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Repository Citation

Elizabeth Mincer, *Fifty Shades and Fifty States: Is BDSM a Fundamental Right? A Test for Sexual Privacy*, 26 Wm. & Mary Bill Rts. J. 865 (2018), <http://scholarship.law.wm.edu/wmborj/vol26/iss3/9>

FIFTY SHADES AND FIFTY STATES: IS BDSM A FUNDAMENTAL RIGHT? A TEST FOR SEXUAL PRIVACY

Elizabeth Mincer*

INTRODUCTION

In 2012, the *Fifty Shades of Grey* trilogy took the literary world by storm, selling over 100 million copies worldwide, resulting in a film adaptation that has grossed over \$500 million internationally at the box office.¹ The books, which chronicled the erotic love story between two characters, were featured at the top of the Times Best-seller List² and have forged their way into popular culture.³ However, it was not the literary scholarship that caused the books to become so popular, but the subject matter.⁴ *Fifty Shades of Grey* went beyond the classic romance novel, and delved into the secret world of domination and submission, exposing the masses to what had long been taboo.⁵

Bondage/Domination/Sado-Masochism (BDSM) can be defined as “a range of sexual preferences that generally relate to enjoyment of physical control, psychological control, and / or pain.”⁶ Studies have shown that up to 36% of all Americans

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¹ Julie Bosman, *For “Fifty Shades of Grey,” More than 100 Million Sold*, N.Y. TIMES (Feb. 26, 2014), <https://nyti.ms/2lo9E3e>; Scott Mendelson, *Box Office: “Fifty Shades of Grey” Becomes 6th R-Rated Film to Top \$500M*, FORBES (Mar. 5, 2015, 2:10 PM), <https://www.forbes.com/sites/scottmendelson/2015/03/05/box-office-fifty-shades-becomes-6th-r-rated-film-to-top-500m/#69a88e516f7a> [<https://perma.cc/86YD-DMZM>].

² *The New York Times Best Sellers—June 24, 2012*, N.Y. TIMES (June 24, 2012), <https://nyti.ms/2Bh8g90>.

³ Julie Bosman, *Discreetly Digital, Erotic Novel Sets American Women Abuzz*, N.Y. TIMES (Mar. 9, 2012), <https://nyti.ms/2u5udos>.

⁴ See Alex Clark, *Critics Hate Grey. So Why Can’t Readers Get Enough of the Dark Side of Fifty Shades?*, GUARDIAN (June 27, 2015, 19:05 EDT), <https://www.theguardian.com/books/2015/jun/28/what-el-james-grey-success-tells-us-about-future-of-fiction> [<https://perma.cc/38DF-NM8X>].

⁵ See Sari Cooper, *BDSM: Fifty Shades of Grey Unplugged*, PSYCHOL. TODAY (Mar. 6, 2012), <https://www.psychologytoday.com/blog/sex-esteem/201203/bdsm-fifty-shades-grey-unplugged> [<https://perma.cc/HZ92-UU85>]; see also Bosman, *supra* note 3; Clark, *supra* note 4.

⁶ Ali Hébert & Angela Weaver, *An Examination of Personality Characteristics Associated with BDSM Orientations*, 23 CANADIAN J. HUM. SEXUALITY 106, 106 (2014). The acronym

incorporate some form of BDSM during sexual activity,⁷ and yet it still remains highly stigmatized in society.⁸ Given this stigma, many people choose to engage in BDSM secretly, keeping a distinction between their public life and their private life.⁹ Similar to other marginalized groups, there are entire communities devoted to providing help and support to people who identify with the BDSM lifestyle.¹⁰ These communities have created their own culture of self-policing and safety protocols, designed to help carefully navigate the legal reality that the justice system has not developed in a way that recognizes and incorporates BDSM.¹¹

