trial in the Spanner case, but would not help in many other scenarios.

One major reason why English assault precedent is limited in its ability to achieve erotic justice is its tacit view of privacy as something spatial, as opposed to agential. Although these prior cases and Lord Mustill do not identify why each case was "private," a review of the facts shows that private acts are ones that occur in literal, physical spaces from which the public is restricted. In the *Brown* case, the acts were in a participant's home. The other case in Mustill's analysis of precedent where criminality did not lie involved a planned fight "on private land."¹⁸⁴ As such, the type of privacy that exonerates guilt in English case law is spatial.

Mustill's reliance on *R v. Donovan* and explicit discussion of sex work that leads to injury shows how limited precedent is for

182. *Id.* at 48.

183. See *infra* Section III.B (discussing the *Twyman* case).

184. *Brown*, [1993] UKHL 19 at 37.

erotic justice.¹⁸⁵ For Mustill, “prostitution is very different from the present case,” as “there is no pretence of mutual affection”: “[t]he prostitute, as beater or beaten, does it for money.”¹⁸⁶ As such, Mustill opines that “prosecuting authorities have (rightly in my view) tended to deal with [prostitution] cases, if at all, as offences against the public order.”¹⁸⁷ In *Donovan*, a man made a sexual arrangement with a woman to hit her in the privacy of his home.¹⁸⁸ Mustill places this under the category of “prostitution,” although the Court was silent as to whether this was paid activity.¹⁸⁹ Mustill argues that regardless of whether money changed hands, this man was rightfully charged under criminal law because this case was not “in a category which is automatically innocent.”¹⁹⁰ Instead of love and affection, the “accused met the complainant and immediately asked her ‘Where would you like to have your spanking, in Hyde Park or in my garage?’”¹⁹¹ In addition to showing the absence of affection, Mustill’s intent in quoting seems to highlight the fact that although the acts did happen in a private location (the man’s garage), they could have just as easily happened in a public park. This spatial indifference of the defendant (for either public or private) is connected to emotional indifference (the absence of intimacy), and expels the acts from the charmed circle. Precedent, then, in its demand for spatial privacy and home and for “mutual affection” cannot bring us to erotic justice, which demands that sex acts and sexual actors outside the charmed circle enjoy the same liberty interest in privacy as those within it.

Mustill himself declares in his opinion that precedent should not control here, because he “cannot accept that the infliction of bodily harm, especially the private infliction of it, is invariably criminal absent some special factor which decrees otherwise.”¹⁹² Instead, Mustill prefers to “address each individual category of consensual violence in the light of the situation as a whole.”

185. See *id.* at 42–43; see also *R v. Donovan* [1934] 2 KB 498.

186. *Brown*, [1993] UKHL 19 at 42.

187. *Id.* at 43.

188. *Id.* at 42.

189. *Id.*

190. *Id.* at 45.

191. *Id.* at 43.

192. *Id.* at 19, 45.

“Circumstances,” thus “must alter cases.”¹⁹³ There, the Court “is free . . . to consider entirely afresh whether the public interest demands” that the BDSM acts here be criminal.¹⁹⁴ Freeing himself to reason anew and depart from prior cases, Lord Mustill announces that this is a matter of private morality—which should not be judged by criminal law.¹⁹⁵ Instead, if these standards are to be upheld, the individual must enforce them upon himself according to his own moral standards, or have them enforced against him by moral pressures exerted by whatever religious or other community to whose ethical ideals he responds:

[T]he state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of the individuals who together comprise the populace at large.¹⁹⁶

Thus, Mustill’s view of “private morality” is similar to Gobetti’s agential and ambulatory view of “privacy”: A person may properly act unimpeded by the government as long as those freely chosen acts are not out of balance with the needs of the public.¹⁹⁷

Applying his concept of private morality and an agential concept of privacy, Lord Mustill argued that the Court should have held that although the videoed acts were “repugnant,” they should not be made illegal due to the deference to private morality nor limited by the government’s invasion of people’s ability to live their lives according to their own (albeit religiously and otherwise pressured) morals.¹⁹⁸ From that properly deferential place, balancing an individual’s interest with that of the public tips the scales in favor of legalization in this case: modern medicine reduces the risk of infection, people may be punished if things actually get out of hand, and not because they hypothetically could have. Further, there was no evidence of HIV/AIDS transmission here, sex between men was legal, and if minors were involved, there was already a separate criminal offense for the “corruption of youth.” In addition, the argument that BDSM is proselytizing and

193. *Id.* at 45.

194. *Id.*

195. *Id.* at 46.

196. *Id.* at 48.

197. Gobetti, *supra* note 10, at 106.

198. *Brown*, [1993] UKHL 19 at 49.

generally corruptive for adults is redundant—if BDSM is legal, then enticing others into BDSM should also be legal.¹⁹⁹ As such, Lord Mustill works from an ambulatory view of privacy, and insists that any claim to harm which might revoke privacy's shield be substantiated.²⁰⁰ However, his opinion was a dissenting one, and one which has not been resuscitated by subsequent cases.

