

## SEX IN AND OUT OF INTIMACY

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The state has long attempted to regulate sexual activity by channeling sex into various forms of state-supported intimacy. Although commentators and legal scholars of diverse political perspectives generally believe such regulation is declining, the freedom to engage in diverse sexual activities has not been established as a matter of law. Instead, courts have extended legal protection to consensual sexual acts only to the extent such acts support other state interests, including marriage, procreation, and, most recently, the development of enduring intimate relationships.

Courts and scholars have largely failed to consider whether sexual activity might serve any valuable purposes independent of these aims. The few cases generally credited with establishing constitutional rights to sex, on closer examination, actually have little to do with sex acts themselves. Cases concerning contraceptives and abortion, for example, although involving the potential procreative effects of sexual activity, have very little to say about the legitimacy or illegitimacy of state regulation of the underlying sexual conduct.<sup>1</sup>

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We thank participants at the Law & Society Conference, UCLA's Legal Theory Workshop, and the University of Chicago's Regulation of Family, Sex, and Gender Workshop for comments and critiques at early stages of this project and participants at faculty workshops at George Washington University Law School and University of Illinois College of Law for comments and critiques at later stages. For other insightful and challenging discussions about these ideas, we thank Susan Appleton, Sam Bagenstos, Sarah Boyd, Emily Buss, Mary Anne Case, Mariano Florentino-Cuellar, Adrienne Davis, Robin Effron, Elizabeth Emens, David Fontana, Emily Hughes, Kenneth Karst, Laura Kessler, Nalini Kotamraju, Michele Jaffe, Gia Lee, Saul Levmore, Melissa Murray, Doug NeJaime, Martha Nussbaum, Natalie Pierce, Russell Robinson, Adam Samaha, Seana Shiffrin, Marc Spindelman, Eugene Volokh, and Noah Zatz.

<sup>1</sup> See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874–78 (1992) (plurality opinion) (clarifying that women may seek abortions before fetal viability but states may impose restrictions that do not amount to undue burdens); *Roe v. Wade*, 410 U.S. 113, 152–64 (1973) (holding that a criminal ban on first-trimester abortions was unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438, 446–55 (1972) (extending the right to use contraceptives to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (establishing married couples' constitutional right to use contraceptives). For more discussion of the implications of these cases, see *infra* text accompanying notes 60–77.

The most recent Supreme Court case ostensibly protecting sexual activity, *Lawrence v. Texas*,<sup>2</sup> also can be narrowly construed to protect sexual conduct only when such activity promotes emotional intimacy. In holding that same-sex couples possess a liberty right to engage in sodomy,<sup>3</sup> the Court emphasized that sexual acts, including anal sex between two men, “can be but one element in a personal bond that is more enduring.”<sup>4</sup> The Court therefore did not declare that consenting adults enjoy the freedom to engage in all forms of sex. Instead, the Court suggested that sex deserves constitutional protection only when potentially in the service of emotional intimacy. That analysis in many ways fulfills the goals set forth in Kenneth Karst’s influential article, *The Freedom of Intimate Association*.<sup>5</sup> Karst identified an underlying state interest in promoting intimate associations between individuals and developed a system of values that justified constitutional protection of such associations.<sup>6</sup> The Court in *Lawrence* acknowledged that sexual activity can play a crucial role in forming and sustaining intimate associations and accordingly protected sex in that context.<sup>7</sup>

Although protecting intimate associations from governmental intrusion is vitally important, relying on that rationale to protect sodomy furthers a form of sexual regulation that *Lawrence* was originally thought to abolish. *Lawrence* has not spurred a “libertarian” sex revolution, as some had feared and others had hoped.<sup>8</sup> Most courts have narrowly construed *Lawrence* to uphold various regulations of sexual activity.<sup>9</sup> Indeed, after *Lawrence*, judges have made their own judgments about which sex acts promote the type of intimacy protected by *Lawrence*. Sex toys, no (at least in Alabama). Oral and anal sex, yes—though only in one’s own home and for free. Sex clubs and group sex, no.

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<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> Texas, like most states, defined sodomy as ““(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* at 563 (quoting section 21.01(1) of the Texas Penal Code, which was in effect in 2003). As such, both oral and anal sex fall under the category of sodomy, and we use that common definition throughout this Article.

<sup>4</sup> *Id.* at 567. For more discussion of *Lawrence*, see *infra* Part I.B.

<sup>5</sup> Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

<sup>6</sup> *Id.* at 629–37. For more discussion of those values, see *infra* text accompanying notes 261–72.

<sup>7</sup> See *Lawrence*, 539 U.S. at 567.

<sup>8</sup> For examples of those who thought *Lawrence* heralded a constitutional sexual revolution, see *infra* note 85.

<sup>9</sup> See discussion *infra* Part II.B.

Fornication, yes—at least most of the time. Bondage and sado-masochism, no. Strip clubs, yes. Prostitution, no.<sup>10</sup>

This Article challenges the underlying assumption in *Lawrence* that sex is valuable only when potentially in service to emotional intimacy and proposes a new theory for extending legal protection to a wider range of consensual sexual activities. The current regulation of sex devalues both sexual relationships that lack an intimate component and intimate relationships that lack a sexual component. We argue that the state should independently protect both intimate relationships and sexual interactions because sex can constitute a vital part of individual identity and self-expression even when not channeled into intimacy. Other legal scholars have argued that intimate sexual relationships should be protected outside of marriage,<sup>11</sup> or that sex and marriage should be separated from state support for families.<sup>12</sup> Our project is unique in that we extend the deconstructive project to intimacy in general, arguing that sex should be decoupled in the legal sphere from both domestic relationships and other traditional forms of emotional intimacy. We thus challenge the dominant, almost sacred, understanding that the most important relationships between adults should always be both sexual and emotionally intimate.

In Part I, we briefly discuss the current sex-negative landscape. We examine the legal and social structures that discourage sexual activity outside of emotionally intimate relationships and that deter openness about the potential diversity of sexual experiences. In Part II, we discuss the limits of *Lawrence* and the problems that flow from its romantic rhetoric. Although the Supreme Court in *Lawrence* could have liberated sex, it provided another

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<sup>10</sup> For case citations, see *infra* Part II.B. Strip club activities have been evaluated under a different rationale than other sexual activities because the Supreme Court has held that nude dancers enjoy a First Amendment right of free expression. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (plurality opinion). The distinction between the expression of such dancing and the expression contained in other sexual activities is somewhat elusive. For further discussion of strip clubs, see *infra* text accompanying notes 206–07.

<sup>11</sup> See Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1127–28 (1981); Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1181–84 (2006); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1109–12 (2004).

<sup>12</sup> See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 117–89, 213–35 (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 2–5, 103–09, 123–45 (2008); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368–70 (2004).

avenue for confining it.<sup>13</sup> In Part III, we then examine in more detail some of the consequences of protecting sex only when it potentially serves emotional intimacy. Among other things, we illustrate how the vision of sexuality adopted in *Lawrence* is gendered, viewing sex as the primary avenue through which men can become emotionally intimate.

In Part IV, we turn to alternative conceptions of sex and intimacy. We discuss ways that sex can have value even in non-intimate circumstances and challenge the notion that relationships are more valuable or more emotionally intimate when there is a sexual component. At the same time, we contend that sex can maintain its relational and generally intimate character even if it is not always tied to emotional intimacy. Sex could become intimate and intimacy could become sexual in new ways. Sex might even eventually lose its status as an exceptional activity with unique values and dangers. As long as sex retains its exceptional status, however, we contend it is deserving of the same protection extended to intimate association. Therefore, in Part V, we consider how the values furthered by alternative constructions of sex and intimacy could support a constitutional right to engage in consensual sexual activity without regard to the motives or goals behind the activity.

## I. THE SEX-NEGATIVE LANDSCAPE

The coupling of sex with emotional intimacy is one aspect of a broader social construction of sex that promotes a narrow vision of acceptable sexual expression and conduct and stigmatizes other visions. A number of theorists have analyzed and critiqued this sex-negative construction, including theorists as diverse as Michel Foucault,<sup>14</sup> Gayle Rubin,<sup>15</sup> Leo Bersani,<sup>16</sup> Brenda Cossman,<sup>17</sup> Catharine MacKinnon,<sup>18</sup> Adrienne Rich,<sup>19</sup> and Steven Seidman.<sup>20</sup>

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<sup>13</sup> We are not the first legal scholars to emphasize this aspect of *Lawrence*. As discussed *infra* in text accompanying notes 107–15, Libby Adler, Katherine Franke, Teemu Ruskola, and Marc Spindelman have also discussed the ways *Lawrence* may limit sexual freedom, although they emphasize different limitations than we do.

<sup>14</sup> 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 103–14 (Robert Hurley trans., Vintage Books 1990) (1978).

<sup>15</sup> Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 278–84 (Carole S. Vance ed., 1984).

<sup>16</sup> LEO BERSANI, *HOMOS* 1–7, 35–45 (1995).

<sup>17</sup> BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* *passim* (2007).

<sup>18</sup> CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 126–54 (1989).

<sup>19</sup> Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631, 632–48 (1980).

These theorists, among others, emphasize that myriad social and cultural forces sustain the construction of sex in complex and diverse ways.<sup>21</sup> The state is one of these forces given its promulgation of laws prohibiting or penalizing some forms of consensual sex, as well as its role in recognizing and privileging certain relationships assumed to be sexual, particularly marriage.<sup>22</sup> As such, the law constitutes one perspective from which to critique the current social construction of sex.

We engage in such a legal critique to expose, examine, and challenge those aspects of legal discourse and doctrine that posit emotionally intimate contexts as the only legitimate site for adult sexual activity. A purely legal critique is unlikely to transform the current construction of sex given that so many extralegal factors also contribute to that construction. Legal discourse about sex has also undoubtedly been shaped by such extralegal forces, making it difficult to identify legal effects separate from the effects of other forces. Despite these limitations, legal critique is a necessary component of any challenge to the current construction of sex given the law's power to endorse certain sexual practices while ignoring or punishing others.<sup>23</sup>

Moreover, legal scholars should care about challenging the current construction of sex, both within the law and outside of it, for at least two related reasons. First, the construction, and laws that contribute to it, benefit some individuals while harming others, thus conflicting with norms of equality and individual liberty. The vision of acceptable sexual activity furthered by the current construction of sex is primarily modeled on heterosexual, monogamous couples, thus channeling sex into a domesticated and gendered form.<sup>24</sup> Individuals who do not adhere to this vision are stigmatized as being hypersexual, asexual, criminal, or otherwise deviant. Those who engage in sex

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<sup>20</sup> STEVEN SEIDMAN, *THE SOCIAL CONSTRUCTION OF SEXUALITY passim* (Jeffrey C. Alexander ed., 2003).

<sup>21</sup> *See, e.g.*, FOUCAULT, *supra* note 14, at 103 (discussing “the manifold objectives aimed for, the manifold means employed in the different sexual politics concerned with the two sexes, [and] the different age groups and social classes”).

<sup>22</sup> *See, e.g.*, JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* vii (2d ed. 1997) (noting that “laws construct our understandings of sexuality”); Rubin, *supra* note 15, at 288–91 (discussing negative effects of “sex laws”); *see also infra* text accompanying notes 30–34, 46–49 (discussing ways family law and criminal law have intersected to channel sex into intimacy).

<sup>23</sup> *Cf.* Judith Butler, *Is Kinship Always Already Heterosexual?*, in *LEFT LEGALISM / LEFT CRITIQUE* 229, 232–33 (Wendy Brown & Janet Halley eds., 2002) (“In the case of gay marriage or of other affiliative legal alliances, we see how various sexual practices and relationships that fall outside the purview of the sanctifying law become illegible or, worse, untenable, and new hierarchies emerge in public discourse.”).

<sup>24</sup> Carl E. Schneider, *The Channeling Function in Family Law*, 20 *HOFSTRA L. REV.* 495, 496 (1992).

outside of emotionally intimate contexts, or without the prospect of developing an ongoing emotional bond, are often dismissed as engaging in “meaningless,” “casual,” or “promiscuous” sex.<sup>25</sup> On the flip side, those who prioritize relationships that do not have sexual components are often dismissed as engaging in relationships that are less stable, mature, and valuable than sexually intimate ones.<sup>26</sup>

Second, legal analysis plays a role not just in creating the current construction of sex but also in naturalizing that construction, thereby obscuring the ways the construction can be challenged and changed. Legal scholars contribute to this naturalization when they argue that most sexual activity takes place in a zone outside of the law or that the law merely reflects and supports pre-existing social practices.<sup>27</sup> Although the role of the law should not be overstated, placing sex outside the law reinforces the notion that sexual practices are primarily innate or biological, rather than the product of social and cultural forces.<sup>28</sup> By examining the current construction of sex and the law’s role in that construction, legal scholars can instead expose and critique its constructed nature.<sup>29</sup>

#### A. *Law and the Construction of Sex*

Until the Court’s decision in *Lawrence*, criminal law and family law long worked in tandem to channel perceived sexual vice into protected forms of intimacy. Criminal law traditionally prohibited and punished a wide range of

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<sup>25</sup> For a few examples of this tendency within legal scholarship, see Richard Arneson, *The Meaning of Marriage: State Efforts to Facilitate Friendship, Love, and Childrearing*, 42 SAN DIEGO L. REV. 979, 982–83 (2005); Gary Chartier, *Marriage: A Normative Framework*, 9 FLA. COASTAL L. REV. 347, 400 (2008); Maxine Eichner, *Principles of the Law of Relationships Among Adults*, 41 FAM. L.Q. 433, 438 (2007). For an example outside of legal scholarship, see Catherine M. Grello et al., *No Strings Attached: The Nature of Casual Sex in College Students*, 43 J. SEX RES. 255, 255 (2006).

<sup>26</sup> See Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 204–06 (2007). Karst, however, does emphasize that his vision of intimate association includes at least “close friendship[s].” Karst, *supra* note 5, at 629.

<sup>27</sup> For examples of these arguments in family law, see Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789–93 (2003).

<sup>28</sup> As such, we adopt Foucault’s argument that “[s]exuality must not be described as a stubborn drive, by nature alien and of necessity disobedient to a power which exhausts itself trying to subdue it and often fails to control it entirely.” FOUCAULT, *supra* note 14, at 103; see also JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 119 (2006) (stating that Foucault “resisted the idea that derepressing sexual desire would be liberating”).

<sup>29</sup> For a general discussion of the law’s ability to change social norms, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032–33 (1996). For more discussion of ways the current construction of sex might be altered, see discussion *infra* Part IV.

sexual activity, including sex between unmarried people, sex between a married person and someone other than his or her spouse, and sex between a prostitute and client,<sup>30</sup> although it failed to punish similar sexual activity between slave owners and those they enslaved.<sup>31</sup> At the same time, family law provided incentives for individuals to choose marriage over these criminally prohibited activities.<sup>32</sup> The state thereby attempted to regulate sexual conduct and privatize the dependency of any children conceived as a result,<sup>33</sup> by limiting the ways that individuals could engage in sexual activity free from state interference and positing marriage as the only site where sex would be affirmatively supported by the state.<sup>34</sup>

This sex-negative legal regime remains largely in place today despite increasing social acceptance of a broader range of sexual activity. Family law continues to privilege marriage over all other relationships between adults, with five states and the District of Columbia currently extending the marriage privilege to same-sex couples,<sup>35</sup> and ten other states currently extending similar

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<sup>30</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 127–28 (1993) (discussing prohibitions on sexual behavior in early American history); PAUL WILSON, *THE SEXUAL DILEMMA: ABORTION, HOMOSEXUALITY, PROSTITUTION, AND THE CRIMINAL THRESHOLD* 80 (1971) (noting that prostitution has long stood in opposition to marriage, justifying its criminal prohibition).

<sup>31</sup> See, e.g., Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 N.C. L. REV. 489, 541–45 (2007).

<sup>32</sup> Schneider, *supra* note 24, at 502–03; see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1264–93 (2009) (engaging in a detailed analysis of the interplay between statutory rape laws and marriage laws).

<sup>33</sup> For more discussion of the role of marriage in privatizing the dependency of both children and spouses, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 7 (2000); Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 533 (1998); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000).

<sup>34</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“And, if appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.”). Of course, the state’s view of what constituted a proper marriage changed over time, particularly in response to concerns about immigration during the early twentieth century. See PAMELA HAAG, *CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM* 97–118 (1999).

<sup>35</sup> New Hampshire, Vermont, Connecticut, Iowa, and Massachusetts extend legal marriage to same-sex couples. N.H. REV. STAT. ANN. § 457:1-a (2009) (effective Jan. 1, 2010); VT. STAT. ANN. tit 15, § 8 (2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 905–07 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565, 566–72 (Mass. 2004) (advising that a bill prohibiting same-sex couples from marrying but allowing them to form civil unions would violate state constitutional equal protection and due process requirements); see also Ian Urbina, *Gay Marriage Is Legal in U.S. Capital*, N.Y. TIMES, Mar. 4, 2010, at A20. New York and Maryland extend marriage recognition to same-sex couples legally wed in other jurisdictions, and Rhode Island purported to do the same at one point. See *Martinez v.*

privileges to same-sex couples who register for domestic partnerships or civil unions.<sup>36</sup> The majority in *Lawrence* stated that it did not intend to interfere with the traditional prerogative of states to set their own requirements for which relationships are eligible for state recognition and support and which are not.<sup>37</sup> Similarly, although many people assume that all criminal prohibitions on consensual sex are unconstitutional after *Lawrence*,<sup>38</sup> courts and legislatures have been slow to adopt that position.<sup>39</sup> Most states have abandoned or are in the process of abandoning criminal prohibitions on fornication, adultery, and unmarried cohabitation,<sup>40</sup> but all states continue to criminalize adult consensual incest,<sup>41</sup> prostitution,<sup>42</sup> and public or quasi-public sexual conduct.<sup>43</sup>

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County of Monroe, 850 N.Y.S.2d 740, 741–42 (App. Div. 2008); Letter from Douglas F. Gansler, Md. Att’y Gen. & Robert N. McDonald, Chief Counsel, Opinions & Advice, Office of the Md. Att’y Gen., to Richard S. Madaleno, Jr., Md. Senate (Feb. 23, 2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>; Letter from Patrick C. Lynch, R.I. Att’y Gen., to Jack R. Warner, Comm’r, R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), available at <http://www.glad.org/uploads/docs/cases/ri-ag-statement.pdf>. The Supreme Court of California ruled that it was unconstitutional for the state to deny same-sex couples access to state-recognized marriage, *In re Marriage Cases*, 183 P.3d 384, 452–53 (Cal. 2008), and thousands of same-sex couples subsequently legally married in California before voters passed a referendum limiting civil marriage to different-sex couples. See *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (describing the effect of Proposition 8 and upholding it).