This manifests itself in several ways. First, many states have laws that indirectly ban different types of BDSM practices, which has contributed to the creation of an underground culture.¹² Old laws that are on the books regulate the morality of sexual

can also include other words in its abbreviation. *See* *BDSM—An Acronym of Acronyms*, FRISKY BUS. BOUTIQUE (Oct. 25, 2014), <https://friskybusinessboutique.com/bdsm-an-acronym-of-acronyms/> [<https://perma.cc/U95X-BDH9>] (describing Bondage/Discipline, Domination/Submission, and Sado-Masochism). A larger umbrella term used for taboo sexual practices is the word “kink,” which can also include sexual fetishes. *See* Taylor Kubota, *Sexual Fetishes: What You Need to Know*, MEN’S J., <http://www.mensjournal.com/expert-advice/sexual-fetishes-what-you-need-to-know-20150401/the-difference-between-a-fetish-and-kink> [<https://perma.cc/7FKG-YPX5>] (last visited Feb. 21, 2018) (describing some of the most common sexual fetishes).

⁷ Rose Eveleth, *Americans Are More into BDSM than the Rest of the World*, SMITHSONIAN.COM (Feb. 10, 2014), <http://www.smithsonianmag.com/smart-news/americans-are-more-bdsm-rest-world-180949703/?no-ist> [<https://perma.cc/K62M-ZMWA>].

⁸ *See* Diane Mehta, *The Rumpus Interview with Susan Wright*, THE RUMPUS (May 22, 2013), <http://therumpus.net/2013/05/the-rumpus-interview-with-susan-wright/> [<https://perma.cc/C38C-G2KA>]. *See generally* NAT’L COALITION FOR SEXUAL FREEDOM, <https://www.ncsfreedom.org/> [<https://perma.cc/2TRR-QK7F>] (last visited Feb. 21, 2018) (providing resources for people who engage in BDSM, including an incident report and response mechanism for discrimination).

⁹ *See* Jillian Keenan, *Can You Really Be Fired for Being Kinky? Absolutely.*, SLATE (Oct. 28, 2014), http://www.slate.com/blogs/outward/2014/10/28/the_jian_ghomeshi_case_echoes_many_kinksters_worst_fears_being_outed_and.html [<https://perma.cc/29LA-33XZ>] (explaining that there are no legal protections for people who practice BDSM; therefore, people can be fired or denied employment, putting many people in fear of being “outed” or blackmailed).

¹⁰ *See, e.g.*, Matt Haber, *A Hush-Hush Topic No More*, N.Y. TIMES (Feb. 27, 2013), <https://nyti.ms/2IN4Fr3>.

¹¹ Tracey Clark-Flory, *A BDSM Blacklist*, SALON (June 2, 2012, 9:00 PM), http://www.salon.com/2012/06/03/a_bdsm_blacklist/ [<https://perma.cc/SK6G-HLTY>]. Communities will use online forums to discuss consent violations in their local communities. *Id.* However, methods for preventing abusers from participating in the BDSM community vary, and there is much debate over how to address this issue. *Id.*

¹² *See* Neil McArthur, *It’s a Travesty that BDSM Isn’t Technically Legal*, VICE (Aug. 2, 2016, 1:00 PM), https://www.vice.com/en_us/article/vdqem4/its-a-travesty-that-bdsm-isnt-technically-legal [<https://perma.cc/8W7K-XW8B>]; Tamara Tabo, *Fifty Shades of Legal Liability—Legal Risks of Kinky Sex*, ABOVE THE L. (Feb. 13, 2015, 6:00 PM), <https://above.thelaw.com/2015/02/fifty-shades-of-legal-liability-legal-risks-of-kinky-sex> [<https://perma.cc/6EVB-P7J8>].

activity, putting people at risk of arrest or prosecution.¹³ There is nothing that legally protects people who engage in BDSM from having their activities revealed and used against them during other legal matters, such as divorce¹⁴ and child custody,¹⁵ which makes them vulnerable both within the legal system and to blackmail from others.¹⁶ Furthermore, laws that strictly define domestic violence, sexual assault, and prostitution can be ill-designed for application to situations in which BDSM is involved.¹⁷