Lastly, Lord Slynn also dissented from the majority, arguing that under the current case law, the government *can* criminalize some consensual acts done in private, but only if they result in serious bodily harm.²⁰¹ Although BDSM which did not result in serious injury was at that point not illegal, Lord Slynn believed the public might still decide (ethically and in practice) to criminalize it: “[i]f society takes the view that this kind of behaviour, even though sought after and done in private, is either so new or so extensive or so undesirable that it should be brought now for the first time within the criminal law, then it is for the legislature to decide.”²⁰² As such, Lord Slynn would have the court find that a societal determination that a sex act is “new,” “extensive” or “undesirable” is sufficient to justify its criminalization.²⁰³ A majority could properly vote to take away privacy rights to engage in BDSM acts. On further appeal, the European Court of Human Rights unanimously affirmed the House of Lords decision in a brief ruling, which stated that countries may decide to criminalize private activity if concerns of public health and safety are involved, and particularly when physical injury is present.²⁰⁴

In sum, *Brown's* detailed re-telling of the BDSM acts underlying the case and its ultimate finding of guilt contributes to the construction of a cursed “homosexual sadomasochistic” identity. Instead of a public debate around the ethics and safety of BDSM, the legal system produced a “vilified and marginalised” identity for already-marginalized men involved in alternative sexual practices.²⁰⁵ As such, *Brown's* removal of privacy

199. *Id.* at 19, 48–50.

200. *Id.* at 50.

201. *Id.* at 19, 58.

202. *Id.*

203. *Id.*

204. See Khan, *supra* note 90, at 105; see also Laskey v. United Kingdom, App. Nos. 21627/93, 21826/93 & 21974/93, ¶ 43 (Eur. Ct. H.R. Feb. 19, 1997).

205. See Sangeetha Chandra-Skeheren, *Theorising the Limits of 'Sadomasochistic Homosexual' Identity*, 21 MELB. U. L. REV. 584, 584 (1997).

protections for BDSM on the basis of tenuous-at-best claims to public harms reinforces a charmed circle and the exclusion and repression of those outside of it. *R v. Brown* remains good law, and is regularly invoked by courts and scholars.²⁰⁶

More than twenty years after *R v. Brown*, a professor invoked *Brown* to support criminalization of cosmetic surgery for adults, and especially for minors.²⁰⁷ Pointing to the rapid growth of “non-necessary” surgery, Professor Dennis J. Baker argues that under *R v. Brown*, consent of the person receiving surgery does not make legal for-profit and injurious (particularly if there are complications) elective surgery.²⁰⁸ Instead, such surgeries should be illegal because of public harm: the resources used in cosmetic surgery could be used to cure people who are actually ill.²⁰⁹

England re-visited sado-masochism two years after *Brown* in *R v. Wilson*.²¹⁰ In this case, Mr. Wilson was arrested and charged with assault for branding his initials into his wife’s buttock with a hot knife, after her doctor reported her scar to the police.²¹¹ Unlike the bottoms in *Brown*, Mrs. Wilson was not arrested as an accessory or accomplice to her husband’s assault, but he was convicted at trial based on its precedent nonetheless.²¹² On appeal,

206. See Annette Houlihan, *When “No” Means “Yes” and “Yes” Means Harm: HIV Risk, Consent and Sado-masochism Case Law*, 20 L. & SEXUALITY 31, 34–38 (2011) (“*Brown* brought the gaze of criminal law into the hidden and the consensual.” *Id.* at 38); Jain & Rhoten, *supra* note 5, at 106–10 (“Lord Templeman’s opinion not only allotted considerable discussion to the erasure of submissive consent based on the presumed perverseness of BDSM activity, but also revealed disgust towards men who have sex with men in such a manner.” *Id.* at 110); Maayan Niezna, *Consent to Labour Exploitation*, 53 INDUS. L.J. 3, 15 (2024); Mona Abdolrazaghi, *Vitiating Consent for Sexual Assault Causing Bodily Harm: Should Jobidon Apply to Sexual Activities?*, 46 MAN. L.J. 131, 138–39 (2024) (the split court in *Brown* shows the “struggle in applying public policy arguments to determine the involvement of criminal law.” *Id.* at 139); Ben A. McJunkin, *Rape as Indignity*, 109 CORNELL L. REV. 385, 462 (2024) (citing *Brown* in arguing that “[b]ecause dignity is not coextensive with autonomy, a thick commitment to dignity in the substantive criminal law could potentially justify the criminalization of some consensual sexual conduct.”); Giovanna Gilleri, *Sadomasochism in Strasbourg: A Pleasurable Danger?*, 41 BERKELEY J. INT’L L. 39, 58 (2023) (noting that the European Court of Human Rights upheld an appeal by some of the defendants in *Brown*); Boris Burghardt & Leonie Steinl, *Sexual Violence and Criminal Justice in the 21st Century*, 22 GERMAN L.J. 691, 696 (2021) (looking to *R v. Brown* in defining sexual autonomy).

207. See Dennis J. Baker, *Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?*, 17 NEW CRIM. L. REV. 587, 588 (2014).

208. *Id.* at 589–90.

209. *Id.*

210. *R v. Wilson* [1996] 2 Crim. App. 241 (Eng.).

211. *Id.* at 3.

212. *Id.* at 2–4.

England's Court of Appeal (Criminal Division) reversed Mr. Wilson's conviction, finding that he was not guilty of assault for three reasons. First, Mrs. Wilson was a "mature" woman, who went beyond consenting and had actively "instigated" the branding, as opposed to the "youths" in *Brown* who had been recruited (which was in complete contradiction to the testimony in *Brown* that made clear that the bottoms had similarly initiated the encounter).²¹³ Second, the Court held that the branding was not a "somasochistic encounter" at all—even though branding was one of the "violent" and "evil" acts in *Brown*.²¹⁴ Instead, Mrs. Wilson had sought her husband's assistance "in what she regarded as the acquisition of a desirable piece of personal adornment," much like a tattoo.²¹⁵ The branding was thus not erotic, but a feminine body modification. Mrs. Wilson's branding was also not aggressive, as the acts in *Brown* were, but "done for love," as a permanent proclamation of her love for her husband.²¹⁶ Lastly, and of great weight to the Court, it was not in the public interest to interfere with the privacy of marriage.²¹⁷ Therefore, the same act—branding—is extreme, degrading, threatens the peace and hurts the public in general when done by (unmarried) men of different ages in a group, but deserving of privacy, and is a desirable proclamation of love when performed by a man on his wife.