<sup>36</sup> The states are California, Colorado, Hawaii, Maine, Maryland, Nevada, New Jersey, Oregon, Washington, and Wisconsin. CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2007); COLO. REV. STAT. § 15-22-105 (2009); HAW. REV. STAT. § 572C (2004); ME. REV. STAT. ANN. tit. 22, § 2710 (2008); MD. CODE ANN. HEALTH-GEN. § 6-101 (2010); 2009 Nev. Stat. 2183; N.J. STAT. ANN. § 37:1-29 (West 2008); OR. REV. STAT. § 106 (2009); WASH. REV. CODE § 26.60.030 (2009); WIS. STAT. § 770.001 (2009). Nevada permits same-sex and different-sex couples to register for domestic partnerships on the same terms; the other states limit registration to same-sex couples or, in some instances, to same-sex couples and older different-sex couples. In addition to recognizing same-sex marriage, the District of Columbia permits two people to register for domestic partnerships without regard to gender or the nature of the relationship. D.C. CODE § 32-701(3) (2009).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>38</sup> See *infra* note 85 (citing articles embracing that view).

<sup>39</sup> See *infra* text accompanying notes 116–52 (discussing the post-*Lawrence* legal landscape).

<sup>40</sup> See, e.g., *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at \*1 (N.C. Super. Ct. Aug. 25, 2006) (striking down state anti-fornication and anti-cohabitation laws in light of *Lawrence*); *Martin v. Zihel*, 607 S.E.2d 367, 371 (Va. 2005) (holding Virginia’s anti-fornication law unconstitutional in light of *Lawrence*). Criminal bans on these activities, however, were unlikely to be enforced even before *Lawrence*. See, e.g., *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (dismissing a challenge to a criminal prohibition on out-of-wedlock cohabitation because plaintiffs faced “only the most theoretical threat of prosecution” and therefore lacked standing to sue); *Berg v. State*, 100 P.3d 261, 265 (Utah Ct. App. 2004) (finding that plaintiff lacked standing to challenge the state’s fornication law because the state attorney general agreed with the plaintiff “that two consenting adults who engage in the statutorily forbidden sexual acts should not face criminal liability”).

<sup>41</sup> E.g., *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *State v. Lowe*, 861 N.E.2d 512, 516–18 (Ohio 2007).

A few states also continue to criminalize the distribution and possession of sex toys.<sup>44</sup> One state has even proposed new prohibitions on sex toys after *Lawrence*.<sup>45</sup>

Moreover, even if all states completely got out of the business of criminalizing consensual sexual activity between adults, other areas of the law have come to mirror the criminal law's traditional approach to sex, penalizing various forms of consensual sexual conduct. For example, judges in some states are permitted to view sex outside of marriage adversely in divorce proceedings,<sup>46</sup> and to consider the sexual activities of parents when determining which custody arrangements would serve children's best interests.<sup>47</sup> Courts have also permitted public employers to fire employees because of extra-marital affairs.<sup>48</sup> And federal immigration law continues to favor different-sex married couples over same-sex married couples and any unmarried couples.<sup>49</sup> The holding in *Lawrence*, which is limited to criminal prohibitions, does not affect such civil penalties.

Accordingly, states continue to play a role in channeling sex into particular forms of intimacy, and they likely will do so even if criminal prohibitions on consensual sexual activity are abolished. This channeling may no longer directly discourage individuals from participating in sexual activity outside of married coupling, but the governing legal regime signals that sex within a

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<sup>42</sup> *E.g.*, *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); *State v. Romano*, 155 P.3d 1102, 1109–15 (Haw. 2007); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004); *State v. Pope*, 608 S.E.2d 114, 115–16 (N.C. Ct. App. 2005).

<sup>43</sup> *See, e.g.*, *Singson v. Commonwealth*, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005) (offer of oral sex in men's restroom not protected by *Lawrence* because of the public location).

<sup>44</sup> *See infra* text accompanying note 133.

<sup>45</sup> Tennessee introduced a bill that would outlaw the distribution of sex toys. The state attorney general issued an opinion declaring the proposed ban constitutional, but the bill ultimately failed to pass. *See Constitutionality of Proposed Legislation Banning the Distribution of Sexual Devices*, Op. Tenn. Att'y Gen. No. 06-106 (July 5, 2006), available at <http://www.tennessee.gov/attorneygeneral/op/2006/op/op106.pdf>.

<sup>46</sup> *See, e.g.*, *McNair v. McNair*, 987 S.W.2d 4, 6–7 (Mo. Ct. App. 1998).

<sup>47</sup> *See, e.g.*, *Doe v. Pryor*, 344 F.3d 1282, 1283 (11th Cir. 2003); *Vanderveer v. Vanderveer*, No. 0122-04-2, 2004, WL 2157930, at \*4 (Va. Ct. App. Sept. 28, 2004).

<sup>48</sup> *See, e.g.*, *Beecham v. Henderson County*, 422 F.3d 372, 375–78 (6th Cir. 2005) (holding post-*Lawrence* that a public employer can fire an employee for committing adultery); *see also* *Marcum v. McWhorter*, 308 F.3d 635, 640–43 (6th Cir. 2002) (holding pre-*Lawrence* that there is no constitutional right to adultery) (affirmed by *Beecham*).

<sup>49</sup> Federal immigration law currently gives preferential treatment to individuals married to U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i) (2006), but pursuant to the Defense of Marriage Act, codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006), the federal government does not recognize same-sex marriages, civil unions, or domestic partnerships. For a general discussion of the role of different-sex marriage in immigration law, see Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1666–68 (2007).

particular form of relationship is superior to sex in all other contexts. That signal in turn implies that other sexual practices are unworthy of state support. The legal and social disapproval that follows such nonconformity can have a powerful effect on individuals' psyches, their relationship to their own sexuality, and their overall place in society.<sup>50</sup> The law thereby continues to sustain a narrow vision of acceptable sexual expression and conduct.

The general silence of legal scholars about the potential values of sex outside of coupled intimacy helps to perpetuate this sex-negative legal regime. For example, some legal scholars have explicitly denied that sex has any value outside of relationships when considering harms that emanate from legal prohibitions. Isaac Ehrlich and Richard Posner, for example, conclude that the harm of overinclusive statutory rape laws is minimal in large part because individuals who comply with the laws lose only the opportunity for sexual pleasure.<sup>51</sup> Even some liberal legal scholars view the prospect of protecting sex outside of relationship with derision. Laurence Tribe has criticized those who contend that there is a fundamental human right to "sexual stimulation or release."<sup>52</sup> David Meyer has similarly dismissed mere "sexual gratification" as unworthy of constitutional protection while viewing sexual activities in "the family context" as "higher expression," worthy of constitutional armor.<sup>53</sup> Legal scholarship, like the law in general, has therefore played a role in sustaining the current construction of sex.

### B. *Challenges to Sex Negativity*

Some scholars have sought to articulate broader constitutional rights to sexual activity, but they have done so largely in the context of protecting reproductive rights,<sup>54</sup> attempting to extend equal protection of the law to gays

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<sup>50</sup> Cf. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 227 ("[B]ecause sexual expression and control of one's body are so central to both material reality and sense of self, state condemnation matters, even when it has no concrete consequences."); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110-68 (2000) (discussing psychic effects of sodomy laws pre-*Lawrence*, even when states rarely enforced them).

<sup>51</sup> See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUDIES 257, 271 (1974).

<sup>52</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1922 (2004).

<sup>53</sup> David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 482.

<sup>54</sup> See, e.g., Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 332-36 (2007); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019-20 (1984). These authors are aware, however, that their analysis could be broader. See Jansen, *supra* at 322 (analyzing "treaty monitoring bodies' consideration of sexual

and lesbians,<sup>55</sup> or promoting intimate associations like those celebrated in *Lawrence*.<sup>56</sup> None of these efforts, however, has explicitly sought to disentangle legal protection of sexual activity from intimate association. Queer theorists have advocated for more sexual freedom in other contexts, but most of those scholars believe that such freedom can be achieved only outside of state protection or regulation.<sup>57</sup> Accordingly, there have been few attempts to develop legal theories designed to acknowledge and protect the values of sex without regard to other legal goals.<sup>58</sup>

Much of the scholarship advocating broader constitutional protection for sexual conduct was written before *Lawrence* and the case it overruled, *Bowers v. Hardwick*.<sup>59</sup> This right-to-sex literature generally falls into two main categories, neither of which alters the construction of sex we now critique. The first category analyzes the series of Supreme Court decisions on privacy and reproductive freedom from the mid-1960s and early 1970s and concludes that those cases support a broad autonomy right to private sexual activity free from government interference.<sup>60</sup> We, like a number of others before us,<sup>61</sup> think that these scholars are overly optimistic about the Supreme Court's view of these "sex cases," a conclusion bolstered by the Supreme Court's holding in

rights" and noting that "[n]othing that comes close to a right to enjoy one's sexuality is formulated, nor are any particular strong statements made with respect to same-sex relationships"); Law, *supra* at 1028 (critiquing the idea "that the risk of unwanted pregnancy should function to discourage sex and to bind families together").

<sup>55</sup> See, e.g., Law, *supra* note 50, at 196, 218–21, 227–35; Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 80 (1986).

<sup>56</sup> See, e.g., Karst, *supra* note 5, at 637–42; Law, *supra* note 50, at 225; Law, *supra* note 54, at 1019.

<sup>57</sup> See *infra* text accompanying notes 79–82 (discussing the work of Michael Warner and other queer theorists).

<sup>58</sup> For a discussion of those few attempts, see *infra* text accompanying notes 107–15 (discussing the work of Libby Adler, Katherine Franke, Teemu Ruskola, and Marc Spindelman).

<sup>59</sup> 478 U.S. 186, 194–96 (1986) (upholding the criminal conviction of two men for consensual sodomy that took place in the home of one of the defendants).

<sup>60</sup> See, e.g., Mohr, *supra* note 55, at 80; Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 777 (1998); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1663–68 (1991); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 732–37 (1973); Carl E. Schneider, Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 296 (1978) [hereinafter *Fornication*]. These scholars primarily relied on *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), and *Stanley v. Georgia*, 394 U.S. 557, 564–68 (1969) (establishing a privacy right to read obscene works in one's own home).

<sup>61</sup> See, e.g., David B. Cruz, "The Sexual Freedom Cases"? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 353–82 (2000) (questioning the traditional autonomy-based reading of these cases); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1059–60 (2004) (stating that pre-*Lawrence* there was "no general right to engage in consensual sexual activity").

*Bowers*.<sup>62</sup> Even though *Lawrence* subsequently discredited *Bowers*, *Lawrence*, as we will discuss in the next Part, did not explicitly adopt a broad autonomy-based right to sex. Instead, the language of the majority opinion suggests that sex is worthy of constitutional protection only when it has the potential to further emotional intimacy.

The second category of scholars also rely on individual autonomy interests, but they engage in more normative analyses. J. Harvie Wilkinson III and G. Edward White, for example, suggest that there should be “constitutional protection for personal lifestyles,” including sexual conduct, both because of the privacy cases of the 1960s and 1970s and because sexual conduct can further self-fulfillment and self-realization, touchstones of personal autonomy.<sup>63</sup> Wilkinson and White therefore contend that choices about sexual conduct are central to fundamental personal decisions protected by the Constitution.<sup>64</sup> Similarly, David Richards presents a robust account of the autonomy-based interests furthered by broad constitutional protection of private, consensual sexual conduct.<sup>65</sup> Given those interests, Richards contends that prostitution should be decriminalized,<sup>66</sup> and gay sex should be protected in the name of autonomy.<sup>67</sup>

Our analysis is closer to the second group of scholars than to the first, but we move beyond the focus on autonomy in order to more closely examine the ways that sexual choices and desires have been constructed by social forces, including the law. Sex negativity can circumscribe private choices, making autonomy a weak foundation on which to build a broader right to sex, particularly, though not exclusively, for women and sexual minorities.<sup>68</sup> Indeed, even within the autonomy-focused discussions described above, many scholars continue to rely on sexual scripts that assume differences between the sexes and devalue sex outside of committed relationships. Paul Abramson,

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<sup>62</sup> 478 U.S. at 194–96.

<sup>63</sup> J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 612–13, 615 (1977).

<sup>64</sup> *Id.* at 611–12.

<sup>65</sup> David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 *passim* (1979).

<sup>66</sup> David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 *passim* (1979).

<sup>67</sup> Richards, *supra* note 65, at 1006–08; *see also* DAVID A.J. RICHARDS, *THE SODOMY CASES: BOWERS V. HARDWICK AND LAWRENCE V. TEXAS passim* (2009) (arguing that *Lawrence* establishes the fundamental right to an autonomous private life).

<sup>68</sup> For further discussion of these issues, *see infra* Part III.B.1.

Steven Pinkerton, and Mark Huppín, for example, resort to sexual double standards in their discussion of prostitution despite their defense of a broad constitutional right to sex.<sup>69</sup> They claim that “[m]ost adults, women in particular, prefer sex within the context of an intimate relationship. The prospect of having sex with a random stranger is . . . repellent . . . .”<sup>70</sup> Similarly, prostitution “provides a needed interpersonal sexual outlet for people (primarily men) who are unable to procure consensual sexual partners. This includes men limited by their appearance, personality, social situation, or other circumstances.”<sup>71</sup> As such, these authors seem incapable of imagining other reasons for having sex with prostitutes or imagining women as clients and men as prostitutes. Although Abramson, Pinkerton, and Huppín do ultimately support constitutional protection for prostitution because they view it as a private choice,<sup>72</sup> they do not attempt to examine how the law and other social forces influence the popular opinions they so readily adopt.

Other scholars have eschewed gender stereotypes but nonetheless have uncritically adopted the view that sex is a crucial element of personal autonomy because it can lead to emotional intimacy, thereby reinforcing, rather than challenging, the law’s traditional channeling of sex into intimacy. Sylvia Law, for example, powerfully analyzes how legal regimes that do not adequately protect women’s rights to contraception or abortion restrict women’s freedom of sexual expression, yet she also emphasizes that sex is important because it promotes intimacy.<sup>73</sup> She argues that “sexual relations are invaluable expressions of love and bonding that strengthen the intimate relationships that give life meaning.”<sup>74</sup> “Through sexual relationships, we experience deep connection with another, vulnerability, playfulness, surcease, connection with birth and with death, and transcendence.”<sup>75</sup> Wilkinson and White also embrace the intimacy paradigm, arguing that sexual conduct should be protected because it furthers the values of “love, pleasure, intimacy, [and] mutual interdependence.”<sup>76</sup> Even Richards, who perhaps articulates the broadest understanding of sexual autonomy, argues that sex should be valued

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<sup>69</sup> PAUL R. ABRAMSON, STEVEN D. PINKERTON & MARK HUPPIN, *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS passim* (2003).

<sup>70</sup> *Id.* at 113.

<sup>71</sup> *Id.* at 115.

<sup>72</sup> *Id.* at 113.

<sup>73</sup> Law, *supra* note 50 *passim*; Law, *supra* note 54 *passim*.

<sup>74</sup> Law, *supra* note 54, at 1019.

<sup>75</sup> Law, *supra* note 50, at 225.

<sup>76</sup> Wilkinson & White, *supra* note 63, at 587–88.

because it is the primary vehicle for closeness to a long-term partner and for generating families with children.<sup>77</sup>

Our approach, in contrast, examines reasons to value sex outside of the promotion of intimate relationships in order to theorize ways the law could respect more diverse conceptions of sex and intimacy.<sup>78</sup> Queer theorists have long championed such a vision. For example, Michael Warner has argued that sexual dignity can be achieved only if we first acknowledge the shame of all sex, whether the sex is “married, heterosexual, private, loving,” or “no more dignified than defecating in public, and possibly less so.”<sup>79</sup> Warner has criticized “leading gay legal theorists” who “dismiss gay sexuality as mere liberty, uncivilized[,] and uncommitted.”<sup>80</sup> Queer thought instead rests, among other things, on the principles of recognizing “the diversity of sexual and intimate relations as worthy of respect and protection,” cultivating “unprecedented kinds of commonality, intimacy and public life,” and “resist[ing] the notion that the state should be allowed to accord legitimacy to some kinds of consensual sex but not others, or to confer respectability on some people’s sexuality but not others.”<sup>81</sup> Queer theory has traditionally resisted, however, any suggestion that the law could further those objectives, instead arguing for freedom from state regulation.<sup>82</sup> Therefore, queer theorists have not engaged in the project we set out here—a reimagining of the law’s relationship to sex, designed to produce more legal support for diverse conceptions of both sex and intimacy.

Some commentators thought that *Lawrence* would move legal doctrine in this direction, as it recognized and even celebrated the possibility of sexual

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<sup>77</sup> Richards, *supra* note 65, at 1000–04.

<sup>78</sup> See *infra* Parts IV, V.

<sup>79</sup> MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 36–37 (1999) (“If sex is a kind of indignity, then we’re all in it together. And the paradoxical result is that only when this indignity of sex is spread around the room, leaving no one out, and in fact binding people together, that it begins to resemble the dignity of the human.”).

<sup>80</sup> *Id.* at 111; see also *id.* at 113 (critiquing campaigns for same-sex marriage that rely on arguments that “[m]arriage, in short, would make for good gays—the kind who would not challenge the norms of straight culture, who would not flaunt sexuality, and who would not insist on living differently from ordinary folk”).

<sup>81</sup> *Id.* at 88.

<sup>82</sup> See, e.g., Michel Foucault, *Confinement, Psychiatry, Prison*, in *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984*, at 178, 200–05 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988); Michel Foucault, *The History of Sexuality*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977*, at 183, 187–88 (Colin Gordon ed., Colin Gordon et al. trans., 1980); Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2703 (2008); Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW 197* (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

activity between two men. *Lawrence* did alter some aspects of the current construction of sex by broadening the space for acceptable sex from procreative activities in state-sanctioned marital relationships to intimate associations more generally.<sup>83</sup> *Lawrence* did not provide a framework for protection of more diverse conceptions of sex, however, because it adopted a sex-in-service-to-intimacy approach.<sup>84</sup> Protecting sexual activity by invoking the importance of intimate association leaves limited legal and cultural space for sexual activity that does not involve emotional intimacy or for emotional intimacy that does not involve sex. The next Part discusses this aspect of *Lawrence*.

## II. THE LIMITS OF *LAWRENCE*

Initial readings of *Lawrence* heralded the end of sex-negative laws. Many commentators read the majority opinion as holding that the state could no longer dictate what sort of sexual behavior is acceptable between consenting adults—gay, straight, or in-between.<sup>85</sup> Justice Scalia, in his dissent, claimed that the majority left no regulation of sexual conduct standing: “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . [all] called into question.”<sup>86</sup> These broad readings find some support in Justice Kennedy’s

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<sup>83</sup> 593 U.S. 558, 567 (2003).

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 35–41; Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1272–74 (2007); Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1884 (2006) (describing *Lawrence* as holding that there is a “freedom to have noncommercial sexual relations with consenting adults”); Hunter, *supra* note 11, at 1112–13 (concluding that *Lawrence* establishes a liberty right to consensual sex between unmarried adults conducted in private and predicting that fornication laws will be invalidated and adult incest laws will be “in jeopardy”); Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1429 (2006) (interpreting *Lawrence* as standing for the proposition that “individual decisions regarding physical intimacy between consenting adults, either of the same or opposite sex, are constitutionally protected”); Sunstein, *supra* note 61, at 1060–61 (contending that *Lawrence* calls into question all laws regulating non-commercial, consensual sexual conduct); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 68–72 (suggesting that *Lawrence* calls into question bans on adult incest, fornication, and sexual devices); Jota Borgmann, Note, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN’S L.J. 171, 210 (2006) (“*Lawrence* stands for a right to one’s own thoughts, relationship choices, and sexual expression.”). But see Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L.J. 197, 218 (2005) (“The *Lawrence* opinion could have done more good by regarding sex as dignified in its tautological and paradoxical sense.”); *infra* text accompanying notes 107–15.