Cases that have alleged an unfair application of the law given the context of a BDSM dynamic have made their way to the courts, both at the state and the federal level.¹⁸ In general, at the state level, BDSM has been used as a defense to alleged sexual assaults and misconduct, but has almost universally been rejected on appeal.¹⁹ In 2016, in a case about a university's investigation of sexual misconduct, a federal district court in the Eastern District of Virginia wrote that there was no right to engage in BDSM activities, and went so far as to suggest that public universities could consider BDSM to be *per se* sexual misconduct.²⁰ If BDSM is unprotected as a fundamental right, and as such can be banned or regulated by state universities, does that also mean that states can ban or regulate BDSM as they see fit? Or does the right to privacy, particularly the right to sexual privacy, extend to the rights of consenting

¹³ See Chelsea Hawkins, *14 Outdated Sex Laws that Need to Change This Year, in One Unbelievable Map*, MIC (Jan. 4, 2016), <https://mic.com/articles/131616/14-outdated-sex-laws-that-need-to-change-this-year-in-one-map#.Ai5zsU5tm> [<https://perma.cc/2558-89R5>] (last visited Feb. 21, 2018) (listing, state by state, sex-related laws that are still on the books, but that are likely unconstitutional or would not be prosecuted today). Given the changing nature of legislation, it is possible that some of these have been repealed. For example, the article listed Florida's statute against unmarried cohabitation, but also mentions that earlier that year it was repealed. *Id.*

¹⁴ See Daniel Haley, Note, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631, 649 (2015).

¹⁵ See *id.*; Katie Zavadski, *Parents Can Lose Custody of Children Just for Being Kinky*, DAILY BEAST (June 18, 2015, 5:15 AM), <https://www.thedailybeast.com/parents-can-lose-custody-of-children-just-for-being-kinky> [<https://perma.cc/W7AG-8AHC>].

¹⁶ See, e.g., *id.*; Haley, *supra* note 14, at 649.

¹⁷ See Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 326 (2013) (discussing how domestic violence laws often do not encompass the wide range of behaviors that are actually domestic violence).

¹⁸ See, e.g., *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712 (E.D.Va. 2015); *People v. Davidson*, No. D064880, 2015 WL 4751166 (Cal. Ct. App. Aug. 12, 2015); *People v. Febrissy*, No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006); *State v. Van*, 688 N.W.2d 600 (Neb. 2004). These cases will all be described in more detail later in this Note.

¹⁹ See *Consent and BDSM: The State of the Law*, NAT'L COALITION FOR SEXUAL FREEDOM, <https://www.ncsfreedom.org/please-login-to-kap/item/580-consent-and-bdsm-the-state-of-the-law> [<https://perma.cc/FB7K-WRPP>] (last visited Feb. 21, 2018). This is not to say that juries have never taken consensual BDSM into account. Given the difficulty of prosecuting sexual assault in general, I believe that evidence of consensual BDSM would likely influence the jury's decision.

²⁰ See *generally Doe*, 132 F. Supp. 3d 712.

adults to engage in BDSM? Furthermore, how should the justice system adapt to provide for the best outcomes in legal scenarios where BDSM is involved?

Given the wide variety of practices, analyzing BDSM through a constitutional lens becomes complicated quickly. For example, if unprotected, the state could regulate the sexual activities of consenting adults, which seemingly goes against the right to sexual privacy.²¹ However, on the opposite end, if protected as a fundamental right, states could lose their ability to protect people from activities that involve a risk of injury or even death.²² In order to balance both the privacy rights of individuals as well as the state's interest, practitioners of BDSM should be given quasi-rights protection. This would not only provide freedom to those who wish to consent to BDSM, but also provide protection to potential victims. Furthermore, applying a quasi-rights protection provides both fairness and flexibility when BDSM becomes an element of other legal matters.

First, this Note will discuss the current precedent that has been set by Supreme Court decisions on the issue of sexual privacy. This Note will then argue that, in general, BDSM activities should be protected under the right to privacy, though with exceptions, and should therefore be reviewed under a form of heightened scrutiny. To determine where courts and states should draw the line under this review, this Note will explain a test that balances the interests of consent with the risk of injury. Finally, this Note will discuss some of the legal implications of recognizing BDSM as a right under sexual privacy.