Comparing *Wilson* and *Brown*, Ummni Khan argues that the opinions illustrate the "charmed circle": BDSM that occurs within the "Good" circle's "heterosexual, marital and monogamous confines" is less likely to lead to legal consequences than BDSM otherwise positioned within the "Abnormal, Unnatural, Sick, and Sinful" outer circle.²¹⁸ BDSM is still seen suspiciously, but such acts occurring within otherwise "charmed" conditions can lead to certain BDSM situations being seen, legally and socially, as "acceptable."²¹⁹ When under the "legal gaze," BDSM practitioners' "exoneration seems to hinge on their ability to fit into prescribed sexual and social identities."²²⁰ Specifically, cases like *Wilson*,

213. *Id.* at 2–3.

214. *Id.* at 6.

215. *Id.* at 5.

216. *Id.* at 3.

217. *Id.* at 7.

218. Khan, *supra* note 90, at 81–82.

219. *Id.* at 82.

220. *Id.* at 84.

which involve white, married, middle class, monogamous, attractive people, with mild kinks and featuring men as tops and women as bottoms, are much less likely to lead to legal liability than cases like *Brown*. In Khan's words, "the power of hetero-marital monogamous hegemony to absorb and neutralize nonnormative sexual practices" is astonishing.²²¹ Critical to legal acceptability for Khan is whether the alleged conduct fits under our existing concepts of "marital privacy" and "spousal fidelity."²²² The monogamous marriage in *Wilson* acts as a "normalizing privacy shield," which allows the actors to evade legal repercussions.²²³

The third upper-court case on BDSM in England, *R v. Emmett*, also involved a heterosexual couple who married during the legal proceedings.²²⁴ Mr. Emmett was arrested for assault under the same 1861 Offences Against the Person Act as in *Brown* and *Wilson*, for two BDSM scenes.²²⁵ In the first, Mr. Emmett had choked his partner, after which she went to a doctor after experiencing popped blood vessels in her eyes and bruises on her neck.²²⁶ In the second, a few weeks later, he poured lighter fluid on her breasts, and lit them on fire, leading to burns that got infected (which looked serious but did not leave any scarring).²²⁷ Mr. Emmett's partner saw a doctor after each incident at Mr. Emmett's insistence, and the doctor called the police after the second visit.²²⁸ Neither testified at trial, but Mr. Emmett told the police that he agreed that the choking and burning scenes had not gone as planned.²²⁹ Mr. Emmett also informed the police that most of the BDSM ideas were his, but that they only did things that his partner

221. *Id.* at 83, 100–103.

222. *Id.* at 84–86.

223. *Id.* at 100.

224. *R v. Emmett* [1999] EWCA (Crim) 1710 (Eng.).

225. *Id.*

226. Again, the Court provided explicit details of the facts: Emmett "covere[d] the complainant's head with a plastic bag," "tie[d] it at the neck with a ligature," "tightened to the point of endurance," and "while his partner was tied up and may also have been gagged. Then, while the lady was enveloped in the plastic bag in this way, the defendant engaged in oral sex with her and it became apparent, at some stage, that his excitement was such that he had lost track of what was happening to the complainant. He eventually became aware that she was in some sort of distress, was unable to speak, or make intelligible noises, and it was apparent that she was in trouble because of the loss of oxygen. He rapidly removed the bag from her head." *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

completely consented to after discussion.²³⁰ Following *R v. Brown*, the trial judge denied Mr. Emmett a consent defense.²³¹ He was found guilty of one count of assault and pleaded guilty to another, and was given a suspended jail sentence.²³² His partner was not arrested as an accessory to her assault.²³³

The Court of Appeal (Criminal Division) upheld the conviction, and distinguished this case from *Wilson*, which involved branding that in the Court's view was no more painful or risky than an ordinary tattoo.²³⁴ Instead, based on the physical injury Mr. Emmett's partner suffered, and the possibility that she could have died during the asphyxiation incident, the Court held that Mr. Emmett's actions were indeed criminal (despite his partner's consent, the fact that the actions occurred in private, were not for profit, and she was not seriously injured).²³⁵ Thus, even monogamy, heterosexuality and whiteness will not always be a shield to criminal liability for distinctly "wrong" sexual acts. However, as Khan notes, "being female and heterosexual seems to absolve a woman from participating in submissive sexual conduct,"²³⁶ and Mr. Emmett did not have to serve any time in jail (unlike the arrestees in *Brown*).²³⁷ Additionally, in its relatively short opinion, the Court of Appeal goes out of its way to note that "it is only right to recall that, since the events which formed the basis of this prosecution and since the prosecution was launched, they have married each other."²³⁸ Thus, although ultimately finding liability, the Court still views marriage as an exculpatory factor for what it otherwise sees as criminal, violent assault.

Appeals to privacy to protect sex acts have therefore failed in England. Baseless findings of public harm have been sufficient to remove any privacy rights that might have protected those outside of the charmed circle. Only those in married, monogamous, heterosexual relationships (*i.e.*, those firmly in the charmed circle)

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Khan, *supra* note 90, at 111.

237. *Id.*

238. *Emmett*, [1999] EWCA (Crim) 1710.

have found any success in claiming sexual privacy under English case law.