<sup>86</sup> *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

majority opinion, which embraces “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>87</sup> On its face, this language is wide in its scope and libertarian in its approach.

Upon closer reading, however, *Lawrence* is much more modest in its views about sex. Sex is not protected because there is a right to engage in homosexual (or heterosexual) sodomy; in fact, the Court expressly criticizes the opinion in *Bowers v. Hardwick* for framing the issue as one about a particular sex act.<sup>88</sup> Instead, as we will discuss, the Court’s holding can be read as protecting sex only when it promotes emotional intimacy and the potential for a long-term bond between two people.

This more limited reading of *Lawrence* still constitutes a victory for the gay rights movement and for many individuals engaged in same-sex relationships, as the Court signaled its respect for same-sex couples by making favorable comparisons to different-sex couples.<sup>89</sup> Over thirty years ago, legal scholars believed the Court viewed such “lifestyle choices” as “bizarre” and a threat to “traditional American conceptions of family life.”<sup>90</sup> Justice Kennedy’s majority opinion rejected that view, portraying same-sex couples as engaged in the same sort of life choices as different-sex couples.<sup>91</sup> But given the facts of the case, the Court did not have to frame its analysis in this manner. The defendants in *Lawrence*—two men discovered engaging in anal sex in a private home—did not hold themselves out as a couple nor is there any evidence that they intended to pursue an ongoing relationship comparable to dating or

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<sup>87</sup> *Id.* at 572 (majority opinion).

<sup>88</sup> *Id.* at 566–67 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>89</sup> Cf. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1644 (1993) (stating that a focus on “the couple as pair bond” may be “most useful . . . in challenges to the sodomy statutes, challenges which might benefit if brought on behalf of persons whose relationship the courts could more readily assimilate to the marital relationship protected in *Griswold*”). Neither the majority opinion in *Lawrence* nor Justice O’Connor’s concurring opinion, however, endorse same-sex marriage or even the more modest equalization of state benefits for same-sex couples. *Lawrence*, 539 U.S. at 578; *id.* at 585 (O’Connor, J., concurring). Thus, the Court essentially held that same-sex couples should be treated like different-sex couples in the bedroom but not elsewhere. For a skeptical view of the benefits of even this limited form of equality, see *infra* text accompanying notes 107–15 (discussing arguments made by Libby Adler, Katherine Franke, Teemu Ruskola, and Marc Spindelman).

<sup>90</sup> Wilkinson & White, *supra* note 63, at 573.

<sup>91</sup> See *Lawrence*, 539 U.S. at 567.

marriage.<sup>92</sup> In fact, one of the men was “romantically involved” with another man at the time of the arrest, and it was that romantic partner who called the police.<sup>93</sup> While wrapping this interaction in the garb of long-term romantic coupling has great rhetorical and emotional appeal, it also allows courts to ignore the possibility that individuals may engage in sex acts for reasons other than creating and sustaining relationships that are both emotionally and sexually intimate. As set forth below, *Lawrence* thus reinforces rather than challenges many aspects of the current construction of sex.

### A. *Sex in Service to Intimacy*

*Lawrence* admittedly changed the law’s role in the construction of sex by expanding the contexts in which individuals may engage in sex free from state intervention. States can no longer invoke the desire to promote marriage and procreation as a basis for criminalizing extramarital, non-procreative sex acts.<sup>94</sup> The romantic rubric of *Lawrence*, however, replaces marriage and procreation with a new ground for restricting sexual conduct—the promotion of emotional intimacy. As such, states may find reason to continue to criminalize or otherwise penalize sexual activities that occur outside of acceptable relationships or are otherwise assumed to play no role in the furtherance of emotional intimacy even within relationships.

Instead of holding that there is a right to engage in sex free from state intervention, *Lawrence* held that there is a right to engage in “certain *intimate* conduct,” including “*intimate* sexual conduct” and “sexual *intimacy*.”<sup>95</sup> This focus on “intimate” activities in the sexual context could mean many things.

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<sup>92</sup> Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004) (relaying the assessment of one of the defense attorneys that the defendants “may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested”).

<sup>93</sup> *Id.* at 1478–79.

<sup>94</sup> See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 758–63 (2006) (arguing that *Lawrence* removed marriage as the dividing line between licit and illicit sex); Hunter, *supra* note 11, at 1109 (viewing *Lawrence* as eliminating “the last vestiges of marriage as the only zone of permissible expression for any and all forms of sexual practices”).

<sup>95</sup> *Lawrence*, 539 U.S. at 562, 564, 566, 578 (emphasis added). It is worth noting that the holding in *Lawrence* cannot be justified under principles of constitutional minimalism. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 39–41 (1999); CASS R. SUNSTEIN, RADICALS IN ROBES 27–30 (2005); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 *passim* (1996). Because the defendants were not engaged in an emotionally intimate relationship, the Court’s reframing of the issue from whether there is a right to engage in certain sex acts (sodomy) to whether there is a right to engage in sex in the context of an emotionally intimate relationship broadens, rather than narrows, the issue at hand.

For example, it could reflect discomfort with more direct or specific ways to describe sexual activities and a desire to embrace a discourse often thought to be more civilized and dignified. Even if that is true, however, we contend that the focus on intimacy likely means more. In particular, the desire to engage in a more dignified discourse betrays the assumption that sex is more worthy of respect and protection when in service to certain ends rather than others. Although Justice Kennedy does not define intimacy in his opinion, there are several clues that he embraces this assumption.

The first indication that the invocation of intimacy in *Lawrence* serves to protect certain conceptions of sex over others can be found in the framing of the question at issue. Justice Kennedy criticizes the sex-centered approach taken by the *Bowers* Court: “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>96</sup> Instead, Justice Kennedy frames the issue as whether a state can make “it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”<sup>97</sup> Justice Kennedy thus shifts the discussion from sexual activities to relationships and uses sweeping language to celebrate the value of same-sex romance.

This shift from sex acts to relationships aligns *Lawrence* with the right to intimate association already articulated by the Court in other contexts.<sup>98</sup> Kenneth Karst has defined an “intimate association” as one that is a “close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.”<sup>99</sup> It transforms individuals into a “we” that exists beyond a “you” and “me.”<sup>100</sup> Similarly, the liberty interest embraced by Justice Kennedy is not tied to sexual conduct, but instead

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<sup>96</sup> *Lawrence*, 539 U.S. at 567.

<sup>97</sup> *Id.* at 562.

<sup>98</sup> The Court, in dicta, has emphasized that associations are worthy of constitutional protection if they are “sufficiently personal or private” so as to resemble the family-like relationships accorded constitutional protection. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545–46 (1987); *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting) (stating that “[t]hrough the precise scope of the right to intimate association is unclear,” the Boy Scouts do not constitute an intimate association because of the organization’s “size, . . . its broad purposes, and its nonselectivity”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620–21 (1984) (finding that the local chapters of the Jaycees are not constitutionally protected intimate associations because they are “large and basically unselective groups”).

<sup>99</sup> Karst, *supra* note 5, at 629.

<sup>100</sup> *Id.*

to the potential of “a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>101</sup> As Justice Kennedy emphasizes: “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.”<sup>102</sup> The choice to which Justice Kennedy refers is not the choice to engage in sexual conduct; instead it is the choice to enter a relationship that has the potential to become emotionally intimate and, ideally, long-lived.

Underlying the language and rationale of *Lawrence* is the notion that without sex a relationship between adults cannot reach the pinnacle of intimacy represented archetypically in the marital bond. On the flip side, sex absent the potential for a more enduring bond appears to fall outside the protected liberty interest. As such, Justice Kennedy’s opinion reinforces, rather than challenges, negative constructions of sex. In accordance with the traditional channeling function of family law, sex has value only when it creates, solidifies or deepens an emotional bond between two individuals. That bond no longer need be marital or procreative, but the possibility of an emotional bond still seems required.

Ultimately, then, *Lawrence* is not a revolution for sex.<sup>103</sup> Its holding can be seen as simply extending case law barring the criminalization of contraceptive use to same-sex sexual relations, at least to the extent that those previous cases are read broadly to remove criminal penalties for private sexual activities that potentially promote emotionally intimate relationships.<sup>104</sup> A number of legal scholars have applauded *Lawrence* for adopting this focus on romance and intimacy in the context of same-sex couples and for dismissing the notion that

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<sup>101</sup> *Lawrence*, 539 U.S. at 567.

<sup>102</sup> *Id.* The “enduring bond” language evokes the memorable lines from *Griswold v. Connecticut*:

Marriage is a coming together for better or for worse, hopefully *enduring*, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486 (1965) (emphasis added).

<sup>103</sup> At least one scholar has claimed that *Lawrence* is a “constitutional revolution” and a “libertarian revolution.” Barnett, *supra* note 85, at 21.

<sup>104</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972), held that a Massachusetts statute criminalizing contraceptive use by unmarried individuals, but not married individuals, violated the Equal Protection Clause. *Id.* at 446–55.

the case was about sex.<sup>105</sup> In fact, most of the reams of articles devoted to analyzing *Lawrence* focus on its implications for same-sex marriage,<sup>106</sup> while relatively few address its potential impact on government regulation of sexual conduct.

A few legal scholars have criticized the relationship focus of *Lawrence*. These commentators, most notably Libby Adler, Katherine Franke, Teemu Ruskola, and Marc Spindelman, have expressed concern over the ways *Lawrence* limits the acceptable spheres of gay sex to a heteronormative marriage-like model.<sup>107</sup> Adler discusses the deployment of dignity in the majority opinion, noting that the fact that “a long-term relationship *might* provide the context for sodomy seems important to Justice Kennedy, though he does not tell us why or state this forthrightly.”<sup>108</sup> Instead, Justice Kennedy simply assumes “a claim is ‘demeaned’ for being understood to regard sex alone,” an assumption that leads Adler to speculate that Kennedy must have “felt that if he were going to speak in the language of dignity, two men meeting at a bar or a cruising spot and going home to one man’s house for a one-time encounter was not going to serve him well.”<sup>109</sup> Franke similarly describes the “liberty principle upon which the [*Lawrence*] opinion rests [as] less expansive, rather geographized, and, in the end, domesticated.”<sup>110</sup>

Ruskola emphasizes that *Lawrence* “leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship.”<sup>111</sup> Ruskola describes *Lawrence* as suggesting that “homosexuals

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<sup>105</sup> Laurence Tribe, for example, supports the move away from a right to sodomy toward a right to an emotionally intimate relationship with a sexual component. See Tribe, *supra* note 52, at 1922–23, 1934–43. David Meyer also supports this reading of *Lawrence*, expressing concern that any other reading of the opinion would disrupt the traditional channeling function of family law. Meyer, *supra* note 53, at 474–85.

<sup>106</sup> See, e.g., Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1458–63 (2004) (analyzing ways that the *Lawrence* majority attempted to limit its analysis to avoid reaching the same-sex marriage issue and arguing that such attempts will ultimately be unsuccessful); Sunstein, *supra* note 61, at 1070–76 (discussing the potential implications of *Lawrence* for same-sex marriage); Tribe, *supra* note 52, at 1945–51 (arguing that same-sex marriage is “only a question of time” after *Lawrence*).

<sup>107</sup> See Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN’S L.J. 1, 16–19 (2008); Adler, *supra* note 85, at 215–18; Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400–01 (2004); Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?*, 23 SOC. TEXT 235, 238–45 (2005); Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1385–86 (2005).

<sup>108</sup> Adler, *supra* note 107, at 17.

<sup>109</sup> *Id.* at 18–19.

<sup>110</sup> Franke, *supra* note 107, at 1401.

<sup>111</sup> Ruskola, *supra* note 107, at 239. Ruskola may have been channeling the spirit of Sylvia Law when he focused on “transcendent” sex. See Law, *supra* note 50, at 225.

exist *only* in relationships, and that relationships are the *only* context in which homosexuals might conceivably engage in sex acts.”<sup>112</sup> Ruskola further observes that the opinion in *Lawrence* fails “to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy. The implicit bargain the Court proposes is plain. The Court, and the Constitution, will respect our sex lives, but on [the] condition that our sex lives be respectable.”<sup>113</sup> Spindelman concisely analyzes the phenomenon: “*Lawrence* accords sexuality outside of marriage—for unmarried heterosexual and unmarried homosexual couples—the same basic protection it receives in marriage because it is marriage-like: presumptively good . . . because intimate.”<sup>114</sup> Spindelman believes this rationale for constitutional protection is particularly problematic because it overlooks the private harms that can be masked by intimacy (including the harm of sex-based domestic violence, now often called intimate violence).<sup>115</sup>

We agree with Adler, Franke, Ruskola, and Spindelman that *Lawrence* furthers a narrow vision of acceptable gay sex, but our critique goes further. In our view, the *Lawrence* model for protecting sexual conduct is problematic not only because it channels gay sex into one marriage-like form, but also because it channels all sex into such a form. Judicial interpretations of *Lawrence* reinforce our critique, as we discuss below.

### B. *Lawrence’s Sex-Negative Progeny*

*Lawrence’s* sex-in-service-to-intimacy rationale leaves ample room for courts to uphold state restrictions on sexual activities that do not promote emotional intimacy, and courts indeed have done so. Sodomy laws in existence prior to *Lawrence* have been invalidated to the extent they criminalize consensual, private sodomy between adults in non-military settings,<sup>116</sup> but courts have upheld restrictions on various other forms of sexual activity.<sup>117</sup> These courts rejected the notion that *Lawrence* confers a broad

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<sup>112</sup> Ruskola, *supra* note 107, at 239.

<sup>113</sup> *Id.*

<sup>114</sup> Spindelman, *supra* note 107, at 1386.

<sup>115</sup> *Id.* at 1387–96.

<sup>116</sup> *See, e.g.,* McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004) (stating that *Lawrence* “legalized the practice of homosexuality and in essence made it a protected practice under the Due Process clause of the United States Constitution”).

<sup>117</sup> *See, e.g., In re R.L.C.*, 635 S.E.2d 1, 3–4 (N.C. Ct. App. 2006), *aff’d*, 643 S.E.2d 920 (N.C. 2007) (emphasizing that the state’s “crimes against nature” statute was invalidated after *Lawrence* only with respect

right of sexual privacy or autonomy and have instead applied minimal, rational basis review to laws regulating sexual activity.<sup>118</sup> Accordingly, *Lawrence* has only minimally altered these courts' analyses in cases involving criminal or civil regulation of sexual conduct. Instead of looking to the underlying facts of the *Lawrence* case, lower courts have relied on Justice Kennedy's rhetoric, permitting the analysis to overcome the facts. Some may believe such courts are misinterpreting *Lawrence*, but our analysis reveals that there is support in *Lawrence* for a narrow reading of the opinion—one that protects sexual conduct only in the context of emotionally intimate relationships.

Since *Lawrence* was decided, courts have mostly upheld, with a few exceptions,<sup>119</sup> state laws barring the distribution and possession of sex toys,<sup>120</sup> adult consensual incest (even between non-blood relatives),<sup>121</sup> prostitution,<sup>122</sup> and public or quasi-public sexual conduct.<sup>123</sup> Even sodomy laws remain on the books and are enforced in cases regarding public or quasi-public conduct,<sup>124</sup>

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to "private activity between consenting adults," thus making application of the statute valid with respect to sodomy involving "minors; public conduct; prostitution; or non-consensual, coercive conduct").

<sup>118</sup> See, e.g., *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding that *Lawrence* did not establish a fundamental right "for adults to engage in all manner of consensual sexual conduct"); *Williams v. Att'y Gen.*, 378 F.3d 1232, 1238 (11th Cir. 2004) ("In short, we decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny."); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) ("[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right."); *State v. Lowe*, 861 N.E.2d 512, 517 (Ohio 2007) ("*Lawrence* did not announce a 'fundamental' right to all consensual adult sexual activity . . ."); *State v. Acosta*, No. 08-04-00312-CR, 2005 WL 2095290, at \*3 (Tex. App. Aug. 31, 2005) (concluding that the holding in *Lawrence* was limited to "private sexual conduct" and therefore did not create a fundamental right to the "commercial promotion of sexual devices"). But see *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (viewing *Lawrence* as establishing a fundamental privacy right of "sexual intimacy"); *Anderson v. Morrow*, 371 F.3d 1027, 1032–33 (9th Cir. 2004) (suggesting that *Lawrence* established "the right of two individuals to engage in fully and mutually consensual private sexual conduct"); *People v. Knox*, 903 N.E.2d 1149, 1153 (N.Y. 2009) (stating that *Lawrence* established a fundamental "right to engage in private consensual sexual activity").

<sup>119</sup> The most prominent exceptions are *State v. Limon*, 122 P.3d 22 (Kan. 2005), discussed *infra* text accompanying note 127, and *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008), discussed *infra* text accompanying notes 139–43.

<sup>120</sup> See *infra* text accompanying note 133.

<sup>121</sup> E.g., *Muth*, 412 F.3d at 818 (holding post-*Lawrence* that there was "no clearly established federal law" supporting a "fundamental right to engage in incest free from government proscription"); *Lowe*, 861 N.E.2d at 516–18 (upholding constitutionality of a city ordinance prohibiting consensual sex between a stepfather and adult stepdaughter).

<sup>122</sup> E.g., *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); *State v. Romano*, 155 P.3d 1102, 1109–15 (Haw. 2007); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004); *State v. Pope*, 608 S.E.2d 114, 115–16 (N.C. Ct. App. 2005).

<sup>123</sup> See, e.g., *Singson v. Commonwealth*, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005) (holding that offer of oral sex in a men's restroom was not protected by *Lawrence* because of the public location).

<sup>124</sup> *Id.*

the military,<sup>125</sup> and minors.<sup>126</sup> One court has held that such laws may no longer subject same-sex activities to harsher treatment than different-sex activities,<sup>127</sup> but other courts have upheld criminal prohibitions even when, for example, the punishment for sodomy is more severe than that for vaginal intercourse that takes place in a similar context, such as when the conduct involves a minor<sup>128</sup> or takes place in public.<sup>129</sup> Courts have also continued to view sexual conduct outside of marriage adversely in custody and employment decisions, rejecting any suggestion that extra-marital sex is constitutionally protected.<sup>130</sup>

Some of these holdings explicitly rely on a reading of *Lawrence* as protecting sexual activity from governmental intrusion only when in the service of an intimate relationship. One court even suggested erroneously that the defendants in *Lawrence* were involved in a “romantic relationship,” and concluded that the opinion had little relevance to sexual conduct outside of such relationships.<sup>131</sup> Other courts have invoked *Lawrence*’s discussion of the value of personal bonds. The Supreme Court of Utah upheld a criminal

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<sup>125</sup> *E.g.*, *United States v. Marcum*, 60 M.J. 198, 205–08 (C.A.A.F. 2004). The military has not only retained its criminal ban on sodomy (albeit limited by *Marcum*), but it has also continued to view adultery, fraternization, and wrongful cohabitation as falling under the criminal prohibition of “Conduct Unbecoming a Gentleman,” even when spouses are separated and have permission to date others. Uniform Code of Military Justice, 10 U.S.C. §§ 933, 934 (2006); Manual for Courts-Martial ¶¶ 51, 59, 62, 69, 83 (2008); *see also* *United States v. Barber*, No. 20000413, 2004 CCA Lexis 391 (A. Ct. Crim. App. Oct. 7, 2004) (affirming conviction for adulterous conduct); C. Quince Hopkins, *Rank Matters but Should Marriage: Adultery, Fraternization, and Honor in the Military*, 9 U.C.L.A. WOMEN’S L. J. 177, 204–05, 213, 239–48 (1999).