I. HISTORY OF THE SUPREME COURT AND THE RIGHT TO PRIVACY

In 1965, in the landmark case *Griswold v. Connecticut*,²³ the Supreme Court held that a law prohibiting the use of contraceptives by married people was unconstitutional.²⁴ This case established the precedent for the right to privacy by asserting that even though the Constitution does not explicitly contain an amendment for privacy, it is constructed upon the inferred combination of several constitutional guarantees.²⁵ Not only did the Court balk at the implication that the police could investigate the intimate relations of married people,²⁶ but it also created the “zone of privacy” to protect those intimate relations.²⁷

²¹ See *Consent and BDSM: The State of the Law*, *supra* note 19 (discussing how the doctrine of sexual privacy has not been applied in a BDSM context).

²² See McArthur, *supra* note 12; *cf.* *Consent and BDSM: The State of the Law*, *supra* note 19.

²³ 381 U.S. 479 (1965).

²⁴ *Id.* at 485–86.

²⁵ See *id.* at 484–85 (discussing the concept of “penumbras”).

²⁶ See *id.* at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

²⁷ *Id.* at 484–85.

Later, the Court expanded this protection to include non-married persons in *Eisenstadt v. Baird*.²⁸ The Court gave individuals, married or not, the right to use contraceptives, and also expanded the right to privacy to include freedom from “unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁹ In *Eisenstadt*, the Court examined two grounds for banning contraceptives for unmarried persons, deterring fornication and protecting health, and determined that neither constituted the true legislative purpose of the law.³⁰ Furthermore, the Court also held that banning contraceptives for unmarried people violated equal protection, and, given their previous ruling that married couples could use contraceptives as a federally protected right to privacy, anyone should have the right to use it, regardless of their marriage status.³¹

The next major Supreme Court case to address the right to privacy in terms of family planning was *Roe v. Wade*.³² The Court held that women have the fundamental right to terminate a pregnancy before the fetus becomes viable, if they so choose.³³ In their explication of the right to privacy, the Court wrote that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”³⁴ The Court held that the right to privacy was broad enough to encompass the decision to terminate a pregnancy, specifically because of the potential physical or mental harm to the mother if forced to carry a child to term.³⁵ The Court also listed several areas of personal decision-making that the right to privacy can extend to, including activities related to marriage, procreation, contraception, family relationships, and child-rearing and education.³⁶

²⁸ 405 U.S. 438 (1972).

²⁹ *Id.* at 453.

³⁰ *See id.* at 443, 448–53.

³¹ *Id.* at 443, 454–55.

³² 410 U.S. 113 (1973).

³³ *Id.* at 164–67.

³⁴ *Id.* at 152 (internal citation omitted).

³⁵ *Id.* at 153.

³⁶ *Id.* at 152–53 (citing *Eisenstadt*, 405 U.S. at 453–54 (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications . . . is surely to deprive all the State’s citizens of liberty without due process of law.” (internal citation omitted)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing a “private realm of family life which the state cannot enter”); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race,” and therefore require constitutional standard of strict scrutiny); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who

The right for women to get an abortion was further strengthened in *Planned Parenthood v. Casey*,³⁷ when the Court held that not only did women have a right to terminate a pregnancy, but that the government could not place an “undue burden” on a woman’s access to abortion, because such a burden also violated their rights.³⁸ The Court further explained, in reference to abortion, that “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.”³⁹

However, despite this list of activities that fall under personal privacy, all of which tangentially relate to sex, the Court did not specify a right to sexual privacy in *Bowers v. Hardwick*.⁴⁰ In fact, ten years later the Court rejected the right to sexual privacy by upholding (5–4) a Georgia law that criminalized sodomy, which included both anal and oral sex.⁴¹ The opinion held that sodomy, specifically homosexual sodomy, was neither deeply rooted in the nation’s history, nor implicit in the concept of ordered liberty, arguing that there is a long history of government regulation on the basis of morality and ethical Judeo-Christian values.⁴² In his dissent, Justice Blackmun pushed back against the assumption that homosexual sex was unprotected, writing, “sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.’”⁴³ In *Bowers*, the Court was forced to directly examine sexual privacy unrelated to procreation and family planning, and determined that governments could ban certain sexual practices between consenting adults.⁴⁴

Ultimately, this doctrine was largely overturned in *Lawrence v. Texas*.⁴⁵ The Court examined a Texas law that banned homosexual sodomy, and found that it violated the right to privacy.⁴⁶ This decision officially recognized that privacy extends to sexual activity beyond that which is directly related to procreation.⁴⁷ The recognition of the right for consenting adults to engage in sexual activity in the privacy of their own homes should logically extend to many BDSM activities.⁴⁸

nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”)).