B. Atrocious, and Utterly Intolerable in a Civilized Community: US Jurisprudence on BDSM

That privacy functions to protect acts within the context of marriage is also in accord with US case law. While it also hinted towards a more robust view of privacy, as discussed in Part II above, the Court in *Obergefell* made clear that the strong protections it announced were operational only within the context of marriage. So, too, was the privacy right announced by the US Supreme Court to take birth control rooted in married couples, having sex in a marital bedroom. In the first major case on birth control, the US Supreme Court held that *married* people could not be constitutionally restricted from obtaining birth control.²³⁹ The Court wrote that at issue in married people using contraceptives was “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”²⁴⁰ It was not until seven years later that the right to take birth control without undue governmental interference was extended to unmarried people.²⁴¹

US cases on BDSM have also grappled with the reach of privacy. The major case in the United States to deal with BDSM is *Twyman v. Twyman*, which arose within the context of a divorce case, where the wife included claims against her husband for the negligent infliction of emotional distress.²⁴² Although the brief plurality opinion in *Twyman* did not reach the substance of the case, the concurring and dissenting opinions each relied on

239. See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (emphasis in original).

240. *Id.* at 486.

241. See *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972).

242. See *Twyman v. Twyman*, 790 S.W.2d 819, 820–21 (Tex. App. 1990), *rev'd*, 855 S.W.2d 619 (Tex. 1993). See generally Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805 (2004). Negligent infliction of emotional distress is a tort—a type of civil (as opposed to criminal) wrong, arising from “a breach of a duty that the law imposes on persons who stand in a particular relation to one another” (*Tort*, BLACK’S LAW DICTIONARY (10th ed. 2014)). In other words, instead of being subject to arrest in the name of the “People” in the United States or “Regina” (Queen) in England, one person is liable for money or other forms of relief (such as injunctive) to another person, because she owed a duty to that person, which she violated. Of all torts, negligent infliction of emotional distress is widely regarded as one of the hardest claims to pursue, and many states do not allow claims of negligent infliction of emotional distress at all.

privacy. The concurring opinions, however, based any possible protections for the BDSM sex acts in a view of marital privacy as completely impenetrable.²⁴³ The explicitly feminist dissenting opinion pierced marriage's veil, but did not look for other sources of privacy that might protect sex acts after stripping away that marital privacy.²⁴⁴

The facts of *Twyman*, as recited by the Court, involved Mr. Twyman having continuous extramarital affairs involving bondage, which Ms. Twyman did not want to be engaged in because of a sexual assault prior to her marriage.²⁴⁵ Ms. Twyman saw many therapists, including with her husband, who agreed to stop cheating on her (but continued doing so).²⁴⁶ Throughout this period, Mr. Twyman told his wife that there was something wrong with her for not wanting to be involved in bondage, that sex was better with his girlfriend, and that their marriage could not continue if she refused bondage.²⁴⁷ Their ten-year-old son also found a "graphic" bondage magazine in their home.²⁴⁸

After seeing other counselors and losing weight from the stress, Ms. Twyman attempted bondage activities with her then-husband.²⁴⁹ The Court then continues that:

[t]heir last encounter, however, was so rough that Sheila sustained bleeding for four days and was treated by a gynecologist who tested her for venereal disease.²⁵⁰ She testified the activity was so painful and humiliating that she knew she could not continue to attempt it, and that she feared exposure to AIDS and other venereal diseases.²⁵¹

243. *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (Gonzalez, J., concurring).

244. *Id.* at 640 (Spector, J., dissenting).

245. *Twyman*, 790 S.W.2d at 820. In a BDSM context, bondage refers to the practice of consensually tying, binding, or restraining a partner for erotic, aesthetic, or sensory stimulation. Someone may be physically restrained in many ways, and with the use of many materials including the use of rope, cuffs, tape, etc. Someone can tie/restrain herself, or can be tied/restrained by another person. For some, an important part of bondage can be that it is done in semi-public spaces where there is an audience, who can observe the restrained (and sometimes suspended) person.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

The Court does not cite to any testimony or other explanations as to how bondage, which involves tying or otherwise restraining a person, could lead to four days of bleeding and was intolerably painful, or how Ms. Twyman would possibly be at risk for contracting a sexually transmitted infection from being tied up by her husband. These facts are murky, and “told to us only through the court’s narrative of ‘deviate sexual practices.’”²⁵²

Based on these facts, the trial court found that Mr. Twyman was liable for negligent infliction of emotional distress, and in addition to granting the divorce, it awarded Ms. Twyman US\$15,000 in damages.²⁵³ On appeal, the Court of Appeals of Texas affirmed the lower court’s decision, finding that Ms. Twyman had suffered a sufficient amount of mental anguish for the tort to lie.²⁵⁴ The Court, however, refused to consider Mr. Twyman’s argument that there was no evidence to support “the trial court’s finding that bondage is a deviant sexual act,” because of a procedural bar since he did not raise this issue early enough in his appeal.²⁵⁵

On further appeal, the Supreme Court of Texas remanded the case, holding in this and a companion case that there is no cause of action at all for the *negligent* infliction of emotional distress in Texas.²⁵⁶ However, a plurality of the Court decided that a case for *intentional* infliction of emotional distress can be brought in Texas, and that this case can be brought between married people.²⁵⁷ Writing that a case for intentional infliction of emotional distress can be brought “only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community,” Justice Cornyn sent this case back for a new trial to determine whether Mr. Twyman’s alleged attempts to engage Ms. Twyman in “deviant sexual acts” were done

252. Brenda Cossman, *Sexuality, Queer Theory, and ‘Feminism After’: Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847, 862 (2004). As discussed below, the Texas Supreme Court separate opinions re-tell the facts focusing on other parts of the record, which further complicates this narrative and obfuscates the “truth” of what occurred.