<sup>126</sup> *See, e.g.*, *In re R.L.C.*, 643 S.E.2d 920, 924–25 (N.C. 2007) (upholding “crime against nature” statute with respect to minors).

<sup>127</sup> *State v. Limon*, 122 P.3d 22, 38 (Kan. 2005) (holding unconstitutional “Romeo and Juliet” law that penalized same-sex activities more harshly than different-sex activities).

<sup>128</sup> *In re R.L.C.*, 643 S.E.2d at 921–25 (upholding, as to minors, a “crime against nature statute” that criminalized oral sex, a form of sodomy, but not vaginal intercourse).

<sup>129</sup> *E.g.*, *State v. Thomas*, 891 So. 2d 1233, 1237–38 (La. 2005) (upholding more severe penalties for solicitation of oral sex than for intercourse); *Tjan v. Commonwealth*, 621 S.E.2d 669, 675–76 (Va. Ct. App. 2005) (upholding felony charges for oral sex in public even though public vaginal intercourse is only a misdemeanor).

<sup>130</sup> *See, e.g.*, *Beecham v. Henderson County*, 422 F.3d 372, 375–78 (6th Cir. 2005) (holding post-*Lawrence* that a public employer can fire an employee for committing adultery); *Vanderveer v. Vanderveer*, No. 0122-04-2, 2004 WL 2157930, at \*3–5 (Va. Ct. App. Sept. 28, 2004) (limiting *Lawrence* to the criminal context and concluding that it has no relevance in custody determinations, thereby permitting courts to consider unmarried cohabitation by a parent when determining the custody arrangement that would serve the child’s best interests).

<sup>131</sup> *See, e.g.*, *United States v. Marcum*, 60 M.J. 198, 212–13 (C.A.A.F. 2004) (Crawford, J., concurring) (distinguishing the “romantic relationship” in *Lawrence* from a situation which “occurred after a night of drinking when Senior Airman H ‘crashed’ on Appellant’s couch, wearing only boxer shorts and a T-shirt, and awoke to find Appellant performing oral sex on him”).

prohibition on bigamy because sex outside of a valid marriage causes “injury to a person or abuse of an institution [marriage] the law protects.”<sup>132</sup> The Eleventh Circuit upheld an Alabama statute banning the distribution and possession of sex toys because sex toys promote “prurient interests in autonomous sex” and “the pursuit of orgasms by artificial means for their own sake.”<sup>133</sup> The court was likely influenced by vestiges of a procreative construction of sex, but the dismissal of solo sex is also inherent in *Lawrence*’s approach to intimacy; solo sex may be pleasurable and may even bring one closer to oneself emotionally,<sup>134</sup> but the act itself is not thought to promote an intimate relationship with a partner.<sup>135</sup> A federal district court in New Jersey likewise rejected the applicability of *Lawrence* to a sex club because the court viewed *Lawrence* as “protecting *relationships* from governmental intrusion.”<sup>136</sup> Similarly, the Hawaii Supreme Court, in upholding prohibitions against prostitution, described *Lawrence* as primarily protecting the conduct of “persons engaged in homosexual *relationships*.”<sup>137</sup> The court thus concluded that *Lawrence* has no bearing on prostitution because prostitution involves money, which it presumed precludes the possibility of emotional intimacy.<sup>138</sup>

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<sup>132</sup> State v. Holm, 137 P.3d 726, 743 (Utah 2006) (quoting *Lawrence* to reject a constitutional defense to criminal charges under Utah’s bigamy statute).

<sup>133</sup> Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001), *aff’d after remand and appeal sub nom.*, Williams v. Att’y Gen., 378 F.3d 1232, 1234–38 (11th Cir. 2004) (holding that *Lawrence* did not establish a fundamental right to engage in sex).

<sup>134</sup> See Richards, *supra* note 65, at 1002 (“[F]or humans to experience sex is never, even in solitary masturbation, a purely physical act, but is [i]mbued with complex evaluational interpretations of its real or fantasied object, often rooted in the whole history of the person from early childhood on.”); see also *infra* text accompanying notes 161–62.

<sup>135</sup> Of course, one can easily argue that sex toys promote emotional intimacy, including marital intimacy. In fact, this argument was made to the *Williams* court and ultimately rejected. See COSSMAN, *supra* note 17, at 32–42. That rejection supports our analysis that the court was at least in part uncomfortable with the non-procreative focus of *Lawrence*. See also Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 23–26 (2004) (describing how lawyers seeking to challenge state bans on the sale of sex toys often portray the women who use them as dysfunctional, thereby potentially providing courts with a means “to acknowledge female sexual needs without challenging the primacy of marriage and the male role”).

<sup>136</sup> 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614, 623 (D.N.J. 2005) (emphasis added).

<sup>137</sup> State v. Romano, 155 P.3d 1102, 1111 (Haw. 2007) (emphasis added).

<sup>138</sup> *Id.*; see also United States v. Thompson, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006) (stating that *Lawrence* only applies to laws banning sodomy and has nothing to contribute to constitutional analysis of prostitution laws); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1836 (2007) (contending that *Lawrence* distinguishes prostitution from constitutionally protected sexual conduct because prostitution lacks an emotional connection between the participants). *But see Romano*, 155 P.3d at 1119 (Levinson, J., dissenting) (contending that *Lawrence* holds that states cannot “criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not”).

These narrow readings of *Lawrence* are understandable given the language of Justice Kennedy's opinion, but they are not necessarily required. In fact, the Fifth Circuit recently refused to adopt such a narrow reading, instead invoking *Lawrence* to hold that Texas's ban on sex toys was unconstitutional.<sup>139</sup> The state had argued that nothing in *Lawrence* prevented it from banning sex toys in order to “discourag[e] prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and [to] prohibit[] the commercial sale of sex.”<sup>140</sup> The Fifth Circuit flatly rejected that argument: “To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive.”<sup>141</sup> The Fifth Circuit was not completely immune to *Lawrence*'s rhetoric of emotional intimacy, however, emphasizing at various points that sex toys may be used to further relationships.<sup>142</sup>

It is possible that the Fifth Circuit's reading of *Lawrence* will become the dominant one, replacing the narrow focus on relationships embraced by other courts. The Fifth Circuit refused to rehear the case en banc, albeit over the dissent of seven judges.<sup>143</sup> We fear, however, that the Fifth Circuit's approach will be relatively isolated. The few other courts that have interpreted *Lawrence* broadly still limit the Court's holding to the context of a two-person, long-term (or at least potentially long-term) relationship.<sup>144</sup> The Supreme Court of Virginia, for example, struck down that state's fornication law but emphasized that the parties had been in a romantic relationship and the “specific act of intercourse” was an element of their “personal relationship,”

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<sup>139</sup> *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742–47 (5th Cir. 2008).

<sup>140</sup> *Id.* at 745 (quoting the state's brief).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 742 (stating that “some couples” may use sex toys “to engage in a safe, sexual relationship”); *id.* at 744 (“An individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right.”); *id.* at 746 (“The sale of a device that an individual may choose to use during intimate conduct with a partner in the home is not the ‘sale of sex’ (prostitution).”). The Fifth Circuit therefore embraced the intimacy arguments rejected by the Eleventh Circuit. *See supra* note 135. Of course, the Fifth Circuit was likely prudent to bolster its holding by invoking *Lawrence*'s rhetoric, but that assessment in turn reinforces the view that sexual conduct taking place in the context of a relationship is more valuable than other forms of sexual conduct.

<sup>143</sup> *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355 (5th Cir. 2008) (per curiam); *id.* at 356 (Jones, C.J., dissenting); *id.* at 357 (Garza, J., dissenting); *id.* at 365 (Elrod, J., dissenting).

<sup>144</sup> *See, e.g., Anderson v. Morrow*, 371 F.3d 1027, 1032 (9th Cir. 2004) (suggesting in dicta that the right articulated in *Lawrence* applies only to sex between “two individuals”).

thus particularly justifying protection under the logic of *Lawrence*.<sup>145</sup> Similarly, although the Ninth Circuit has suggested in dicta that it reads *Lawrence* as supporting a broad right to engage in consensual sexual activity,<sup>146</sup> it has still viewed *Lawrence* as a comment on romantic relationships. The court did so, for example, when it affirmed a rape and sodomy conviction of a defendant who had sexual intercourse with a woman with mental disabilities.<sup>147</sup> Although the case centered on whether the woman was capable of consenting to sex with the defendant because of her limited mental capacity,<sup>148</sup> the nature of the woman's relationship with the defendant ultimately dominated the court's analysis. The Ninth Circuit adopted the prosecution's view that if the sexual activities at issue took place in the context of a "boyfriend-girlfriend" relationship, they were consensual, but if they were of a more fleeting nature, they were not.<sup>149</sup> The court did not even consider the possibility that the woman could consent to sex outside the context of a relationship.<sup>150</sup> The majority also came dangerously close to embracing the rationale behind the traditional marital rape exemption: that being in a relationship eliminates the need for consent to sex.<sup>151</sup> As Judge Berzon observed in her dissent, such an approach imposes the sexual mores of prosecutors and jurors to "override [the woman's] sexual choice."<sup>152</sup>

At the very least, *Lawrence*'s reliance on intimacy creates great latitude for courts to continue to restrict sex outside of preferred forms of relationship, and even within preferred relationships when the sexual activities are deemed not to promote emotional intimacy. *Lawrence* therefore did not dislodge the

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<sup>145</sup> *Martin v. Zihler*, 607 S.E.2d 367, 370–71 (Va. 2005) (rejecting the argument that a woman who contracted herpes from her sexual partner could not recover tort damages because her sexual conduct was illegal under the state's fornication law).

<sup>146</sup> See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (stating that the fundamental right to privacy includes "a right of sexual intimacy" after *Lawrence*).

<sup>147</sup> *Anderson*, 371 F.3d at 1032–33.

<sup>148</sup> *Id.* at 1029–30. Evidence established that the woman, though her mental age was that of an eight- or nine-year-old girl, understood what sexual intercourse entailed, understood the repercussions of sexual activity (pregnancy and sexually transmitted diseases), and knew how to use birth control. *Id.* at 1038 (Berzon, J., dissenting).

<sup>149</sup> *Id.* at 1042 (Berzon, J., dissenting).

<sup>150</sup> The majority gave weight to a non-medical expert witness for the prosecution who observed that the woman viewed sex solely as a physical act, whereas "[i]f you ask, you know, anyone else what sex was or what intercourse is you see an entire picture. You see the candles, the wine, the dating, you know, whatever else goes on. With her sex is just one quick spur of the moment thing." *Id.* at 1042.

<sup>151</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1382–1402 (2000).

<sup>152</sup> *Anderson*, 371 F.3d at 1041 (Berzon, J., dissenting).

dominant construction of sex but instead provided a new rationale for upholding laws reinforcing that construction. That construction of sex has consequences for people engaging in sex acts both in and out of relationships, as well as for those engaged in non-sexual relationships.

### III. CONSEQUENCES OF THE CURRENT CONSTRUCTION OF SEXUAL INTIMACY

By promoting one vision of intimacy—that of a couple engaged in emotional *and* sexual intimacy—the law ignores those individuals whose lives do not conform to this narrow definition of intimacy and reinforces incentives for others to structure their lives in ways that embrace that definition. The law thereby denies that sex can be valuable to individuals and society in ways unrelated to traditional forms of emotional intimacy.

This legal construction of sex is not supported by any form of empirical evidence. Rather, it reflects the intuitions of legislators, jurists, and scholars about individuals' sexual and emotional preferences, as well as intuitions about the best way to privatize the dependencies that might arise either between sexual partners or between sexual partners and their children.<sup>153</sup> The sex-in-service-to-intimacy paradigm is grounded in the notion that each individual will find one person with whom he or she can have a deeper bond than would be possible with anyone else.<sup>154</sup> This bond is assumed to be both emotional and sexual, with the sexual component serving to deepen the emotional bond. The state has historically supported this bond, to the exclusion of others, as a means to promote the stability of family life.<sup>155</sup>

Despite the state's goals, sexual activity often occurs without regard to intimacy or in varied forms of relationship to intimacy. In fact, even the "romance" in *Lawrence* consisted of sporadic sexual interactions between two men, one of whom was in a relationship with someone else, with no apparent

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<sup>153</sup> As Judge Richard Posner has noted: "[J]udges know next to nothing about [sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much . . . screened out of the judiciary." RICHARD A. POSNER, *SEX AND REASON* 1 (1992); *see also supra* note 33 (citing sources discussing the state's attempts to privatize dependency through marriage).

<sup>154</sup> Given the realities of divorce and re-marriage, this person may in fact be several people over time but never more than one person at any single time. *See* Karst, *supra* note 5, at 669–72 (discussing associational values of remarriage).

<sup>155</sup> *See, e.g.,* MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY passim* (1993) (arguing that family law should return to this focus on intimate relationships instead of emphasizing individual autonomy).

interest in an ongoing coupled relationship beyond friendship.<sup>156</sup> Yet rhetoric like that embraced in *Lawrence* implies that these other approaches to sex either do not exist or are not worthy of protection from state interference.<sup>157</sup>

This Part examines how this hierarchy of sexual value is at odds with other visions of sexual value, as developed by queer theorists, feminists, social scientists, and other scholars. In so doing, we do not attempt to construct another, putatively more accurate, construction of sexual value.<sup>158</sup> Instead, we illustrate some of the harms of adopting one view to the exclusion of others.

#### A. *Potential Values of Sex in and out of Intimacy*

Most legal scholars have not robustly examined how sex furthers values other than intimacy. Some theorists and social scientists, however, emphasize that sex can be one component of individual identity even outside of monogamous coupling.<sup>159</sup> For example, experiencing sexual pleasure, without regard to relationship or other end goals, can be an important aspect of individual identity and self-expression.<sup>160</sup> This vision of the value of sex

<sup>156</sup> Carpenter, *supra* note 92, at 1478.

<sup>157</sup> For two examples of this rhetoric, see Karst, *supra* note 5, at 633 (permitting room for pre-relationship sex, but calling the general trend towards “‘surface relationships’ and ‘quick exchanges’” an “American disease”) (emphasis added) and Tribe, *supra* note 52, at 1905 (stating that the *Lawrence* Court “evidently recognized an obligation to extend constitutional protection to some brief interactions that might not ripen into meaningful connections over time,” but did so only because “[h]ad the Court done otherwise, it would have ceded to the state the power to determine what count as meaningful relationships and to decide when and how individuals might enter into such relationships”). *Cf.* Case, *supra* note 89, at 1651–52 (noting that the term “couple” can mean “two gay men or lesbians together in any intimate capacity, whether it be for a lifetime of domestic partnership or a ‘quickie,’” but emphasizing that courts treat differently “several different kinds of coupling: pair bonding and its subcategory of marriage, copulating, and the sort of displays of affection that can be the prelude to or the public expression of either”).

<sup>158</sup> Our exploration of the social science literature, however, has made us question the current direction of sexuality research. See *infra* text accompanying note 283.

<sup>159</sup> See, e.g., DRUCILLA CORNELL, AT THE HEART OF FREEDOM: FEMINISM, SEX, & EQUALITY 33 (1998) (“[D]efending the idea that our sexuate being and the way we choose to represent ourselves sexually is basic and personality-defining, and must therefore be protected by any meaningful concept of liberty of conscience . . . .”); Eli Coleman, *Promoting Sexual Health and Responsible Sexual Behavior*, 39 J. SEX RES. 3, 3–6 (2002) (surveying the social science literature and national and worldwide sexual health initiatives); Michael Kimmel, *John Gagnon and the Sexual Self*, in THE SEXUAL SELF: THE CONSTRUCTION OF SEXUAL SCRIPTS vii, xi (Michael Kimmel ed., 2007) (discussing general acceptance of the principle that sex acts can form a crucial component of individual identity); Rubin, *supra* note 15 *passim*. We do not think that identities are innate or fixed, but they nevertheless are composed of our relationships with ourselves and others, and one component of this identity can be our relationship to sex.

<sup>160</sup> Susan Appleton has recently embraced this view, in part as a way to support the channeling story that we critique. Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 285–304 (2008). A few other legal scholars have embraced a similar focus on sexual pleasure

outside of relationship does not reveal some alternative truth about sexuality, but it does reveal that individuals' experiences can be more diverse than the law assumes.

Indeed, most individuals experience sexual desire and frustration, in one form or another, regardless of whether they have a primary sexual partner. These experiences can embody the same range of emotions thought to occur in sexual coupling, including some of the positive values thought to be furthered by coupling. For example, individuals often derive satisfaction, self-esteem, and self-possession, among other values, through masturbation,<sup>161</sup> either as a complement to engaging in sex acts with other people or in lieu of such interactions. Masturbation therefore may constitute a vital part of psychological health and well-being for many people,<sup>162</sup> while for other people it may be unsatisfying.

On the flip side of masturbation, individuals may also explore their relationship to sex by engaging in sex with people outside of monogamous relationships.<sup>163</sup> Some of the values of this exploration may be similar to those assumed to flow from coupled intimacy: the excitement, assurance, and understanding that can come from the touch, and touching, of another; the exploration of sexual possibilities that are difficult or impossible during masturbation; and the production of sensation separate from its receipt, and vice versa. Other values are more distinct: multiple opportunities to explore other people's bodies and responses and to experience the excitement, fear, surprise, and uncertainty that can flow from an initial sexual encounter; the increased self-awareness and understanding of the world that can flow from intense interactions with multiple individuals; a letting go; and, most obviously, the very act of experiencing sex with other people outside of the obligations and benefits of an ongoing relationship.

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outside of family law, only to be ignored by courts and other scholars who focus primarily on the associational values of sex. For example, Wilkinson and White, as well as Richards, attempted to theorize the values of sex outside of relationship, although they often fell back into the relationship paradigm. *See supra* text accompanying notes 63–67 and 76–77.

<sup>161</sup> *See, e.g.*, Richards, *supra* note 65, at 1002.

<sup>162</sup> *See, e.g.*, BETTY DODSON, *SEX FOR ONE: THE JOY OF SELFLOVING passim* (1996) (illustrating the multiple ways masturbation can be a healthy form of self-expression).

<sup>163</sup> *See, e.g.*, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE *passim* (2004) (engaging in a critical study of the law's support of monogamy and exploring ways the law might better support individuals who choose polyamory).