³⁷ 505 U.S. 833 (1992).

³⁸ *See id.* at 876.

³⁹ *Id.* at 851.

⁴⁰ 478 U.S. 186 (1986).

⁴¹ *Id.* at 196.

⁴² *Id.* at 192–96.

⁴³ *Id.* at 205 (Blackmun, J., dissenting) (quoting, ironically, Chief Justice Burger’s opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973), which held that there is no First Amendment protection for obscene films).

⁴⁴ *See id.* at 196.

⁴⁵ 539 U.S. 558 (2003).

⁴⁶ *See id.*

⁴⁷ *See id.* at 578–79.

⁴⁸ This Note will later examine the *Lawrence* decision in greater detail and apply it to the rights analysis for BDSM. *See infra* Section III.A.

II. BDSM AND THE LAW

A. *Categorizing BDSM*

Unlike sodomy, which can be defined by the state as a certain set of physical practices,⁴⁹ BDSM contains such a wide variety of practices that it can be difficult to specify what exactly it is.⁵⁰ One such difficulty in defining BDSM is that, though it is generally viewed as sexual in nature, people have various motivations for practicing it, including both spiritual and therapeutic.⁵¹ Furthermore, within specific subsets of BDSM, individual preferences vary so much that what may be considered extreme by one person may be viewed as “vanilla”⁵² by another.⁵³ For example, some people enjoy receiving pain, but do not want their partner to leave any sort of “mark”⁵⁴ on their body, while others will specifically ask for bruises or abrasions.⁵⁵ There are people who consider themselves members of a community or lifestyle, some even labeling themselves as 24/7 practitioners of BDSM, while others limit their activities to the bedroom.⁵⁶ Finally, there are people who consider their BDSM lifestyle to be central to their identity as a person, much in the same way a person identifies with a religion or sexuality, while others see it only as a form of roleplay, meant to “spice things up.”⁵⁷

These differences make it difficult to categorize what is and is not BDSM. However, for the sake of defining BDSM for constitutional analysis, BDSM will be defined broadly as “a range of sexual preferences that generally relate to enjoyment of physical

⁴⁹ See William N. Eskridge, *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 655–66 (describing the history of sodomy laws in the United Kingdom and United States).

⁵⁰ See generally JAY WISEMAN, *SM 101: A REALISTIC INTRODUCTION* (2d ed. 1998) (describing various BDSM practices and guidelines); Hébert & Weaver, *supra* note 6.

⁵¹ Margaret Nichols, *Psychotherapeutic Issues with “Kinky” Clients: Clinical Problems, Yours and Theirs*, 50 J. HOMOSEXUALITY 281, 285–86 (2006).

⁵² *Id.* at 285 (using “vanilla” as a term to describe heteronormative, non-BDSM activities).

⁵³ There is debate amongst BDSM practitioners about the concept of the “one-true-way,” the idea that there is a specific way in which people should go about conducting their dynamics and activities. See MARGOT WEISS, *TECHNIQUES OF PLEASURE: BDSM AND THE CIRCUITS OF SEXUALITY* 74–75 (2011); see also Lakota Phillips, *Breaking Taboo: BDSM’s No True Way*, YOUTUBE (Feb. 23, 2015), <https://www.youtube.com/watch?v=-C0g8Lo11VM> (hosting a debate with BDSM experts Eden Bradley and Ann Mayburn on authorship and the problems with the “one true way” philosophy).

⁵⁴ This is a word commonly used in BDSM communities to describe visible imprints on the skin after engaging in BDSM activities. See, e.g., WISEMAN, *supra* note 50, at 307.

⁵⁵ See Jennifer Marion, *Please Hurt Me: A Feminist Psychoanalytic Study of Women’s Consensual Sadomasochistic Sexual Practices*, 156–57 (June 2016) (unpublished Ph.D. dissertation, Adelphi University) (discussing the BDSM practices of three women who described their enjoyment of pain).