253. *Twyman v. Twyman*, 790 S.W.2d 819, 820 (Tex. App. 1990), *rev’d*, 855 S.W.2d 619 (Tex. 1993).

254. *Twyman*, 790 S.W.2d at 823.

255. *Id.* at 821–22.

256. *Twyman*, 855 S.W.2d at 619.

257. *Id.*

intentionally.²⁵⁸ In a short concurrence, Justice Gonzalez believed that the intentional tort had in fact already been proven here because “[w]hat happened to Sheila Twyman in this case involves grossly offensive conduct which warrants judicial relief” and “the actions of William Twyman in engaging in bondage activities with Sheila Twyman, under the rationale that such activities were necessary to the future of their marriage, were all intentional in nature.”²⁵⁹

In their separate opinions, the other justices each focused on marital privacy and sex, with two opinions finding that sex acts within marriage are behind a privacy veil not to be penetrated by the courts.²⁶⁰ Chief Justice Phillips argued that intentional infliction of emotional distress claims cannot be brought between spouses at all: marriage is “an intensely personal and intimate relationship,” and “[w]hen discord arises, it is inevitable that the parties will suffer emotional distress, often severe.”²⁶¹ As such, extreme emotional distress is a normal part of marriage, and acts occurring within marriage should be awarded privacy outside of the reach of the courts.²⁶²

Justice Hecht’s opinion at first appears to offer more promise for the protection of disfavored sex acts. Likening the case here to obscenity laws, Justice Hecht raised concerns that the intentional infliction of emotional distress cause of action will be used against conduct that a majority of society disfavors because of “prejudice” or “passion.”²⁶³ “Outrageousness” is a poor marker of wrongdoing that should be punished by the judicial system, because it is a “very subjective, value-laden concept.”²⁶⁴ Something that is an outrage to one person could be completely fine to someone else. Even where there is a consensus as to what is “outrageous,” Justice Hecht urges “the law must guard against the danger that a consensus against certain conduct is forged of prejudice and passion rather than

258. *Id.* at 620–21 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (A.L.I. 1965) and the lower court opinion).

259. *Id.* at 626.

260. *Id.* at 626–28 (Phillips, C.J., concurring in part and dissenting in part); *id.* at 636–37 (Hecht, J., concurring in part and dissenting in part).

261. *Id.* at 627 (Phillips, C.J., concurring in part and dissenting in part).

262. *Id.* at 628–29.

263. *Id.* at 629.

264. *Id.*

indignation against intolerable behavior.”²⁶⁵ As such, Justice Hecht’s opinion in part recognizes that sexual approbation is often based on systems of hierarchy and oppression, rather than a true sexual ethics.

Further, Justice Hecht’s study of case law leads him to conclude that although the tort is only supposed to lie for truly the most appalling conduct, in practice it is applied erratically, and depends on the views of the person examining the case: “[b]ecause outrageousness is a subjective, almost personal, notion, its application is as much a matter of who decides as of what happened.”²⁶⁶ In deciding infliction of emotional distress cases, triers of fact “can resort only to their own views and their own prejudices.”²⁶⁷ As such, “passions of the moment” turn into law and legal decisions are spun out of “personal attitudes.”²⁶⁸ Indeed, because of the moral overtones inherent in this tort, a jury is really tasked here with deciding whether a person was “bad.”²⁶⁹ For Justice Hecht, such moral fact-finding is inapposite to the correct aim of the law—a pursuit of justice.²⁷⁰

However, despite this promising preamble, Justice Hecht ultimately grounds his dissent in marital privacy. Hecht writes that sex is an intimate aspect of marriage—and thus one with great sensitivity—in which partners “expect that some accommodation of each other’s feelings will be necessary to their mutual good.”²⁷¹ Other similarly “sensitive” areas of marriage include how to spend money and how to raise children.²⁷² Therefore, “the inquiry which must be made to determine whether a spouse’s conduct is outrageous entails too great an intrusion of the marital relationship,” and should not therefore be allowed by law.²⁷³ As such, Mr. Twyman should be protected from suit primarily because sex acts in marriage are outside the proper scope of judicial scrutiny.²⁷⁴ Thus, despite a promising move arguing against

265. *Id.*

266. *Id.* at 631.

267. *Id.* at 632.

268. *Id.* at 632–33 (internal citations omitted).

269. *See id.* at 633.

270. *Id.* at 634.

271. *Id.* at 636.

272. *Id.* at 636–37.

273. *Id.* at 637.

274. *Id.*

societal norms, Justice Hecht's opinion ends in the familiar call for privacy within marriage.²⁷⁵ Justice Hecht also explicitly argued against Justice Spector's opinion, discussed below—emotional distress claims were not disproportionately brought by women. Even if this was a cause of action used more by women, the tort's existence was because of condescending and patronizing views of women—not equality—or because of “a development of the law without particular regard for gender.”²⁷⁶

Lastly, in the only opinion which fully dissents from the Court's plurality opinion, Justice Spector looked to the patriarchal development of law to guide her holding. Justice Spector was the first woman to be elected to Texas' Supreme Court, with *Twyman* issued her first year on the Court. Her dissent in *Twyman* is still studied in family law courses, despite the fact that the case itself is otherwise considered unremarkable by those not studying BDSM and the law. In her opinion, Justice Spector traced how tort recovery for claims involving emotional distress has developed in order to compensate women for injuries by men, who were insensitive to the harm they were causing.²⁷⁷ Justice Spector argued that men, implicitly including her colleagues on the Texas Supreme Court, have a disproportionate interest in downplaying claims for emotional distress, which are brought disproportionately by women against men.²⁷⁸ “In the judicial system dominated by men,” Justice Spector notes, “emotional distress claims have historically been marginalized,” because the law values property and physical security over “emotional security and human relationships.”²⁷⁹ Thus, in a system dominated by men, the emotional distress torts are allowed to exist—to give the appearance of redress for harms suffered predominately by women—yet are “seldom successful” in practice.²⁸⁰ Justice Spector also took issue with Chief Justice Phillips and Justice Hecht, who would have disallowed this cause of action for married people. By

275. *Id.*

276. *Id.* at 640 (Hecht, J., concurring in part and dissenting in part).