Exploring what lies between solo sex and sex with various partners highlights some of the power of the current construction of sex. Pursuant to that construction, if sex is not coupled with intimacy, it is either solo or promiscuous. This construction ignores the fact that individuals also have sex with other people in multiple ways that involve ongoing emotional ties outside of monogamy. For some people, such approaches to sex may better meet their desires for both sexual and emotional connection than the sex-in-service-to-intimacy paradigm.<sup>164</sup> For example, sex between friends can simultaneously deepen friendships while providing comfortable sexual outlets. Sex with ex-partners can similarly provide sexual familiarity and comfort while creating a way for various levels of emotional connection to remain after monogamy ends. And ongoing sexual relationships with prostitutes or between members of sex clubs can provide opportunities for sexual interaction outside the dynamics of domestic coupling.<sup>165</sup>

By celebrating sex only when it is in furtherance of a single, primary emotional bond, the sex-in-service-to-intimacy paradigm does not acknowledge the potential values of other visions of sex but instead focuses only on their harms. Masturbation is thereby viewed as a poor substitute to partner sex, and sex with multiple partners is categorized as “casual sex” or “just sex” or not even sex at all, but rather “hook-ups” or “one-night stands.”<sup>166</sup> In addition, sex with friends or ex-partners is viewed as a transition in or out of monogamous relationships, or as a relapse, fluke, or mistake,<sup>167</sup> whereas ongoing sex with prostitutes or sex club patrons is viewed with the same derision as sex with strangers.<sup>168</sup> The current construction of sex therefore does not celebrate intimacy in and of itself. Instead, it attempts to channel all sex into one celebrated form of intimacy by denying the values that can flow from alternative approaches to sex.

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<sup>164</sup> See Joanne Bryant & Toni Schofield, *Feminine Sexual Subjectivities: Bodies, Agency and Life History*, 10 *SEXUALITIES* 321 *passim* (2007); Gunter Schmidt, *Postscript: The Never-Ending Conversation: Two Interviews*, in *THE SEXUAL SELF*, *supra* note 159, at 265–66 (discussing how many individuals seek sexual satisfaction outside of a love paradigm).

<sup>165</sup> Both sex workers and their clients have, at times, found such encounters to be empowering, satisfying, and sometimes even emotionally intimate or loving. See *infra* text accompanying notes 203–09.

<sup>166</sup> See, e.g., Grello et al., *supra* note 25, at 255; Karst, *supra* note 5, at 633.

<sup>167</sup> Cf. Ethan J. Leib, *Friendship & the Law*, 54 *UCLA L. REV.* 631, 641 (2007) (“In the final analysis, it may also be ‘maligning friendship always to associate it with sex.’” (quoting ROBERT BRAIN, *FRIENDS AND LOVERS* 65 (1976))).

<sup>168</sup> See *infra* text accompanying notes 198–99.

## B. *Harms of the Sex-in-Service-to-Intimacy Model*

The law's channeling function is designed to encourage individuals to engage in intimate coupling regardless of other potential understandings of sexual and emotional desire.<sup>169</sup> Although the confluence of emotion and sex celebrated by *Lawrence* will resonate for some people,<sup>170</sup> for others it will not. Moreover, desire may be such a product of the current construction of sex that it is difficult to imagine conceptions of sex and intimacy that do not either embrace or resist that construction.<sup>171</sup> The sex-in-service-to-intimacy model therefore can harm individuals living both within and outside of coupled intimacy by sustaining the current systems of gender and heteronormativity at the core of the channeling story, producing shame and guilt about desires and practices that do not conform to the state's vision of appropriate sex, and perpetuating myths about the attributes of intimacy and good relationships.

### 1. *Constructing Gender and Heteronormativity*

The sex-in-service-to-intimacy paradigm—with its focus on sexual coupling and silence about the values of sex apart from the promotion of emotional intimacy—can mask various dynamics that sustain gender and sexual hierarchies, thereby making those hierarchies seem natural or inevitable rather than the product of social and legal construction.<sup>172</sup> The paradigm does this by celebrating emotional and sexual bonds between individuals without considering the broader dynamics that may lead individuals to choose such bonds or that may influence behavior once within them. Individuals are presumed to make their sexual choices unaffected by law or society, rendering invisible the ways law and society may not only constrain those choices but may also construct the range of choices through norms of acceptable gender and sexual performances. Social and legal constructions of gender and sexual orientation are thereby silently perpetuated instead of challenged.

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<sup>169</sup> See *supra* text accompanying notes 30–50.

<sup>170</sup> See, e.g., Carol Apt et al., *Relationship Satisfaction, Sexual Characteristics and the Psychosocial Well-Being of Women*, 5 CAN. J. HUM. SEXUALITY 195, 204 (1996) (“We noted that women’s sexual satisfaction is highly correlated with satisfaction concerning the emotional characteristics of the relationship in which the sexual activity takes place.”).

<sup>171</sup> Judith Butler, *Imitation and Gender Insubordination*, in *THE SECOND WAVE: A READER IN FEMINIST THEORY* 300, 301–08 (Linda Nicholson ed., 1997).

<sup>172</sup> Cf. JUDITH BUTLER, *UNDOING GENDER* 9–12, 204 (2004) (discussing the constructed nature of gender and sexuality).

For example, sexual double standards can influence individuals' experiences within the relationships celebrated by the sex-in-service-to-intimacy paradigm. In their most basic incarnation, these sexual double standards reserve sexual desire and pleasure for men, assuming that women either do not or should not enjoy sex.<sup>173</sup> Instead, women value or should value intimacy, in turn taming male sexual desire through relationships that are both sexually and emotionally exclusive and often reproductive.<sup>174</sup> Although *Lawrence* involved sex between two men, it in many ways epitomized these sexual double standards by viewing sex as the primary avenue through which men can become emotionally intimate. *Lawrence* acknowledged that emotional intimacy need not involve women, but it did nothing to disrupt the idea that sexual pleasure is a male domain. The Court instead silently reinforced the notion that men need sex in order to maintain intimate bonds, with either women or other men, thereby perpetuating the construction of men as sexual agents.

*Lawrence* represents just one recent illustration of the ways seemingly gender-neutral legal principles may sustain such gendered sexual roles. As first articulated by Mary Joe Frug, a broad range of legal rules have long limited women's opportunities for sexual pleasure by encouraging or even mandating sexual passivity, monogamy, married heterosexuality, and motherhood.<sup>175</sup> Some women have found ways to "own" sexual pleasure even within these constraints, finding ways to experience pleasure with male lovers or with other women or learning to pleasure themselves.<sup>176</sup> Other women, however, may never experience sexual pleasure and, because of sexual double

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<sup>173</sup> See Law, *supra* note 50, at 210 ("Gendered assumptions about sexuality have long denied women sexual gratification. Sexual ideas, images and practices have been dominated by and oriented to men, and are often not responsive to women.").

<sup>174</sup> Cf. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1055 (1992) (emphasizing that anti-prostitution rules "not only interrogate women with the question of whether they are for or against prostitution; they also raise the question of whether a woman is for illegal sex or whether she is for legal, maternalized sex"). This assumption also affects lesbians, who unlike gay men, are assumed to "sett[e] down into couples with a vengeance." Case, *supra* note 89, at 1651.

<sup>175</sup> Frug, *supra* note 174, at 1048–66; Law, *supra* note 50, at 210 ("Concepts of sexuality are an important element of the more general gender script that destines men for 'serious' work in the world and women for essential, but unvalued, lives caring for others.").

<sup>176</sup> Various books provide advice about each of these projects. E.g., SUSIE BRIGHT, *SUSIE SXPERT'S LESBIAN SEX WORLD* (1990); DOSSIE EASTON & CATHERINE A. LISZT, *THE ETHICAL SLUT* (1997); CATHY WINKS & ANNE SEMANS, *THE GOOD VIBRATIONS GUIDE TO SEX: THE MOST COMPLETE SEX MANUAL EVER WRITTEN* (3d ed. 2002).

standards, may not even know what they are missing.<sup>177</sup> It is thus not surprising to hear legal scholars and others claim that sexual pleasure is a low priority for many women, whether that assessment is true or not.<sup>178</sup>

Societal and legal discourses about sexual intimacy therefore often affect men and women in different ways. Although public sex is discouraged for both men and women, men are often entitled to express their interest in and pursuit of sexual pleasure in ways women are not. The proliferation of strip clubs, and their glorification in popular culture,<sup>179</sup> is just one illustration of this differing entitlement; the prevalence of erectile dysfunction drug advertisements is another.<sup>180</sup> Ratings systems in Hollywood also have their own double standard—limiting male nudity to a much greater extent than female nudity, providing heterosexual men with more opportunities to view the naked objects of their desire than are provided to heterosexual women and gay men.<sup>181</sup>

Sexual double standards can limit sexual experiences in other ways, as well. For men, sexual pleasure is constructed as mostly about physical sensation. In contrast, for many women, at least those shaped by heteronormativity and sexual double standards, sexual pleasure can be more complicated.<sup>182</sup> For such women, sexual pleasure is often consciously or unconsciously tied to the desire to be desired as a sexual and emotional partner, generally in the type of relationship celebrated by *Lawrence*. Such

<sup>177</sup> This can be true even for those women, particularly black women, who are stereotyped as hypersexual, given that the stereotype rarely mirrors reality, and women may overcompensate and deny their sexuality in an attempt to escape the stereotype. Evelyn M. Hammonds, *Toward a Genealogy of Black Female Sexuality: The Problematic of Silence*, in *FEMINIST THEORY AND THE BODY* 93 (Janet Price & Margrit Shildrick eds., 1999).

<sup>178</sup> For an example of a feminist who embraces this view, see MACKINNON, *supra* note 18, at 126–54; see also Frug, *supra* note 174, at 1053 (reporting and critiquing Catharine MacKinnon’s view that “the sexual experience of all women may be, like sex work, the experience of having sex solely at the command of and for the pleasure of another”). For a rejection of this view, see Ayelet Waldman, *Truly, Madly, Guiltily*, N.Y. TIMES, Mar. 27, 2005, § 9, at 11.

<sup>179</sup> See Katherine Frank, *Exploring the Motivations and Fantasies of Strip Club Customers in Relation to Legal Regulations*, 34 ARCHIVES SEXUAL BEHAV. 487, 487 (2005) (noting that strip clubs are increasingly “a very popular form of entertainment in the United States”).

<sup>180</sup> See Susan Frelich Appleton, *Unraveling the “Seamless Garment”: Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294, 298 n.16 (2005) (referencing advertisements for Viagra); cf. Buchanan, *supra* note 85, at 1253.

<sup>181</sup> See THIS FILM IS NOT YET RATED (Independent Film Channel 2006). This documentary about the MPAA also describes the discrimination against gay sex in the movie ratings system.

<sup>182</sup> See, e.g., Daniel Bergner, *What Do Women Want?*, N.Y. TIMES, Jan. 25, 2009, § MM, at 26. For a critique of the biomedical conceptualization of women’s sexual desire, see Jill M. Wood et al., *Women’s Sexual Desire: A Feminist Critique*, 43 J. SEX RES. 236 (2006).

conceptions of male and female pleasure in turn reinforce the construction that men as subjects pursue women as sexual objects, and then women both tame and sustain male desires with emotionally intimate domestic caregiving.<sup>183</sup>

The most obvious context in which this gendered construction of pleasure emerges is in the myth of one all-encompassing sexual and emotional relationship described above.<sup>184</sup> Given sexual double standards and the construction of women as objects of male desire, the myth generally translates into the idea that women will find complete happiness and security through a relationship with a man.<sup>185</sup> But this limited construction of female desire and pleasure can also be found elsewhere. For example, the glorification of private family life and the parent-child relationship derives in part from the assumption that the home is where women tame male sexual desires and nurture future citizens, thereby creating the conditions for the intimacy celebrated by *Lawrence*.<sup>186</sup>

The sexual intimacy furthered by *Lawrence* therefore plays a role not just in the construction of sex but also in constructions of gender and family. These constructions restrict the liberty, or agency, of both men and women, but women often bear more of the burden because current conceptions of gender and family push women to engage in domestic caregiving, often to the exclusion of sexual pleasure or other forms of emotional connection.<sup>187</sup>

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<sup>183</sup> See, e.g., ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE & EROTICISM IN MODERN SOCIETIES 128 (1992) (summarizing Freud's view that women "only find security in the mirror of love provided by the adoring other"); cf. Andrew Koppelman, *Why Phyllis Schlafly Is Right (But Wrong) About Pornography*, 31 HARV. J.L. & PUB. POL'Y 105, 110–11 (2008) (discussing Rousseau's views of the gender dynamics in sexual relationships). Cultural feminists often embrace this model of intimacy, but we do not share that view. For a critique of cultural feminism's conception of desire and intimacy, see HALLEY, *supra* note 28, at 60–76.

<sup>184</sup> See *supra* text accompanying notes 154–55. This myth is also explored in Rich, *supra* note 19, at 649–56. For a recent critique of the myth, see Sandra Tsing Loh, *Let's Call the Whole Thing Off*, ATLANTIC MONTHLY, July–Aug. 2009, at 116.

<sup>185</sup> See Law, *supra* note 50, at 208 ("Multiple cultural messages, and the material reality of women's second-class position as wage workers, define the search for a husband as the central goal of women's lives.").

<sup>186</sup> It is thus not surprising that Katherine Franke's groundbreaking critique of repronormativity appeared in an essay that also critiqued most feminist legal theorists' limited conceptions of female sexual pleasure. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

<sup>187</sup> See Frug, *supra* note 174, at 1048–66 (illustrating the ways legal rules encourage women to choose married monogamy and childrearing); Rich, *supra* note 19, at 632–48 (illustrating the ways society encourages women to structure their lives around male needs instead of forming relationships with other women); Rosenbury, *supra* note 26, at 213–19 (arguing that family law encourages women to spend time engaged in domestic caregiving instead of friendship).

## 2. *The Shame and Guilt of Not Conforming*

The celebration of coupled intimacy also comes with the price of stigmatizing individuals living outside of it. Shame and guilt, therefore, often accompany sex outside of monogamous relationships, leading some individuals to hide aspects of what they find pleasurable and others to embrace only that which is acceptable.<sup>188</sup> Significant harms can flow from these types of closeting, as documented among gays and lesbians who, largely because they cannot conform to dominant constructions of heterosexual sexual intimacy, have committed suicide and engaged in other acts of self-harm at much higher rates than heterosexuals.<sup>189</sup> Eating disorders, drug and alcohol abuse, and depression are also more common in gay communities than straight communities.<sup>190</sup>

Like gays and lesbians, other individuals who do not adhere to the norms of sexual intimacy embraced by the law are stigmatized as being hypersexual or otherwise deviant, potentially leading to similar dynamics of harm.<sup>191</sup> For example, women who transgress the socially constructed version of respectable feminine sexuality “often pay severe penalties in the form of emotional distress, associated with guilt and self recrimination.”<sup>192</sup> If women are able to

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<sup>188</sup> We do not mean to imply that there is an innate sexual drive that is being repressed by the current construction of sex. Repression is a problematic lens of analysis, particularly for examination of the state’s role in the construction of sex, because legal prohibitions historically have served to produce and invent both sexuality and the desiring subject instead of repressing them. See Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 *SIGNS* 277, 299–300 (1997) (analyzing how legal prohibitions on prostitution play a role in constructing sexual subjectivity for all individuals, regardless of their experience with prostitutes); see also FOUCAULT, *supra* note 14, at 5–13, 105–09 (analyzing how sexuality is produced by legal prohibitions rather than repressed by them). We refer to sexual suppression here in a more colloquial sense, to acknowledge felt needs and desires that often are not fully expressed.

<sup>189</sup> See Michael King, *Mental Health of Gay Men*, in *TEXTBOOK OF MEN’S MENTAL HEALTH* 363, 368–75 (Jon E. Grant & Marc N. Potenza eds., 2007) (documenting the costs of closeting).

<sup>190</sup> *Id.*

<sup>191</sup> See Rubin, *supra* note 15, at 281–82 (discussing the construction of sex as placing “sanctifiable, safe, healthy, mature, legal, or politically correct” sex at the center of the “charmed circle” of approved sex and “bad, abnormal, unnatural, [and] damned sexuality” at the “outer limits” of tolerable conduct); see also Evelyn Hammonds, *Black (W)holes and the Geometry of Black Female Sexuality*, 6 *DIFFERENCES* 126, 126–41 (1994) (discussing the denial of black female sexuality in the face of myths about hypersexuality); Schmidt, *supra* note 164, at 265–66 (interviewing William Simon, who described the alienating effect of the “prevalent view that mature and healthy sex, in addition to [being] heterosexual, must be deeply imbued with sentiments of love,” a view that Simon concludes does not “describe[] very many people’s experience”).

<sup>192</sup> Bryant & Schofield, *supra* note 164, at 329; see also Grello et al., *supra* note 25 *passim* (finding that although college-age men and women engage in a similar number and type of “casual” sexual encounters, women who engage in such activity more frequently suffer depression and guilt as compared to women who do not, while men who engage in such sexual activity are happier than men who do not). Moreover, high-

overcome this stigma and generate more subject-oriented conceptions of their own sexuality,<sup>193</sup> their greater access to sexual pleasure, both in and out of relationships, may increase their overall happiness, improving life satisfaction as compared to abstinence.<sup>194</sup> In particular, one of the key components of unmarried women's happiness is having an active and enjoyable sex life, even if sexual activity is not geared toward long-term intimate relationships.<sup>195</sup>

More broadly, almost all individuals can benefit physically and psychologically from a decrease in the negative connotations attached to sexual pleasure.<sup>196</sup> Indeed, in its Statement of Sexual Health, the World Health Organization has embraced the concept that sexual health includes "freedom of sexual expression, sexual pleasure and satisfaction . . . and freedom from abuse, fear, shame, guilt, false beliefs, and other psychological factors inhibiting sexuality."<sup>197</sup> Instead of engaging in the project of freeing sexuality from shame and guilt, channeling sex into a single relationship frustrates that project by perpetuating the notion that sex is valuable only when in service to an emotional relationship.

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school girls and college-age women who engage in "hooking up" report experiencing fewer orgasms than their male partners. See, e.g., KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS passim* (2008); Paula England et al., *Hooking Up and Forming Romantic Relationships on Today's College Campuses*, in *THE GENDERED SOCIETY READER* 531, 535–38 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008).

<sup>193</sup> Bryant & Schofield, *supra* note 164, at 329. Such subject-oriented conceptions of sexuality can have multiple effects. For instance, some studies have suggested that women who are more comfortable with their sexuality are less likely to experience sexual violence and more likely to use contraception and condoms when having sex with men, thereby reducing the likelihood of unintentional pregnancy and the contraction of sexually transmitted diseases. See, e.g., Sharon Horne & Melanie J. Zimmer-Gembeck, *The Female Sexual Subjectivity Inventory: Development and Validation of a Multidimensional Inventory for Late Adolescents and Emerging Adults*, 30 *PSYCHOL. OF WOMEN Q.* 125 *passim* (2006).

<sup>194</sup> See Lucia F. O'Sullivan, M.C. McCrudden & Deborah L. Tolman, *To Your Sexual Health! Incorporating Sexuality into the Health Perspective*, in *HANDBOOK OF GIRLS' AND WOMEN'S PSYCHOLOGICAL HEALTH* 192, 194 (Judith Worell & Carol D. Goodheart eds., 2006) (discussing the role of sexual pleasure in women's lives).

<sup>195</sup> See, e.g., E. KAY TRIMBERGER, *THE NEW SINGLE WOMAN* 20–52 (2005) (contrasting different experiences of unmarried women).