⁵⁶ See *id.* at 40–49 (describing the history of BDSM, modern community organization, and a glossary of basic terms).

⁵⁷ See e.g., *id.*

control, psychological control, and / or pain.”⁵⁸ This definition is flexible and diverse, while also limiting the scope of the various practices. Given its taboo nature, information about BDSM used to be difficult to find, limited to self-published books sold in adult bookstores.⁵⁹ However, today, the internet provides a wealth of information about BDSM, including its history, information on safety and technique, and opportunities to network with other kinky people through community events.⁶⁰

For the analysis of whether BDSM is a fundamental right protected by the Fourteenth Amendment, this Note will use the legal reasoning in the written opinion from *Lawrence v. Texas*.⁶¹ There are several reasons why *Lawrence* provides the best precedential legal comparison for BDSM currently available. First, unlike the other zones of privacy listed in *Roe v. Wade* that are protected by the Fourteenth Amendment,⁶² sodomy is a specific sexual activity that takes place between consenting adult partners that is not directly related to procreation or family planning.⁶³ Like BDSM, the question is whether the activity itself is protected as a private act, as opposed to the right to decide whether to have a child.⁶⁴ Second, like sodomy, BDSM has a history of being viewed as immoral, taboo, and degenerate.⁶⁵ BDSM, along with sodomy, has had run-ins with the obscenity exception to the First Amendment, and even today could be considered illegal if it is deemed too extreme.⁶⁶

Third, there has been a similar history of discrimination for those in the LGBT and BDSM communities, and a banding together to unite against the majority.⁶⁷ In fact, there is a lot of crossover between groups in terms of sexual identity and providing safe, protected spaces for engaging in certain sexual practices.⁶⁸ Furthermore, both are very careful about protecting the identities of individuals, particularly if

⁵⁸ Hébert & Weaver, *supra* note 6, at 106.

⁵⁹ Cf. JULIE PEAKMAN, *THE PLEASURE'S ALL MINE: A HISTORY OF PERVERSE SEX* 8–9 (2013) (discussing the difficulty of studying the history of sexual behavior).

⁶⁰ The National Coalition for Sexual Freedom provides a list of online resources, including an online glossary. See *NCSF: Resource Library*, NAT'L COALITION FOR SEXUAL FREEDOM, <https://ncsfreedom.org/resources/resource-library.html> [<https://perma.cc/VNW9-6ERV>] (last visited Feb. 21, 2018).

⁶¹ See 539 U.S. 558 (2003).

⁶² See, e.g., *supra* notes 32–36 and accompanying text.

⁶³ See Eskridge, *supra* note 49, at 655–66.

⁶⁴ *Lawrence*, 539 U.S. at 565.

⁶⁵ See PEAKMAN, *supra* note 59, at 18–19; see also, e.g., Haber, *supra* note 10.

⁶⁶ See, e.g., Scot A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 75–77 nn.4, 6 (1992).

⁶⁷ See generally LEATHERFOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE (Mark Thompson ed., 1991) [hereinafter LEATHERFOLK] (compiling various essays that describe the history of gay and lesbian leather culture since the 1940s); *History of Our Leather-S/M-Fetish Subculture and Communities*, AMBROSIO'S BDSM SITE, <http://www.evilmunk.org/a/stein.cfm> [<https://perma.cc/SKX4-UU6B>] (last visited Feb. 21, 2018) (listing several works that discuss the history of BDSM culture).

⁶⁸ See generally, e.g., LEATHERFOLK, *supra* note 67.

they are not “out” to friends and family.⁶⁹ Fourth, like homosexuality, BDSM has gained both a level of popularity and acceptance in modern media and culture, largely due to the widespread success of the *Fifty Shades of Grey* trilogy.⁷⁰ Fifth, engaging in BDSM is an identity based on a sexual preference.⁷¹ Though science largely points to sexual orientation as an immutable characteristic,⁷² the decision to engage in homosexual sex, or more generally, sodomy, is still a choice that is made by the individual, unlike a protected status such as race or biological sex.⁷³ This is similar to BDSM because, regardless of whether the preference is immutable, it is ultimately a sexual choice that is connected to a sexual identity.⁷⁴