277. *Id.* at 642.

278. *Id.*

279. *Id.* at 642–43 (internal citations omitted).

280. *Id.* at 643 (quoting Justice Hecht's opinion in this case).

consenting to marriage, she argued, a wife does not assume the risk of physical injury and emotional harm.²⁸¹

Applying her concerns of the need for the law to right wrongs that women disproportionately face and applying the facts here, Justice Spector would have held that Sheila should be able to recover damages “for the years of abuse she had suffered at the hands of her husband,” whose sexual conduct was “grossly offensive.”²⁸² Thus, while her rebuke of her colleagues and explanation of why emotional injury in marriage needs a remedy is incredibly important, Justice Spector joins the other *Twyman* justices finding that the alleged bondage and extramarital affair were offensive enough to lead to civil liability.

As such, every opinion in *Twyman* focused on the “deviate sexual practices” of the fetishistic and cheating spouse, who caused Sheila emotional injury. No opinion acknowledges that the non-BDSM sex had caused Sheila actual *physical* harm. Instead, the presumably vanilla injurious sex was “ignored in the face of a sexual encounter involving bondage that caused psychic harm.”²⁸³ The *Twyman* court awarded damages for emotional harm, a novel concept, but not bodily harm, which is firmly entrenched in the law. This seeming incongruity is explained by looking to the charmed circle. Vanilla sex within heterosexual marriage is not the reason for legal liability, even if it is physically injurious. Instead, the harm investigated and articulated by the court is attributed to the husband’s BDSM and extramarital sex.²⁸⁴ Indeed, the *Twyman* court goes so far as to create a new cause of action in the state based on these emotional harms, rather than allow a husband to face legal repercussions for “normal” marital sex that injured his wife. In sum, the *Twyman* court’s disapproval of BDSM led to opinions that leave out context and obscure the ability to find a just answer to Sheila’s claims.

As explained below, and similar to England, other US cases involving BDSM have found that there is no relevant privacy right on the basis of harm. Yet, the harm in the US context is not understood to be a broader harm against the public but rather to the BDSM bottom. The BDSM bottom is legally considered to be

281. *Id.* at 644.

282. *Id.* at 640.

283. Cossman, *supra* note 252, at 863–64.

284. *Twyman*, 855 S.W.2d at 623–24.

“injured” regardless of whether that person believes they were injured, as seen in *People v. Samuels*²⁸⁵ and *Commonwealth v. Appleby*.²⁸⁶

In *People v. Samuels*, an ophthalmologist/amateur BDSM filmmaker was charged with sodomy, assault, and the production and distribution of obscene materials, as well as other related charges over videos he had filmed and participated in.²⁸⁷ The videos came to the attention of local California police after Mr. Samuels met with a researcher from the Kinsey Institute for Sex Research, who was interested in obtaining these films for study at the Institute.²⁸⁸ The defendant mailed the films, and the researcher had them developed at a local photo lab.²⁸⁹ The lab alerted the police, who issued an arrest warrant for the defendant.²⁹⁰ The films themselves showed Mr. Samuels and other men engaged in BDSM activities in the defendant’s home, including hitting with riding crops, belts and canes.²⁹¹

Once again, testimony at trial went into incredible detail about the BDSM acts. Mr. Samuels argued that the strikes with the implements were fairly light.²⁹² The men in the film had been coached to over-react from each hit to make them seem harder, and makeup was applied to mimic cuts and bruises.²⁹³ An expert medical witness testified at trial for the defendant that the types of marks in the films, combined with the lack of body fluids on the weapons, meant that the marks must have been made by makeup, and not from being hit.²⁹⁴ The prosecution’s experts instead

285. *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Ct. App. 1967).

286. *Commonwealth v. Appleby*, 380 Mass. 296, 300 (1980).

287. *See generally Samuels*, 58 Cal. Rptr. 439.

288. Established in 1947 by Doctor Alfred Kinsey, the Kinsey Institute was founded to conduct research on human sexual behavior and “to administer research resources, including research materials, a library, case histories, and other related materials.” Often referred to as the “father of the sexual revolution,” Dr. Kinsey’s work has “influenced social and cultural values in the United States and around the world.” *See Sex research: Early Literature from Statistics to Erotica*, NAT’L LIBRARY OF AUSTRALIA, <https://catalogue.nla.gov.au/catalog/8639113> [<https://perma.cc/933A-N5PY>] (last visited July 30, 2026).

289. *Samuels*, 58 Cal. Rptr. at 442.

290. *Id.* at 440–43.

291. *Id.* at 444.