<sup>196</sup> See O'Sullivan et al., *supra* note 194 *passim*. For example, greater access to arousal and orgasm can increase physical well-being, leading to "improvements in our respiratory, immune, circulatory, and cardiovascular systems." C. Veronica Smith, *In Pursuit of 'Good' Sex: Self-Determination and the Sexual Experience*, 24 *J. SOC. & PERS. REL.* 69, 69–70 (2007) (citing studies demonstrating this phenomenon).

<sup>197</sup> O'Sullivan et al., *supra* note 194, at 193.

### 3. *Perpetuating Myths About Intimacy and Ideal Relationships*

Channeling sex into one primary sexual and emotional bond also leaves little room for commercial sex, which is thought to embrace sex but not emotion, and friendships, which are thought to embrace emotion but not sex. For example, the *Lawrence* majority and numerous commentators have suggested that even relatively broad views of the right to engage in sexual conduct should not include prostitution.<sup>198</sup> The underlying rationale for excluding prostitution, as well as other forms of commercial sex, is that the exchange of money purportedly disrupts the emotional intimacy of “good sex.”<sup>199</sup> Accordingly, the channeling function embraces a normative view of the ideal content and mix of sex and intimacy, denying the value of interactions that embrace different conceptions of sex and intimacy in different proportions. Given the current construction of sex, many individuals may share these normative views about intimacy and ideal relationships but find that their lives often deviate from that vision.

With respect to prostitution, the relationship between sex, money, and emotion can often be more complicated than critics of commercial sex suggest. As an initial matter, the exchange of money does not set commercial sex apart from all other forms of sexual connection. Sexual relations, even within intimate coupling, can often be governed by monetary or other non-intimate considerations.<sup>200</sup> Decisions about whom to marry, date, and have sex with are often driven by exchanges of money, housing, jewelry, drugs, and other goods.<sup>201</sup> The belief that commerce is not involved in sexual activities outside

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<sup>198</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2002); James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 *FORDHAM L. REV.* 2885, 2896 (2007) (“Can you imagine Dworkin or Laurence Tribe arguing that the Constitution protects a right to prostitution?”). *But see* Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 *N.Y. CITY L. REV.* 161, 176–81 (2005) (arguing that *Lawrence* represents a step toward decriminalizing prostitution).

<sup>199</sup> *See, e.g.*, Volokh, *supra* note 138, at 1836 (suggesting that under the rationale in *Lawrence*, the Court would permit the criminalization of prostitution because prostitution does not promote emotional connection).

<sup>200</sup> For an excellent discussion of the many legal relationships between intimacy and economic exchange, see Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491 *passim* (2005); *see also* Mary Anne Case, *Pets or Meat*, 80 *CHI.-KENT L. REV.* 1129, 1134–49 (2005). For a compelling sociological account of the ways individuals have, throughout history and to this day, used economic activity to create and maintain intimate relationships, see VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY passim* (2005).

<sup>201</sup> *See, e.g.*, Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 *J. POL. ECON.* 988, 1003 (1993) (hypothesizing that both potential husbands and potential wives will “evaluate a prospective marriage contract . . . in terms of the expected utility associated with it; this utility can depend on attributes of the spouse as well as on consumption of the private good and public good”); *cf.*

of relations with sex workers is thus often an illusion. Likewise, the belief that prostitution is devoid of emotion derives in part from the current criminalization of prostitution. As Noah Zatz argues, prostitution is sufficiently threatening to warrant criminalization only because it potentially mixes erotic, emotional, and financial transactions; criminalization reasserts a divide between market work and intimacy that otherwise would not necessarily exist.<sup>202</sup>

Moreover, the assumption that money disrupts the emotional aspects of sexual activity is often unfounded.<sup>203</sup> Not only does the regular exchange of valuable items in coupled relationships belie any such conclusion, but there are also often emotional connections between sex workers and their clients. Some clients may visit sex workers more for emotional than physical sustenance, sometimes foregoing physical sexual contact entirely.<sup>204</sup> As sociologist Elizabeth Bernstein discusses, men often prefer prostitutes with whom there is an emotional connection. In fact, one of the most sought after (and costly) services in the “prostitution encounter has become the ‘Girlfriend Experience,’” in which non-sexual intimacies are at least as important as the sexual ones.<sup>205</sup> Similarly, Katherine Frank, a sociologist and former stripper who has documented the dynamics of strip clubs, illustrates that men may spend time in the clubs because they crave emotional connections with the dancers.<sup>206</sup> Indeed, some men find strip clubs a unique space where they can feel comfortable talking with women in ways that they deem impossible in other contexts.<sup>207</sup> This is true even though, or perhaps even because, strip clubs involve monetary transactions.

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Frug, *supra* note 174, at 1054–55 (“Regardless of whether a woman is terrorized or sexualized, there are social incentives to reduce the hardships of her position, either by marrying or by aligning herself with a pimp.”).

<sup>202</sup> Zatz, *supra* note 188, at 283–85, 289–91.

<sup>203</sup> In fact, money is often necessary to create those aspects deemed “emotional” or “intimate.” See ZELIZER, *supra* note 200 *passim*.

<sup>204</sup> For one example, see *Cathouse: No Sex Please* (HBO television broadcast July 28, 2005).

<sup>205</sup> Elizabeth Bernstein, *Desire, Demand, and the Commerce of Sex*, in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 101, 113–14 (Elizabeth Bernstein & Laurie Schaffner eds., 2005); see also THE GIRLFRIEND EXPERIENCE (Magnolia Pictures 2009).

<sup>206</sup> KATHERINE FRANK, G-STRINGS AND SYMPATHY: STRIP CLUB REGULARS AND MALE DESIRE 86–99, 108–15 (2002); Katherine Frank, “*Just Trying to Relax*”: Masculinity, Masculinizing Practices, and Strip Club Regulars, 40 J. SEX RES. 61, 69–72 (2003).

<sup>207</sup> Strip clubs are constitutionally protected under the rubric of the expressive speech rights of the dancers, thereby ignoring this associational aspect. See Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1113–23 (2005) (discussing cases). Although sexual intercourse and other forms of genital contact are generally not permitted at strip clubs, the performances and interactions arguably constitute another form of sexual activity that unquestionably involves money.

Although such emotional connections are thought to be one-sided, sex workers report that at times their interactions with clients are emotionally fulfilling or empowering for them, while at other times they are “just work.”<sup>208</sup> This response is somewhat surprising given that it occurs in a legal regime that attempts to separate “market transaction[s]” from “the realization of private desire” by criminalizing sex work.<sup>209</sup> If prostitution were decriminalized, the experiences of both clients and sex workers would likely become even more diverse. Accordingly, the law plays a role in producing the notion that intimacy and commerce do not mix.

Beyond the context of sex work, the law also contributes to the notion that the most meaningful relationships involve both sex and emotional connection, thereby maintaining the divide between marriage-like relationships and friendship.<sup>210</sup> Rhetoric like that embraced in *Lawrence* suggests that the most emotionally intimate and sacred relationships can be achieved only through sexual activity.<sup>211</sup> Pursuant to this reasoning, anal sex is protected conduct because such conduct is the only manner in which homosexual men can reach the deepest forms of intimacy. Putting aside any critique of this analysis based on the realities of gay male sexual conduct, it is troubling to assume that deep intimacy can be achieved only through sex acts. Sex may bring some people closer together, but it can also push people apart. As such, it is quite common for friendships not defined by sexual interaction to outlast coupled sexual relationships. By privileging relationships that are both sexual and emotional, the law devalues friendships even when they possess great emotional intimacy.<sup>212</sup>

The current construction of sexual intimacy may even encourage people to prioritize long-term sexual relationships over friendship, despite the fact that

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<sup>208</sup> See Zatz, *supra* note 188, at 284, 287, 291–93, 299 (discussing sex workers’ descriptions of their work as “service,” “affective labor,” “empowering,” “liberating,” and “just another job,” and theorizing sex work as “work with an ambiguous relationship to desire”); see also Norma Jean Almodovar, *Working It*, in WHORES AND OTHER FEMINISTS 210, 214 (Jill Nagle ed., 1997) (describing the experience of being a prostitute as empowering); Cosi Fabian, *The Holy Whore: A Woman’s Gateway to Power*, in WHORES AND OTHER FEMINISTS, *supra* at 44, 44–53 (same); Veronica Monet, *Sedition*, in WHORES AND OTHER FEMINISTS, *supra* at 217, 221–22 (same).

<sup>209</sup> Zatz, *supra* note 188, at 295.

<sup>210</sup> See Rosenbury, *supra* note 26, at 217–21.

<sup>211</sup> See *supra* text accompanying notes 98–103.

<sup>212</sup> See Rosenbury, *supra* note 26, at 208–11 (discussing sociological studies elucidating the emotional functions of friendships not defined by sexual relations between the participants); see also Rich, *supra* note 19, at 648–59 (discussing the importance of female friendship, with or without a sexual component). For other discussions of friendship, see sources cited *infra* note 228.

caring for others outside of sexual interactions often constitutes an important aspect of individual constructions of self.<sup>213</sup> The law currently recognizes the care provided within domestic sexual relationships to the exclusion of care provided in all other forms of relationships between adults. This recognition signals that the care provided within sexual relationships is more worthy of state support, potentially encouraging individuals to prioritize such care when they might otherwise not. In addition, although the state does not specify the exact type of care to be provided within sexual relationships, it is assumed that the care will be of a type and amount to domesticate the pleasures confined within, thereby making the pleasures intimate and not merely sexual. The sex-in-service-to-intimacy paradigm may therefore lead to an overemphasis on the care provided within sexual relationships as a way to justify the pleasure experienced therein.<sup>214</sup>

For some individuals, particularly heterosexual women, the link between care and sexual pleasure often amounts to more focus on domestic caregiving than on developing and maintaining friendships.<sup>215</sup> For other individuals, this link might mean forgoing friendships altogether. Indeed, heterosexual men often experience difficulties developing relationships outside of dating and marriage or business and civic associations.<sup>216</sup> Although there are many potential reasons for these difficulties, the sex-in-service-to-intimacy framework may cause heterosexual men to view emotionally intimate friendships with other men as potentially impugning their sexual orientation or masculinity.<sup>217</sup>

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<sup>213</sup> Rosenbury, *supra* note 26, at 214–20.

<sup>214</sup> We acknowledge that some scholars do not believe this care is overemphasized, but instead believe the amount of care reflects the actual needs of spouses and families. Indeed, the difference of opinion on this point has led to what some commentators call the “care wars.” Compare JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 13–39, 69–96, 112, 237 (2000) (examining ways that law and society construct men without caregiving responsibilities as the “ideal worker” and proposing ways that the law could better help women balance work and parenting obligations), and Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 97–109 (2002) (arguing that the law must do more to support women’s parenting obligations), with Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1753–62 (2001) (arguing that such law reform proposals do not disrupt the gendered division of care), Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1544 (2001) (noting that such law reform proposals could become “regulatory governance practices”), and Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 317–20, 326–29 (2002) (exposing the ways such proposals often amount to the care of men).

<sup>215</sup> Rosenbury, *supra* note 26, at 233–34.

<sup>216</sup> *Id.* at 236–38.

<sup>217</sup> *Id.* at 237 n.210 (citing examples of this fear).

The encouragement of long-term sexual relationships therefore will not necessarily lead to greater intimacy. Even though certain types of intimacy may be furthered under such a paradigm, other types of intimacy may be curtailed. Despite the current construction of sexual intimacy, many individuals already experience deep emotional intimacy with others in the absence of sex. This intimacy can take many forms, including the form of intimacy traditionally thought to exist only within marriage and marriage-like relationships.<sup>218</sup> Assuming that sex acts increase intimacy risks obscuring and undervaluing other forms of intimacy, potentially leading to less intimacy overall.

#### IV. BEYOND THE CURRENT CONSTRUCTION OF SEXUAL INTIMACY

The dominant construction of sex and intimacy discussed above is not inevitable, nor need it be viewed as the most desirable construction. Given that sexual intimacy is a social construction, constituted in part through law, that construction can be contested and debated as a normative matter both in law and in society at large. This Part explores two alternative constructions of sex and the values those constructions could foster.

At the outset, we are cognizant that any alternative construction of sex will also be a social construction with regulatory effects.<sup>219</sup> Although alternative constructions of sex may create more opportunities for the performance of diverse sexual scripts, thereby increasing individuals' freedom to experience sex outside or within coupled intimacy and beyond those two options, alternative constructions will not necessarily permit individuals to embrace any and all conceivable sexual life. Constructions of sex will continue to limit our ability to imagine other sexual possibilities, including the alternative constructions of sex discussed below.

This regulatory dynamic illustrates the ways that social constructions can not only restrict individual liberty but can also mask those restrictions as products of individual choice.<sup>220</sup> That mask in turn serves to obscure the

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<sup>218</sup> *Id.* at 209–11; *see also* Karst, *supra* note 5, at 629 & n.26.

<sup>219</sup> *See* BUTLER, *supra* note 172, at 9–12, 204; FOUCAULT, *supra* note 14, at 103–14.

<sup>220</sup> Nancy Hirshmann describes the dynamic in another context as follows:

Feminists point out that if humans are socially constructed, male domination is and has been an important part of that construction. This has resulted in laws, customs and social rules that come from men and are imposed on women to restrict their opportunities, choices, actions and behaviors. Furthermore, and more problematic, these rules become constitutive not only of what

power of the social construction, implying that individual action is solely a product of natural desires as opposed to a response to the choices made available by the social construction. This Part, therefore, does not attempt to find ways to increase sexual freedom outside of social construction—that is impossible. Rather, this Part explores alternative constructions of the relationship between sex and intimacy as well as the potential consequences of those constructions for individuals' lives.

### A. *Separating Sex from Intimacy*

One way to challenge the construction of sex embraced by *Lawrence* is to separate sex acts from emotional intimacy as an analytical and legal matter. This disentangling would better acknowledge the ways some individuals already derive meaning from sex independent of intimacy.<sup>221</sup> By reducing the negative judgment that currently attaches to sex outside of a relationship,<sup>222</sup> and by challenging the assumption that friendships and other relationships not centered on sex are a poor substitute for sexual coupling,<sup>223</sup> the disentangling of sex and intimacy might also create more opportunities for individuals to explore sex outside of intimate coupling and intimacy outside of sexual relationships. As such, individuals might have more freedom to explore important aspects of their selves outside of the law's channeling story, which constantly connects sex and intimacy.

More distinct conceptions of sex and intimacy are likely to benefit individuals and relationships. Separating sex from intimacy might lead to increased comfort with sex and sexuality by alleviating some of the guilt and shame that currently attaches to sex outside of intimacy. This comfort can in turn generate greater self-esteem and self-awareness, helping individuals

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women are allowed to do but of what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are. Because our conceptual and material world has been formulated and developed by these masculinist perspectives, such rules are not simply external restrictions on women's otherwise natural desires; rather, they create an entire cultural context that makes women seem to choose what they are in fact restricted to.

Nancy J. Hirshmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 52 (1996).

<sup>221</sup> For discussions of this meaning, see *supra* text accompanying notes 159–68.

<sup>222</sup> For discussions of such negative judgment, see *supra* text accompanying notes 14–53 and 188–97.

<sup>223</sup> For a discussion of these assumptions, see *supra* text accompanying notes 212–18; see also PAT O'CONNOR, FRIENDSHIPS BETWEEN WOMEN 102 (1992) (theorizing that “the cultural primacy attached to coupleness means that friendships between single women, whether individual or group-based, and regardless of their provisions, will never be seen as satisfactory”).

achieve deeper intimate connections with friends, lovers, and other individuals who fall between or outside those categories.<sup>224</sup>

Separating sex and intimacy may even help individuals maintain the primary sexual and emotional relationships celebrated in the law by relieving the pressure placed on those relationships to serve all of an individual's emotional and sexual needs. Some individuals may desire multiple sexual partners with or without emotional components even while also wishing to sustain a primary relationship that is both sexually and emotionally intimate.<sup>225</sup> For example, extra-marital sexual relationships are somewhat common.<sup>226</sup> Celebrations of a single all-encompassing sexual and intimate bond suggest that individuals must avoid such extra-relationship sex at all costs, lest they risk losing their primary relationship. It is just as possible, however, that extra-relationship sex could prolong or improve some primary relationships rather than undo them, particularly if the partners to the primary relationship are open and honest.<sup>227</sup> As such, alternative visions of sex that provide room for extra-relationship sex—whether through masturbation, solo use of sex toys, sexual activities with non-primary partners, or visits to sex workers—could foster the continued success and stability of relationships rather than threaten them.

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<sup>224</sup> See, e.g., Susan E. Stiritz, *Cultural Cliteracy: Exposing the Contexts of Women's Not Coming*, 24 BERKELEY J. GENDER, L. & JUST. 243, 264–66 (2008).

<sup>225</sup> See, e.g., Colette DeDonato, *An Open & Shut Marriage*, N.Y. TIMES, Feb. 3, 2008, at 6.

<sup>226</sup> Studies of adultery are often unreliable, given spouses' reluctance to self-report nonmonogamy. Even in the face of such reluctance, however, the most reliable studies estimate that between fifteen and eighteen percent of spouses engage in sex with other partners while married. TOM W. SMITH, NAT'L OPINION RESEARCH CTR., UNIV. OF CHI., AMERICAN SEXUAL BEHAVIOR: TRENDS, SOCIO-DEMOGRAPHIC DIFFERENCES, AND RISK BEHAVIOR 8–9 (2006), available at <http://www.norc.org/NR/rdonlyres/2663F09F-2E74-436E-AC81-6FFBF288E183/0/AmericanSexualBehavior2006.pdf>. There is a gender divide in all studies indicating that men have more extra-marital affairs than women do, although the most recent studies (including those found in popular magazines) suggest that the gender gap is not as wide as first thought. See, e.g., Brenda Cossman, *The New Politics of Adultery*, 15 COLUM. J. GENDER & L. 274, 276–77, 281–84 (2006).

<sup>227</sup> See Emens, *supra* note 163, at 322–30 (exploring relationship-strengthening possibilities of openly polyamorous relationships that practice “radical honesty”). Such openness and honesty about extra-relationship sex may be particularly necessary given the documented decrease in satisfaction with sex life among those in long-term relationships—a decrease attributed to correlations between sexual excitement and newness as well as decreased interest in sex with age. See, e.g., Ansa Ojanlatva et al., *Importance of and Satisfaction with Sex Life in a Large Finnish Population*, 48 SEX ROLES 543, 547–48, 551 (2003). But see Stacy Tessler Lindau et al., *A Study of Sexuality and Health Among Older Adults in the United States*, 357 NEW ENG. J. MED. 762, 772 (2007) (“[T]he majority of older adults are engaged in spousal or other intimate relationships and regard sexuality as an important part of life. The prevalence of sexual activity declines with age, yet a substantial number of men and women engage in vaginal intercourse, oral sex, and masturbation even in the eighth and ninth decades of life.”).