Finally, aside from the similarities between sodomy and BDSM as sexual practices, *Lawrence* provides the most recent Supreme Court decision on the issue of sexual privacy.⁷⁵ Decided in 2003, *Lawrence* overturned *Bowers* and declared that intimate, sexual acts between consenting adults fall under the protection of the Due Process Clause of the Fourteenth Amendment via the right to privacy.⁷⁶ Justice Kennedy penned the majority opinion, declaring the right to sexual privacy.⁷⁷ Justice O’Connor wrote a concurring opinion, arguing that the Texas law is unconstitutional as a violation of equal protection.⁷⁸ And Justice Scalia penned a scathing dissent, listing a slew of other sexual practices that could now become legally protected as sexual privacy, including “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”⁷⁹

Since the decision in *Lawrence*, at least one of Justice Scalia’s fears has come true: same-sex marriage has been recognized as a fundamental right.⁸⁰ In a 5–4

⁶⁹ LGBT and BDSM communities share similar language, such as the word “out,” which means to have disclosed one’s sexual orientation to oneself and/or others. See Guy Baldwin, *A Second Coming Out*, in LEATHERFOLK, *supra* note 67, at 166, 177.

⁷⁰ See *supra* notes 1–4 and accompanying text; see also, e.g., Haber, *supra* note 10.

⁷¹ See generally Haber, *supra* note 10; Marion, *supra* note 55.

⁷² See Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met*, 53 CLEV. ST. L. REV. 545, 560–71 (2005–2006).

⁷³ See Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (arguing that homosexuality should be a protected class, though it is not recognized as one by the Supreme Court); see also, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567, 574 (2003).

⁷⁴ This Note will later examine BDSM as a potentially protected status under Equal Protection. See *infra* Section III.B.

⁷⁵ See generally *Lawrence*, 539 U.S. 558; Haber, *supra* note 10.

⁷⁶ See *Lawrence*, 539 U.S. at 575–79.

⁷⁷ See *id.*

⁷⁸ *Id.* at 579–85 (O’Connor, J., concurring) (arguing that the Texas sodomy laws unfairly and exclusively punish homosexual sodomy).

⁷⁹ *Id.* at 586, 590 (Scalia, J., dissenting) (arguing that all laws based on moral choices can now be called into question, potentially inundating the courts).

⁸⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

decision, Justice Kennedy, writing for the majority as he did in *Lawrence*, determined that the Fourteenth Amendment “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁸¹ Justice Scalia was right—*Lawrence* has opened the door to recognizing other categories of sexual privacy.⁸² However, this recognition is important to ensure justice, equal treatment, and fairness under the law.

B. *BDSM and the Courts*

Thus far, BDSM has not been recognized as a right by either state or federal courts; the cases that have made it to appellate review have each involved a defendant who argued a constitutional right to use the context of a BDSM negotiation as a defense to criminal charges.⁸³ For example, in *People v. Febrissy*,⁸⁴ Febrissy was charged with torture, forcible rape, assault with a deadly weapon, and infliction of corporal injury upon a cohabitant.⁸⁵ Though a jury only convicted him of the last charge, he appealed the decision, and argued a violation of his due process rights because the jury should have been given an instruction that “apparent consent [was] a defense to his crime.”⁸⁶ Febrissy invoked the decision in *Lawrence* as the basis for his claim.⁸⁷

The Court of Appeals for the Third District of California rejected this argument by determining that regardless of whether *Lawrence* applies, “the jury’s verdict necessarily reflects a rejection of any claim that the victim consented or the defendant reasonably could have believed in her consent. Therefore, in the absence of full and mutual consent, the conviction does not transgress any protected liberty interests under the federal Constitution.”⁸⁸ There, the court avoided the analysis of whether the right to BDSM applied to that case because, either way, there was no consent. Would there have been a different outcome if a more viable consent claim hypothetically existed?