292. *Id.*

293. *Id.*

294. For example, the expert doctor testified that bruises appeared immediately in the films, whereas extensive bruising takes hours after a strike. *Id.* at 444.

testified that the level of violence and effects in the videos were not fake.²⁹⁵ There was no evidence of injury to the men in the videos introduced at trial.²⁹⁶ Mr. Samuels was convicted by a jury of several charges, including aggravated assault.²⁹⁷

On appeal, the Court upheld Mr. Samuels' aggravated assault conviction, holding that consent was not available as a defense in this case.²⁹⁸ Instead, the court held that although there was no California case on point, consent is only generally a defense to assault "in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling."²⁹⁹ Further, the court noted that "the apparent consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective."³⁰⁰ Based upon these tenets, the appellate court proceeded to find that it "is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."³⁰¹ Because a "normal" person would never truly want to have force used against them, Mr. Samuels was guilty of a crime.³⁰²

Thus, as in the English context above, the seminal US cases on BDSM and criminal law look at same-sex, casual, extramarital, non-vanilla sexual activities with implements and power exchanges and determine that it is illegal. Interestingly, the US case utilizes the liberal idea that one cannot consent to injury (unless the injury is from boxing or wrestling). However, the court's opinion does not raise a public harm. The "victim" is not society, but remains the submissive man, who could only possibly have consented to sadomasochistic activities if he suffered from a "mental aberration."³⁰³ *People v. Samuels* has been followed by other courts, leading to the currently established rule in the United States that

295. *Id.* at 447.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

“consent to assault, including private sadomasochistic activities, cannot exculpate a perpetrator.”³⁰⁴

Commonwealth v. Appleby also denies protection to BDSM by focusing on the harm suffered by a (possibly) consenting person.³⁰⁵ The case was brought by a man who alleged that he was not homosexual and he had been forced against his will to be the live-in partner and sexual submissive of another man for over two years.³⁰⁶ The other man, Appleby, argued that he and the complainant were in a long-term relationship that included consensual BDSM, which the complainant had repeatedly requested that the defendant engage in.³⁰⁷ Documented in over 700 pages of testimony as to facts at the trial, the relationship was filled with distinctly uncharmed acts and cursed sexuality other than the BDSM: there were allegations that Appleby met the complainant while the complainant was “‘hustling’ sex for money,” their “regular sexual ritual” included “fellatio and anal intercourse,” and the complainant was a regular drug user.³⁰⁸ The court described their relationship as “a sadomasochistic one, as well as homosexual.”³⁰⁹ At trial, Appleby was sentenced to ten years in prison, based upon one occasion in which he had hit the complainant with a riding crop.³¹⁰

The appellate court upheld Appleby’s conviction, although it “express[ed] some reservation on the severity of the sentence,” which it claimed not to have authority to modify.³¹¹ The court’s ruling echoed *Samuels*’ denial of consent as a defense where injury is caused, again focused on injury to the consenting BDSM bottom, holding that assault is always assault, “whether or not the battery was related to sexual activity.”³¹²

Thus, in this holding, the court held that physical injury within consensual sex should not be treated differently than any other battery. Yet, the fact that this was gay sex (at first for pay) clearly

304. See Bergelson, *supra* note 99, at 685 (citing *State v. Collier*, 372 N.W.2d 303 (Iowa Ct. App. 1985); *Commonwealth v. Appleby*, 380 Mass. 296 (1980), among other cases).

305. *Appleby*, 380 Mass. at 296.

306. *Id.* at 297.

307. *Id.* at 297–303.

308. *Id.* at 301.

309. *Id.*

310. *Id.* at 297.

311. *Id.* at 312.

312. *Id.* at 311.

led to this case being treated differently. A sentence of ten years in prison for an incident in which someone was hit with a stick and suffered no injury requiring medical attention would be unheard of in a sexual encounter that was not societally cursed. *Appleby*, like the other cases above, thus participates in sexual repression based on a detailed telling and ultimate finding of guilt. The case also shows in sad and stark relief how sexual acts outside of the charmed circle can lead to immense legal repercussions. In short, using privacy has not moved us closer to erotic justice. Privacy in US case law only protects those already within charmed spaces—with a heavy emphasis on marriage. Privacy, then, is a trap in the search for erotic justice.

IV. CONCLUSION

If privacy cannot move us closer to erotic justice, what can? The other major constitutional doctrine historically used to protect sexual rights is freedom of expression. Freedom of expression provisions have been involved in major constitutional decisions on sexual acts, both in the United States and in other constitutional democracies.³¹³ A basic principle of freedom of expression is that it protects public acts. For example, in the United States, an act may be protected as freedom of expression if it takes place in a traditionally “public” forum, but will not be covered by the Constitution if done in a “private” forum.³¹⁴ As such, at a basic level,

313. See Cohen, *supra* note 1, at 359–63 (discussing the US Supreme Court cases *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 283 (2000)). See also *R. v. Jacob* (1996), 31 O.R. 3d 350 (Can. Ont. C.A.); *R. v. Gowan*, No. Ottawa 97-20544 (Can. Ont. Prov. Div. Mar. 3, 1998); *Phillips v. Dir. of Pub. Prosecutions* [2003] ZACC 1 (S. Afr.).