Separating sex from intimacy is also likely to provide a vehicle for exploring the potential values of intimacy apart from sex. For example, a few legal scholars recently have begun to explore the values of friendship apart from monogamous coupling.<sup>228</sup> Among other things, such friendships can provide emotional, physical, and financial support, as well as opportunities for recreation, self-exploration, and connection. Friendships therefore may serve to relieve the pressure placed on a primary sexual relationship to meet all of one's needs and desires, thus helping to sustain some monogamous relationships while simultaneously providing other opportunities for intimate connection.<sup>229</sup> Moreover, friendship may even "unseat marriage as the measure of all things"<sup>230</sup> by exposing the ways the state supports certain types of care but not others. Once this support is exposed, individuals may imagine new constructions of care, as well as new constructions of pleasure, and restructure their lives accordingly.<sup>231</sup>

Such challenges to dominant conceptions of sex, intimacy, pleasure, and care can also alter existing conceptions of gender and sexual orientation. As previously noted, the current construction of sex is deeply gendered.<sup>232</sup> Men are assumed to want, and are permitted to embrace, sexual pleasure outside of emotional intimacy, whereas women are assumed to value sexual pleasure only to the extent it furthers emotional connections with their partners and thereby leads to family formation.<sup>233</sup> These assumptions construct men as the subjects of sexual activity and women as its objects, and such constructions play a role in defining heterosexuality. In contrast, gay men, at least until *Lawrence*, have been assumed to embody sex and not intimacy, whereas lesbians, even after *Lawrence*, are generally assumed to embody intimacy without sex.<sup>234</sup>

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<sup>228</sup> See Franke, *supra* note 82, at 2702–05 (using friendship as a tool to unseat marriage “as the measure of all things,” but expressing concerns about regulating friendship through law); Leib, *supra* note 167, at 653–62 (discussing the possible virtues of formal legal status for friendship); Rosenbury, *supra* note 26, at 208–11, 226–33 (exploring the increased importance of friendship in individuals’ lives and proposing ways the law could recognize that importance).

<sup>229</sup> Rosenbury, *supra* note 26, at 217–19, 233–42 (arguing that state recognition of friendship could relieve the heavily gendered expectations of marriage and encourage other avenues for connection and intimacy, including within marriage).

<sup>230</sup> Franke, *supra* note 82, at 2686.

<sup>231</sup> *Id.* at 2702–05; Rosenbury, *supra* note 26, at 233–42.

<sup>232</sup> See *supra* text accompanying notes 68–72, 172–87.

<sup>233</sup> See *supra* text accompanying notes 173–74, 179–87.

<sup>234</sup> See, e.g., Case, *supra* note 89, at 1651.

If sex acts are a large part of the current construction of gender, as some feminists claim,<sup>235</sup> then creating more opportunities for women to engage in sex acts as subjects and for men to engage in sex acts as objects could alter that construction. Women could experience less pressure to take on the traditional role of taming male desire through domesticity and intimacy, and men could escape the assumption that they always want sex. More women could begin to articulate their own conceptions of desire and sexual pleasure that go beyond the desire to be desired, and more men could experience the phenomenon of submitting and letting go.<sup>236</sup> It may be difficult for some women and men to imagine what such sexual interactions might look like, given traditional understandings of women as the object of male desire.<sup>237</sup> Separating sex from intimacy could provide the means, however, for both women and men to begin to escape sexual double standards and explore more diverse forms of sexual pleasure and care as both subjects and objects. In this way, women and men could engage in the feminist project without falling prey to the focus on male violence and female victimhood that pervades much of feminist legal theory.<sup>238</sup>

Separating sex from intimacy could also alter constructions of sexual orientation. By proclaiming that homosexuals, or at least gay men, should be able to engage in sexually intimate relationships much like heterosexuals, *Lawrence* has already altered those constructions to some extent, but it did not alter the dominant position of the heteronormative couple and family.<sup>239</sup> Separating sex from intimacy could challenge this hierarchy while also challenging the very meaning of sexual orientation. If sex is allowed to flourish outside of intimacy, then traditional distinctions between heterosexuals

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<sup>235</sup> See, e.g., BUTLER, *supra* note 172, at 9–12, 204 (exploring the performance of gender, in part through sex acts); MACKINNON, *supra* note 18, at 195–214 (arguing that the construction of gender is a function of men’s penetration of women and the dominance that flows therefrom); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 37–45 (1987) (same); see also Frug, *supra* note 201, at 1046 (“[S]ex differences are semiotic—that is, constituted by a system of signs that we produce and interpret . . .”).

<sup>236</sup> In many ways, this is similar to what Adrienne Rich advocated over twenty-five years ago, although she believed women could achieve this re-conceptualization only with other women. Rich, *supra* note 19, at 649–60. We hope that the construction of sex can be altered so that both women and men can more freely choose between subjectivity and objectivity with each other and with members of the same sex.

<sup>237</sup> See *supra* text accompanying note 182–83.

<sup>238</sup> For critiques of this focus on sexual danger, see HALLEY, *supra* note 28, at 16–31; Franke, *supra* note 186, at 197–202.

<sup>239</sup> For more discussion of this phenomenon, see David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 WIDENER L. REV. 249, 255–57 (2007); Tucker Culbertson, *Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia*, 85 WASH. U. L. REV. 575, 588–97 (2007); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 *passim* (2004).

and homosexuals rooted in the potential for procreation and family life become less relevant.<sup>240</sup> Instead of heteronormativity, the values of sex outside of intimacy could hinge on pleasure or self-expression or other factors. Separating sex from intimacy could therefore make the sex, gender, and sexual orientation of the participants largely irrelevant to the acts of sexual expression at issue, for both the participants and society at large.

### *B. Collapsing Sex and Intimacy*

Although the separation of sex and intimacy has much potential to promote more diverse conceptions of sex, intimacy, pleasure, care, gender, and sexual orientation, it is not the only possible alternative construction of sex, nor is it necessarily the best. In particular, a construction of sex that hinges on the separation of sex and intimacy still maintains sex and intimacy as distinct and separate categories. This in turn implies that sex, no matter its value, cannot meet the functions of intimacy, and vice versa. Similarly, pleasure and care are constructed as mutually exclusive. The separation of sex and intimacy can even maintain hierarchies between men and women, by focusing on sexual agency as opposed to objectification, and between heterosexuals and homosexuals, by focusing on the importance of sex acts as opposed to those participating in the acts.

One way to address these pitfalls, while still challenging the current construction of sexual intimacy, is to collapse sex and intimacy instead of separating them. Collapsing sex and intimacy would not mean that sex and intimacy are the same, nor would it mean that sex and intimacy should always be linked, as *Lawrence* seems to suggest.<sup>241</sup> Instead, collapsing sex and intimacy as an analytical matter would emphasize that conceptions of sex and intimacy can be fluid and shifting depending on the situation, thereby destabilizing each category and permitting their meanings to flow between and around each other.<sup>242</sup>

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<sup>240</sup> For discussions of the fluidity of both sexual orientation and relationships in gay and lesbian communities, see RITCH C. SAVIN-WILLIAMS, *THE NEW GAY TEENAGER passim* (2005), and Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 SOC. POL'Y & SOC'Y 409, 410–15 (2004).

<sup>241</sup> See *supra* Part II.A.

<sup>242</sup> Cf. Stacey Young, *Dichotomies and Displacement: Bisexuality in Queer Theory and Politics*, in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES* 51, 61 (Shane Phelan ed., 1997) (emphasizing the desire, within queer theory, to “challenge both the notion that identity categories represent epistemological certainties, and the notion that the uncertainties that do exist are located primarily at what we think of as the boundaries that demarcate one category from another”).

Some individuals already experience fluid understandings of sex and intimacy, finding forms of sexual expression not simply through sex acts but also through acts of care or other everyday activities with friends, loved ones, or even strangers. Individuals can experience sexual sensation and pleasure, including but not limited to orgasm, when engaging in the stimulating exchange of ideas, driving, horseback riding, listening to or playing music, mastering a new skill, gardening, discovering the answer to a knotty problem, looking at or creating art, or eating ice cream or chocolate.<sup>243</sup> Some women even experience the eroticization of care when pregnant<sup>244</sup> or breastfeeding,<sup>245</sup> at times experiencing orgasms. Conversely, as Justice Kennedy suggested, some individuals find that the emotional connection they experience when engaging in sex acts is more intense than the emotional connection they experience in other contexts.<sup>246</sup> A project that collapses sex and intimacy would not only embrace all of these understandings, but it would also challenge the dominant understanding that sex and intimacy are distinct phenomena connected only in the particular form of a dating or marriage-like relationship.

New constructions of sex therefore could embrace and produce multiple connections between sex and intimacy. Moving beyond the current construction of sex does not require the separation of sex from intimacy, which many fear would lead to an understanding of sex as unconnected, instrumental, atomistic, or solely self-serving.<sup>247</sup> Instead, collapsing sex and intimacy could lead to “kinds of intimacy that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.”<sup>248</sup> We can move beyond the equation of sex with a particular kind of intimacy without stripping

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<sup>243</sup> See, e.g., HALLEY, *supra* note 28, at 24 (defining sex as “everything that turns us on,” including “the vibration of your car”).

<sup>244</sup> See, e.g., SUSIE BRIGHT, *Egg Sex*, in SUSIE BRIGHT’S SEXUAL REALITY: A VIRTUAL SEX WORLD READER 99–108 (1992) (describing the pleasure of sex during pregnancy and her use of a vibrator during childbirth); Laura Shanley, *Orgasmic Childbirth: The Fun Doesn’t End at Conception!*, <http://www.unassistedchildbirth.com/sensual/orgasmic.html> (last visited Mar. 7, 2009) (presenting testimonies of women who experienced orgasm during childbirth).

<sup>245</sup> See DIANA KORTE & ROBERTA SCAER, A GOOD BIRTH, A SAFE BIRTH: CHOOSING AND HAVING THE CHILDBIRTH EXPERIENCE YOU WANT 29 (1992); Iris Marion Young, *Breasted Experience: The Look and the Feeling*, in THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 189, 199 (1990).

<sup>246</sup> See *supra* Part II.A.

<sup>247</sup> For examples of such fears, see Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 88–92 (1980); Meyer, *supra* note 53, at 477.

<sup>248</sup> Lauren Berlant & Michael Warner, *Sex in Public*, in QUEER STUDIES: AN INTERDISCIPLINARY READER 170, 175 (Robert J. Corber & Stephen Valocchi eds., 2003).

sex of its relational or even generally intimate character. Sex could become intimate and intimacy could become sexual in new ways.

In the process, current understandings of both sex and intimacy would likely be changed as the two concepts collapse into one another. Sex acts could be viewed as one of the many ways to further diverse forms of intimacy. In addition, acts not widely viewed as sex acts could be acknowledged as producing sexual pleasure and intimacy at times, even as they produce other feelings or no feelings at all at other times. Sex acts would therefore not necessarily be valued over other forms of interaction that further intimacy, nor would other forms of interaction that further intimacy be valued over sex acts. Instead, sex and those other forms of interaction would be part of the pool of human experience that produces various forms of human connection, at times sexual, at times intimate, at times neither or both, thereby potentially destabilizing those constructions and creating more possibilities for multiple and fluid meanings of sex and intimacy.

The consequences of such an approach are potentially far-reaching, as they would likely make our conceptions of sex, intimacy, pleasure, and care more diverse and fluid. Separating sex from intimacy, in contrast, risks defining pleasure as the opposite of emotional intimacy or care. Such a definition denies the possibility that for some people pleasure could be much more closely aligned with care than with the physical sensation of acts that many people now deem sexual.<sup>249</sup> The blurring of the distinction between sex and intimacy permits more room to examine alternative conceptions of care and pleasure, including not only conceptions that hinge on the eroticization of care, but also conceptions that embrace pleasure and care outside of the home or other current markers of domestic intimacy. These alternative conceptions could lead to more individual autonomy in the realm of personal life, as might also happen by separating sex and intimacy, but they could also create new possibilities for engaging in expression, connection, and pleasure outside the illusion of individual autonomy and freedom that is often embraced in discussions of sexual pleasure. In the process, traditional conceptions of

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<sup>249</sup> See, e.g., Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2039 (2001) (“Radical visions in which dependency work is taken out of the family have left many women cold . . . .” (quoting EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 188 (1999))); Laura T. Kessler, *Transgressive Caregiving*, 33 *FLA. ST. U. L. REV.* 1, 57–59 (2005) (noting the tension between theories of gender oppression and the idea of caregiving as including “an element of pleasure”).

pleasure (assumed to be individual) and of care (assumed to be relational) could be greatly transformed.

The deeply gendered and heteronormative private power dynamics of sex and intimacy could also be challenged in new ways. These dynamics may be masked when separating sex and intimacy, as the very act of separation implies that all individuals have the ability to choose between sex and intimacy relatively freely. However, such choices can be deeply constrained by the dynamics of the sexual double standards and heteronormativity described above.<sup>250</sup> Robin West, in particular, emphasizes that some heterosexual women consent to sex that they otherwise do not desire in order to maintain relationships with men or as a price they think they have to pay to obtain other things from their male partners.<sup>251</sup> Separating sex and intimacy can potentially ignore such constraints on agency, and in doing so exacerbate private power differentials, reinforcing the assignment of pleasure to men (straight or gay) and care and intimacy to women (straight or lesbian), as well as bolstering the power of the heterosexual model of domestic coupling to bridge and maintain those gendered categories.<sup>252</sup>

Collapsing sex and intimacy instead confronts some of these private power dynamics by blurring what it means to be a sexual object or subject. Some women may therefore begin to embrace some elements of sexual agency, thereby reducing the effects of private power.<sup>253</sup> Other women may realize that they need not endure unwanted sex in order to achieve intimacy, but rather

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<sup>250</sup> See *supra* text accompanying notes 172–87, 232–34.

<sup>251</sup> As Robin West observes:

Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don't desire, from hook-ups to dates to boyfriends to co-habitators, to avoid a hassle or a foul mood the endurance of which wouldn't be worth the effort, to ensure their own or their children's financial security, to lessen the risk of future physical attacks, to garner their peers' approval, to win the approval of a high-status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, from friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.

Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 236 (Franklin G. Miller & Alan Wertheimer eds., 2010).

<sup>252</sup> Cf. Spindelman, *supra* note 239, at 1633–52 (critiquing the “like-straight reasoning” of *Lawrence*).

<sup>253</sup> See, e.g., Horne & Zimmer-Gembeck, *supra* note 193, at 125.

can experience intimacy in forms beyond the sexual intimacy of domestic coupling.<sup>254</sup>

More fluid understandings of sex and intimacy could also begin the process of deconstructing systems of gender and sexual orientation. Sex acts are currently central to conceptions of gender and sexual identities. Collapsing sex and intimacy could both broaden and de-center sex acts in some individuals' lives. Sex could become less exceptional or distinct from all other aspects of life, requiring no greater meaning than other activities pursued in the course of a day, month, or year—from cooking, to martial arts, to book club conversations. Indeed, the collapsing of sex and intimacy could ultimately lead to the view that sexual activity deserves no greater state regulation or protection than other life activities. Moving beyond sex exceptionalism in this manner could therefore transform intimate life as we know it, producing new and multiple constructions of sex, intimacy, gender, and sexual orientation.

#### V. TOWARD CONSTITUTIONAL PROTECTION FOR SEX WITHOUT REGARD TO INTIMACY

Current legal doctrine ignores the alternative constructions of sex discussed above, thereby perpetuating one primary vision of sex that values sexual activity only within traditional domestic coupling and devalues both sexual activity and intimate relationships that sit outside that context. Other scholars have developed autonomy-based justifications for changing this vision, arguing that the government should simply stay out of individuals' sex lives.<sup>255</sup> We support those justifications, but we question whether unbridled autonomy is possible given the role of socio-cultural forces and the history of legal regulation in constructing individuals' sexual choices and opportunities.

Moreover, broad and underdeveloped appeals to autonomy have neither been sufficient to withstand purported state interests in restricting sexual activity in various contexts, nor has *Lawrence* altered the state's channeling of sex into relationship.<sup>256</sup> Scholars proposing a right of sexual privacy or autonomy have in fact long admitted that numerous government interests could trump such a right, including the promotion of marriage, the discouragement of

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<sup>254</sup> See *supra* note 176 (citing sources exploring the pleasure of sex in multiple contexts outside of domestic coupling).

<sup>255</sup> See *supra* text accompanying notes 60–77.

<sup>256</sup> See *supra* text accompanying notes 117–38, 144–52 (discussing cases in which courts have upheld state restrictions on sexual activity or protected sex only in the context of emotional intimacy).

homosexuality, and the encouragement of procreation and stable child-rearing units.<sup>257</sup> Alternative constructions of sex must be developed to counterbalance such government interests.<sup>258</sup>

In this Part, we therefore articulate a vision of sex that goes beyond the promotion of individual autonomy and privacy. We contend that both the liberty interests of the Due Process Clause and the demands of equal protection require strict limits on laws regulating sexual conduct, whether those regulations involve rewarding or prohibiting certain forms of sexual activity. We do not focus here, however, on a textual constitutional analysis. Constitutional theorists have long struggled with both the location and the content of rights not expressly enumerated by the Constitution. Our goal is not to resolve these long-contested issues or to specifically locate a right to sex within the text of the Constitution.<sup>259</sup> Instead, we contend that the recognition of a right to intimate association requires the recognition of a right to engage in consensual sexual activity without regard to the motives or goals behind the activity.

Accordingly, we hope to highlight the importance of a right to sex without regard to a particular sexual activity's relation to emotional intimacy, reproduction, or marriage. We do this by comparing the values that are thought to support a constitutional right of intimate association with some of the values that could be associated with sexual activity, concluding that there is little basis to exclude sex from constitutional protection if intimate association merits such protection. As such, although our prescription embraces the separation of sex and intimacy, our rationale for doing so is based on the many ways that sex and intimacy may collapse into one another once individuals have the opportunity to engage in more diverse sexual and emotional performances.

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<sup>257</sup> See, e.g., Wilkinson & White, *supra* note 63, at 595–600 (expressly leaving ample room for government regulations, in particular for the state to promote the “nuclear, heterosexual family,” but disagreeing about whether restricting gay sexual activity was justifiable on that basis); Schneider, *Fornication*, *supra* note 60, at 301 (concluding that “detering illegitimacy, preventing disease, and preserving the family” are all “compelling” interests, but that fornication and cohabitation laws, as applied to unmarried heterosexuals, do not further those interests).

<sup>258</sup> In some respects, we are responding to Katherine Franke's call in *Theorizing Yes: An Essay on Feminism, Law, and Desire* to develop a more positive view of female sexuality. See Franke, *supra* note 186, at 199–200. We broaden the charge to sexuality in general and situate it within the context of determining the constitutionality of sexual regulations.

<sup>259</sup> Numerous legal scholars have suggested various constitutional bases for protecting private, consensual sexual conduct between adults. See *supra* text accompanying notes 60–77; see also Ruskola, *supra* note 107, at 235–45 (suggesting that specific sex acts should enjoy constitutional protection).

A. *Overlapping Values of Intimate Association and Sexual Activity*

Although courts have uniformly accepted that there is a constitutional right to intimate association,<sup>260</sup> the most developed articulation of values in support of such a right comes, not from the courts, but from the legal scholar Kenneth Karst.<sup>261</sup> Karst presents four main arguments in support of a right to intimate association. First, he argues that intimate association promotes society between individuals, noting the importance of having physical access to others and of experiencing social community. Karst observes that “[t]he common law has long considered this interest in the society or companionship of an intimate associate as basic.”<sup>262</sup> We contend that sex, with or without emotional intimacy, can also further the goal of promoting society by providing opportunities for pursuing a diverse array of interactions, including physical ones, among different people and producing a greater sense of both interconnectedness and self-understanding.

As such, we resist the assumption that sex outside of domestic coupling or its pursuit is merely self-serving or selfishly instrumental; rather, we contend that such assumptions are part of the current negative construction of sex rather than an inevitable conclusion. If the construction changes, individuals are likely to embrace new ways of connecting with one another through sex, including ways that would not now be considered sexual but are both physical and intimate. Even solo sex may ultimately promote involvement in society by permitting individuals to more fully explore their selves and desires and to develop the confidence and self-possession to more comfortably interact with others.<sup>263</sup>

Karst next argues that intimate association promotes caring and commitment. Although our notion of a right to sex would protect sexual activities without regard to ongoing commitment, sex can unquestionably promote caring even outside of commitment. Sex in such a context can also redefine what is meant by commitment. Taking care of another’s sexual desires, both physical and emotional, is not necessarily less important than the human “need to love and be loved.”<sup>264</sup> Moreover, although this care need not be tied to an ongoing relationship, one can also envision ongoing sexual

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<sup>260</sup> See *supra* note 98.

<sup>261</sup> Karst, *supra* note 5 *passim*.

<sup>262</sup> *Id.* at 631.

<sup>263</sup> See *supra* text accompanying notes 161–62.

<sup>264</sup> Karst, *supra* note 5, at 632.

interactions that are not tied to committed domestic relationships. These engagements could, like intimate associations, provide a degree of consistency and stability in individuals' lives. In addition, as Karst observed, freedom means very little if one does not have the freedom to not do something.<sup>265</sup> If one cannot consider and exercise one's sexual desires outside of the traditional long-term, committed couple model, then the commitment to that primary relationship is itself suspect because of the constraints affecting the choice to engage in and continue that relationship.<sup>266</sup>

Third, Karst enumerates the somewhat tautological value of "intimacy," noting that intimacy is "valued for itself, for the emotions it generates immediately, and not merely for 'the emotional attachments that derive from the intimacy of daily association.'"<sup>267</sup> Although we have conducted the thought experiments of disentangling sexual and emotional intimacy and of collapsing them, sexual activities can also generate emotional responses without regard to the long-term, or even short-term, commitments of the participants. To the extent one values providing more opportunities for the development and expression of emotions, there seems to be no meaningful distinction between emotions generated by sexual activity and those generated by other emotionally intimate contacts. Additionally, like intimacy, sex can have value in and of itself. When legal scholars and jurists discuss associational values, they rarely give any weight to sexual sensation and pleasure, instead viewing individuals as almost bodiless minds for whom physical contact is an afterthought.<sup>268</sup> Human sexuality can be a crucial component of our physical, as well as our spiritual, selves and should be respected as such.

Finally, Karst points to self-identification as the last value justifying legal protections for intimate association.<sup>269</sup> As already discussed, individuals' sexual interactions and sexual desires can be crucial components of identity.<sup>270</sup> Accordingly, there is no basis to deny the role of sex in the construction of self. Sex can constitute a vital part of self-expression, even when not channeled into

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<sup>265</sup> *Id.* at 633.

<sup>266</sup> This is similar to Adrienne Rich's argument that heterosexuality is imposed on many women. *See* Rich, *supra* note 19 *passim*.

<sup>267</sup> Karst, *supra* note 5, at 635 (quoting *Smith v. Org. of Foster Families for Equal. Reform*, 431 U.S. 816, 844 (1977)).

<sup>268</sup> Wilkinson and White, as well as Richards, seem to be exceptions, but as discussed they primarily focus on the values of autonomy as opposed to sex itself. *See supra* text accompanying notes 63–67, 76–77.

<sup>269</sup> Karst, *supra* note 5, at 635–36.

<sup>270</sup> *See supra* text accompanying notes 159–68.

intimacy, and therefore deserves constitutional deference equivalent to that extended to intimate association.<sup>271</sup>

Accordingly, the same underlying values that support a constitutional right to intimate association also support a constitutional right to sexual association. The Supreme Court therefore could have reached the same holding in *Lawrence* by invoking the values of sexual activity rather than the values of emotional intimacy. In describing sexual activity in the context of emotional intimacy, the Court emphasized that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>272</sup>

Just as emotionally intimate associations address our ability to define ourselves and to understand the world, sexual activity can be similarly self-defining and world-revealing even if it takes place outside of emotionally intimate contexts. The values of sex thereby justify constitutional protection of consensual adult sexual activity without regard to intimacy.

### *B. Implications and Concerns*

A right to engage in sexual activity without regard to intimacy would alter the current sex-negative legal regime in many respects. As an initial matter, the right would make unconstitutional those prohibitions on sexual activity that are justified by the state's desire to channel sex into acceptable forms of coupled intimacy. Laws criminalizing adultery, fornication, sodomy, masturbation, so-called crimes against nature, and polyamorous sexual activity would therefore finally be abolished. Secondary harms that potentially flow from engaging in such conduct—for example adverse employment, custody, or divorce decisions—would likewise be unconstitutional. Laws criminalizing commercial sexual activity, such as prostitution and the distribution of sex toys, would also be abolished, although the state could continue to regulate

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<sup>271</sup> For a discussion of this argument in another context, see Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 500–03 (2010) (discussing the protection of identity under notions of substantive due process).

<sup>272</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

such activity to some extent in the interest of public health. Similarly, laws currently criminalizing obscenity and adult incest could be maintained only in those situations where the state could justify them on grounds unrelated to the promotion of emotional intimacy, such as the desire to shield children from obscenity or to prevent abuses of power by family members.

This shift in the legal landscape would likely create more private opportunities for individuals to explore sex with and without intimacy and intimacy with and without sex, as discussed in Part IV. A negative right to engage in sexual association would not, however, entirely transform the sex-negative legal regime or the dominance of sex negativity in the world at large. The law's traditional channeling function will be disrupted only if the state stops supporting its own normative views of the appropriate ends of sexual activity to the exclusion of others.

The state could take several steps to undo its longstanding support of a sex-negative legal and cultural regime, thereby permitting individuals and communities to adopt their own normative views of the appropriate ends of sexual activity. First and foremost, the state could stop recognizing marriage and marriage-like relationships to the exclusion of all other relationships, thereby alleviating some of the pressure to conform to the dominant marital model of emotional and sexual relationship. This change could be accomplished through state recognition of other relationships not necessarily rooted in sexual activity. For example, as one of us has previously suggested, the state could gather all of the privileges and obligations currently attached to marriage and permit individuals to assign all or some of those to consenting individuals of their choice—spouses, friends, other sexual partners, other family members, or those who prefer not to be labeled at all.<sup>273</sup> Alternatively, the state could end the practice of affirmatively supporting relationships between adults altogether, permitting all such relationships to exist outside of formal legal regulation.<sup>274</sup>

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<sup>273</sup> See Rosenbury, *supra* note 26, at 226–33. For a somewhat similar argument rooted more explicitly in caregiving, see POLIKOFF, *supra* note 12, at 123–45.

<sup>274</sup> See Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 4; Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29, 43–57 (Anita Bernstein ed., 2006); Carl F. Stychin, “Las Vegas Is Not Where We Are”: *Queer Readings of the Civil Partnership Act*, 25 POL. GEOGRAPHY 899, 917 (2006). For a discussion of how such proposals might not disrupt current constructions of gender and marriage, see Rosenbury, *supra* note 26, at 224–26.

The state could also alter the other ways that it currently intervenes in the construction of sex. For example, many states, in part due to pressure from the federal government, have developed sex education curricula that discourage sexual activity before marriage and explore only those sexual practices that conform to traditional notions of gender and heteronormativity.<sup>275</sup> More pluralist sex education curricula could provide alternatives to that model of sex and encourage students to embrace a more active role in defining their own sexuality.<sup>276</sup> Increased state support of parents with diverse sexual orientations could also expose children to a wider range of sexual possibilities. Many states limit the ability of same-sex couples and homosexual or bisexual individuals to adopt children,<sup>277</sup> and some states continue to favor heterosexual parents over gay or bisexual parents in custody decisions.<sup>278</sup> Removing those barriers would likely increase the diversity of the parenting pool, leading more children to witness pluralistic conceptions of sex and relationship.<sup>279</sup>

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<sup>275</sup> See Danielle LeClair, Comment, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291 *passim* (2006) (discussing such programs and criticizing their effectiveness).

<sup>276</sup> See Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63 *passim* (2006) (offering a feminist approach to sex education). One pluralist sex education program was conceived at Mt. Holyoke and then implemented at Yale as a not-for-credit course entitled *Topics in Human Sexuality*, led by Professors Lorna and Philip Sarrel from 1971 to 1995. As part of the course, male and female students met together in groups to discuss the course's topics without faculty or older adults present. The discussions were led by trained student facilitators who had previously taken the course. Studies revealed that the course had a positive effect on students' self-confidence and ability to talk about their own sexuality and sex in general. See Email from Philip Sarrel to Jennifer Rothman (Nov. 13, 2009) (on file with author); LORNA J. SARREL & PHILIP M. SARREL, SEXUAL UNFOLDING: SEXUAL DEVELOPMENT AND SEX THERAPIES IN LATE ADOLESCENCE 315, 325–31 (1979); Philip M. Sarrel & Haskell R. Coplin, *A Course in Human Sexuality for the College Student*, 61 AM. J. PUB. HEALTH 1030, 1034–37 (1971).

<sup>277</sup> See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding a Florida law prohibiting homosexual couples from adopting children against challenges based on the federal Due Process and Equal Protection Clauses). *But see In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008) (holding unconstitutional Florida's categorical ban on adoption by individuals who identify as homosexual).

<sup>278</sup> See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 *passim* (2009) (describing the results of a comparative analysis of reported family law opinions).

<sup>279</sup> Numerous studies demonstrate that gay parents are at least as effective in raising children as heterosexual parents. The same studies also reveal that children raised by gay, lesbian, or bisexual parents are less likely to conform to stereotyped gender roles and are more likely to be comfortable with their own sexuality, although they are no more likely to identify as homosexual than children raised by heterosexual parents. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 163–78 (2001).

Beyond sex education, courts and other state bodies charged with enforcing employment discrimination laws could become more mindful of the ways that prohibitions on sexual harassment often induce employers to adopt policies prohibiting or greatly restricting sexual interactions between employees, even when those interactions are not harassing or otherwise discriminatory. Vicki Schultz has illustrated the ways such policies prevent employees from engaging in potentially rewarding relationships, often with no corresponding reduction in gender discrimination.<sup>280</sup> Clearer guidance from the state about when sexual conduct constitutes discriminatory harassment and when it does not might free employers to adopt less sex-negative approaches to sex and dating in the workplace.<sup>281</sup>

Finally, the state could play more of a role in facilitating individuals' explorations of their own sexualities. To the extent particular jurisdictions mandate insurance coverage for various forms of psychotherapy, states could extend such mandates to include sex therapy.<sup>282</sup> Similarly, to the extent that states and the federal government provide public funding for scientific research about sex, they could fund more diverse research. The academic sexology community has moved away from examining individual sexual experiences and toward examining sex primarily in the context of committed emotional relationships.<sup>283</sup> This framework makes it extremely difficult to study other visions of the role of sex in individuals' lives. Additionally, social science research has primarily focused on college students who identify as heterosexual and who have not yet robustly explored their relationship to sex. Even though we do not think that sex experiments and surveys hold definitive answers for making legal or other determinations about how sex should be viewed in society, public funding mechanisms could be used to broaden research in a way that enriches understandings of the diversity and potential of human sexual experience.

Some scholars have long expressed fear that changing the state's treatment of sex to conform to the ideas we propose here might lead to chaos,

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<sup>280</sup> Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

<sup>281</sup> *Id.* at 2163–93 (discussing various alternative approaches to sexual harassment law).

<sup>282</sup> Many insurance plans currently exclude such coverage. *But see* Univ. of Kan. Hosp. Auth. v. Titus, 452 F. Supp. 2d 1136, 1151 (D. Kan. 2006) (mandating coverage of sex therapy, but doing so only because it was also necessary to respond to the risk of infection from a penile implant).

<sup>283</sup> *See* Glen Jennings, *Complexity of Sexuality: Shifting to a Focus on Sexuality in Close Relationships*, 43 J. SEX RES. 388, 388–90 (2006) (reviewing THE HANDBOOK OF SEXUALITY IN CLOSE RELATIONSHIPS (John H. Harvey et al. eds., 2004)).

destabilization of society and family, and a public health crisis.<sup>284</sup> Thomas Grey, for example, raises the concern that a constitutional right to sex might adversely affect the social stability that flows from sexual repression.<sup>285</sup> Similarly, David Meyer warns that “[i]f society is disabled from channeling intimate conduct into relationships reflective of durable commitment, the fulfillment of dependency, and other basic aspirational values commonly associated with family, human interaction may drift toward more self-centered, unstable, and transient forms.”<sup>286</sup>

These concerns are understandable given the current sex-negative landscape, but as products of that landscape they are also overstated. Marriage is likely to remain a respected social institution even if the state stops recognizing it or alternatively also recognizes the value of other forms of emotional and sexual interaction. Entrenched family structures may nonetheless become less stable, but some level of destabilization would likely be a good thing.<sup>287</sup> As discussed, the current sex-negative legal regime constructs highly gendered and heteronormative scripts that limit the ways individuals perform their sexuality and live their domestic and intimate lives. New scripts will no doubt alter the current order, but they might also result in constructions of family and society that permit individuals to be less bound by traditional conceptions of gender and sexual orientation. At the very least, there will be more room for diverse expressions of sexuality and intimacy and more space for individuals, couples, and communities to develop their own ways of interacting with the world.<sup>288</sup>

More broadly, we question the underlying position that some degree of sexual repression is necessary for a functioning society, although many theorists have long embraced that view.<sup>289</sup> That position depends on at least two assumptions that we do not share. First, it assumes that increased freedom to explore sexuality outside of couple-based emotional intimacy will lead to the collapse of families, couples, other relationships, and communities more generally. We believe, however, that it is just as likely, if not more likely, that

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<sup>284</sup> See, e.g., Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Society Interests*, 81 MICH. L. REV. 463, 538–42 (1983).

<sup>285</sup> Grey, *supra* note 247, at 88–92.

<sup>286</sup> Meyer, *supra* note 53, at 477.

<sup>287</sup> Cf. Law, *supra* note 50, at 219 (“Preservation of gender distinctions and traditional family relations premised upon them is the core objective of secular social thinkers who condemn homosexuality.”).

<sup>288</sup> For a discussion of such possibilities in the context of caregiving, see Kessler, *supra* note 249 *passim*.

<sup>289</sup> Grey, *supra* note 247, at 91–94 (discussing theories of Freud, Durkheim, Weber, and Lasch). *But see supra* notes 28, 188 (discussing Foucault’s critique of the deployment of repression).

additional opportunities to express sexual desires could enhance relationships and create and solidify new and existing communities, as discussed earlier.<sup>290</sup> Second, the position assumes that legal changes designed to permit greater sexual freedom will lead to an uncontrollable libidinal energy that is incompatible with work and other non-sexual activities. We are highly skeptical that such an outcome will result, given that changes to the legal structure are not likely completely or immediately to change individuals' and society's constructions of which kinds of sexual activity are acceptable. We also doubt that individuals are likely to be so interested in sex that they would cease to do all else.<sup>291</sup>

In any event, reasonable time, place, and manner restrictions could serve to prevent sexual activities from interfering with other societal activities and to protect individuals from becoming forced voyeurs.<sup>292</sup> We therefore support the institution of some restrictions on explicit sexual activity and displays of genitalia in public. At the same time, however, we believe there should be more opportunities for public discussions of sex and some public forms of sexual activity, such as physical displays of affection short of explicit sexual conduct. For example, same-sex couples are often penalized for fairly banal public displays of affection, such as holding hands and kissing in public, which go unnoticed when different-sex couples exhibit the same behavior.<sup>293</sup> The state should not condone such differential penalties. In semi-public spaces, such as sex clubs where all those present have consented to witnessing or participating in sex, more minimal restrictions should apply.<sup>294</sup> Accordingly, we support careful limits on time, place, and manner restrictions so as not to exile all forms of sex into private spaces and to protect against biases in application.

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<sup>290</sup> See *supra* Part IV.

<sup>291</sup> But this doubt may be a product of the sexual double standards discussed in Parts III and IV. The theorists discussed above are all men, whereas we are women, and our identities likely affect our analysis both consciously and unconsciously.

<sup>292</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91, 803 (1989) (holding constitutional a time, place, and manner restriction on the use of a bandshell in New York's Central Park).

<sup>293</sup> Two notable examples are a lesbian couple that was ejected from a Los Angeles Dodgers baseball game for kissing, and two men who were asked by flight attendants to stop resting their heads on each other's shoulders during an American Airlines flight. See Terry McDermott, *All Smiles After Kiss Commotion*, L.A. TIMES, Aug. 24, 2000, at 1; Kenji Yoshino, *Gays on a Plane*, ADVOCATE, Nov. 7, 2006, at 40.

<sup>294</sup> We note that current First Amendment doctrine permits the zoning of sexually-oriented businesses. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding constitutional a zoning ordinance that restricted the placement of sexually-oriented movie theaters). While we do not directly challenge such zoning ordinances here, we are concerned that such ordinances negatively stigmatize sexual activity and prevent a more positive and public dialogue about the diversity of sexual experience.

Finally, we believe that a broader understanding of constitutionally protected sexual activity could ultimately change our understanding of sex as an exceptional activity producing unique harms and benefits. Recognizing a constitutional right to sexual activity would initially set sex apart from other daily activities, including emotional intimacy, as a matter of law. We believe such legal treatment is justified because sex can constitute a vital part of our selves even when not channeled into intimacy. We do not believe, however, that sex must inherently or always enjoy a unique status. In fact, sex may currently play such an important role in some people's lives because of the historic construction of sex by the state and other social forces. Once that construction is altered, we hope that sex will become less exceptional than this Article may imply.

Accordingly, although broader constitutional protections could lead to more sex, they could also ultimately lead to less sex, or at least less of the type of sex some commentators fear. A constitutional right to sex without regard to intimacy would not necessarily replace the current emphasis on intimacy with an emphasis on sex. Instead, we hope the state's fuller embrace of liberty will create more opportunities for individuals to develop their own understandings of the roles sex, intimacy, and other activities will play in their daily lives.

#### CONCLUSION

The current legal regime unquestionably perpetuates a vision of sexual intimacy to which many individuals do not adhere and others may not adhere if given other opportunities. Although *Lawrence* altered some aspects of that vision, it reinscribed others. By challenging the conflation of emotional and sexual intimacy embraced by *Lawrence*, we hope to spur discussions of alternative constructions of sex that could provide individuals with more room to explore different engagements with both sex and intimacy. Such alternatives could increase individual freedom, but they could also create new forms of relationship beyond domestic coupling and transform various structures that perpetuate the current construction of sexual intimacy largely outside of the law, such as gender hierarchy and heteronormativity. Exploring the right to sexual association apart from intimate association therefore constitutes one step toward a challenge to the broader social construction of sex.