314. See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (“[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech”); *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (“Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”). However, the First Amendment doctrine has been critiqued as considering space to be a neutral, static factor when regulating free speech, thus allowing restrictions on space as it relates to political speech to be found constitutional once passing a very low bar. See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 439 (2006) [*hereinafter* Zick, *Space, Place, and Speech*] (“[t]o the extent that ‘place’ enters constitutional discourse at all, it is as nothing more than a

freedom of expression doctrine from its core involves determinations of what is truly “private”—a task that this Article shows serves primarily to create and reinforce injustice. This may be why the most well-known freedom of expression decisions on sexuality in and outside of the United States have found that the local legislatures are allowed to restrict sexual expression.³¹⁵

resource, a parcel of property, or an inert element of the expressive background.”); see also Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2587 (2007) (“[u]nder current First Amendment jurisprudence, public officials exercise increasingly effective means of displacing dissent through the regulation of place. By rendering dissent invisible, official control over the location of speech threatens a core, even romantic, value protected by the First Amendment.”). Indeed, legal scholars have urged that Foucault’s insights into the ability of space, as a dynamic and active force, that controls and disciplines, be taken into account by courts. See, e.g., Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 583 (2006) [hereinafter Zick, *Spatial Tactics*] (constitutional law on the First Amendment “does not adequately take into account that where a speaker or group of speakers is placed profoundly impacts expressive message, persuasive efficacy, participation, and symbolic meaning” and “[p]urportedly neutral restrictions on place can and do cancel expressive and associative rights.”); see also Crocker, *supra*, at 2600 n.97 (“Architectural control of place, and the spaces that constitute a particular place, is an effective means of asserting state power without appearing to censor speech. Nonetheless, architecture is a means of control, as Michel Foucault famously argued.”). For example, attention has been drawn to the ways in which free (political) speech has been “disciplined, controlled, and even suppressed through a variety of special tactics.” Zick, *Spatial Tactics*, *supra*, at 581. As evidence, attention has been drawn to the confinement of protesters away from the events that they are protesting in the forms of “free speech cages,” “restricted zones,” and “frozen zones,” and the widespread use of metal barricades, nets and laws regarding use of the sidewalks to control the movement of protesters in general. Zick, *Spatial Tactics*, *supra*, at 581–82; Crocker, *supra*, at 2588–89. Thus, not only is the public-ness of space central to First Amendment protections, but there are also convincing arguments as to why courts should pay even closer attention to space in determining how expressive conduct is to be protected.

315. See Cohen, *supra* note 1, at 363 (citing NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* 37–38 (1995) (“The First Amendment’s broadly phrased free speech guarantee . . . contains no exception for sexual expression. Nevertheless, the Supreme Court has consistently read such an exception into the First Amendment, allowing sexual speech to be restricted or even banned under circumstances in which it would not allow other types of speech to be limited.”)); see also Justin A. Giordan, *The United States Constitution’s First Amendment vs. The Canadian Charter of Rights and Freedoms: A Comparative Analysis of Obscenity and Pornography as Forms of Expression*, 26 N.C. CENT. L.J. 71, 74–75 (2004); Clarice B. Rabinowitz, *Proposals for Progress: Sodomy Law and the European Convention of Human Rights*, 21 BROOK. J. INT’L L. 425, 438–40 (1995) (discussing *X. v. United Kingdom*, App. No. 7215/75, 19 Eur. Comm’n H.R. Dec. & Rep. 66, 71, 73 (1978), an early challenge to the United Kingdom’s anti-sodomy laws by a man sentenced to prison for having sex with other adult men. The European Court of Human Rights rejected his challenge of England’s anti-sodomy laws on freedom of expression grounds); Robert Trager & Yuri Obata, *Obscenity Decisions in Japanese and United States Supreme Courts: Cultural Values in*

Despite the litigation strategy in many countries starting in the 1960s, the first decision to find that anti-sodomy laws violate freedom of expression was not until 2016, in a Belize court.³¹⁶

The doctrines of equality and dignity have also been relied on, especially more recently, in protecting sexual rights, and their efficacy in protecting LGBTQ rights will soon be seen.³¹⁷ However, real world inequality is dramatically growing for trans people.³¹⁸ In 2025, the US Supreme Court declined to extend protected-class status to trans youth under the Equal Protection Clause.³¹⁹ In these times, appeals to equality do not appear to be a winning strategy. We need scholarship advancing new concepts to achieve erotic justice, in addition to a more robust vision of what achieving erotic justice would actually look like. While notions of privacy have thus far failed to create sexual agency and freedom for those who engage in “bad” sex acts, it is a constitutional mechanism that cuts through the charmed circle. Trans people, especially in the United States and United Kingdom, lose any bubble of privacy just by existing. Trans people are not afforded privacy even in the most intimate encounters and areas firmly fixed as private, like discussions with doctors about major life decisions. There is no view of privacy that can protect trans people, if transitioning is a major harm. In this way, privacy is truly both promising and dangerous. Future scholarship on erotic justice may reinforce privacy’s promise and focus on what the constitutional degradation of privacy means for society at large. Or, as this Article suggests, further entrap us in the illusion of protection while slowly pushing us further into the outer limits.

Interpreting Free Speech, 10 U.C. DAVIS J. INT’L L. & POL’Y 247, 272–73 (2004); Edward J. Eberle, *The View Outside: What Kind of Expression for Adolescents Outside the United States*, 2025 MICH. ST. L. REV. 879, 904–09 (2005) (discussing decisions where freedom of expression challenges to laws surrounding youth and sexuality failed in Canada, the European Court of Human Rights, the United Nations, and Germany).

316. See Ayodeji Kamau Perrin, *The Evolution of Sodomy Decriminalization in Transnational and Comparative Constitutional Perspective*, 32 WM. & MARY BILL RTS. J. 239, 294 (2023).

317. See *id.* at 249 (discussing how “equality and dignity supplemented, expanded, and ultimately supplanted privacy and equality as the dominant legal frames in sodomy decriminalization cases in the twenty-first century.”).

318. See generally Cohen, *supra* note 1 (discussing rollbacks in LGBTQ+, and especially transgender, rights).

319. See *United States v. Skrmetti*, 605 U.S. 495, 510 (2025).