Another appellate court in California rejected this argument. In *People v. Davidson*,⁸⁹ the Court of Appeals for the Fourth District of California held that there was no error in a trial court’s denial of a jury instruction that consent to BDSM activity was a defense to charges of torture and threats to kill.⁹⁰ In that case, the jury

⁸¹ *Id.* at 2597.

⁸² Compare *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting), with *Obergefell*, 135 S. Ct. at 2604–05.

⁸³ See generally Haley, *supra* note 14 (arguing for the constitutional right to assert BDSM negotiations as a defense to certain crimes).

⁸⁴ No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006).

⁸⁵ Febrissy engaged in a videotaped session of BDSM activity that involved hitting the victim with various instruments and then having sexual intercourse. *Id.* at *1–2.

⁸⁶ *Id.* at *1.

⁸⁷ *Id.* at *5.

⁸⁸ *Id.*

⁸⁹ No. D064880, 2015 WL 4751166 (Cal. Ct. App. Aug. 12, 2015).

⁹⁰ *Id.* at *7–9.

found the defendant, Davidson, guilty of torture, injury to a cohabitant, and making criminal threats.⁹¹ There, the court categorically denied the right to use consent as a defense to “conduct involving serious bodily injury and terrorizing threats, even when based on a claim of consensual sadomasochistic activity.”⁹² The Court in *Davidson* did provide an important caveat, writing:

The jury was of course free to consider the BDSM evidence when deciding whether the prosecution had proven all the elements of the charged offenses beyond a reasonable doubt; however, it was *not* required to evaluate whether the victim’s consent rendered the seriously injurious and threatening conduct lawful even if the elements of the offenses were otherwise proven.⁹³

As acknowledged by the court in *Davidson*, evidence of a BDSM dynamic can be an important weighing mechanism for the jury.⁹⁴ For example, though evidence was presented that the victim had consensually engaged in BDSM previously, the jury still found Davidson guilty of multiple crimes.⁹⁵ In contrast, Febrissy was acquitted of torture, rape, and assault with a deadly weapon, even though his actions had been videotaped.⁹⁶ Despite the legal rejection of BDSM as a defense, the reality is that juries have considered alternative contexts for consent.⁹⁷

Though the two previously mentioned cases were not officially published by the California courts, the Supreme Court of Nebraska has publicly weighed in on the issue of applying *Lawrence* to cases involving BDSM; in *State v. Van*,⁹⁸ the defendant, Van, was convicted of first-degree sexual assault, first and second-degree assault, false imprisonment, and terroristic threats.⁹⁹ The court held, “[w]e find nothing

⁹¹ *Id.* at *3. Davidson had been abusing his girlfriend for several months before she left. *Id.* at *1–2. The victim testified that she had engaged in consensual BDSM activities in the past with another partner; however, Davidson was emotionally unstable and would do things to her without her consent. *Id.* at *1–3. Eventually she fled and reported him to police for domestic violence. *Id.* at *2–3.

⁹² *Id.* at *7–9 (outlining a litany of cases where lack of consent is an element of the crime and where lack of consent is not an element, ultimately holding that torture, injury to a cohabitant, and criminal threats fall in the latter category).

⁹³ *Id.* at *8.

⁹⁴ *See id.*

⁹⁵ *Id.* at *3–9.

⁹⁶ *People v. Febrissy*, No. C049033, 2006 WL 2006161, at *1–3 (Cal. Ct. App. July 19, 2006).

⁹⁷ *See supra* notes 19, 93 and accompanying text.

⁹⁸ 688 N.W.2d 600 (Neb. 2004).

⁹⁹ *Id.* at 626. The victim was engaged in a consensual “master/slave” relationship as a submissive to his dominant male partner. *Id.* at 608–09. The victim negotiated, with the knowledge of his partner, to engage in a consensual kidnapping by Van, who would also torture and

in *Lawrence* to even remotely suggest that non-consensual sexual conduct is constitutionally protected under any circumstances or that consent, once given, can never be withdrawn.”¹⁰⁰ The court also held that all attempts to do physical violence were unlawful, that a person could not consent to an unlawful assault, and that the Nebraska assault statutes did not refer to consent.¹⁰¹ Furthermore, the false imprisonment and terroristic threat statutes, like the assault statutes, were not unconstitutional as applied to Van because the object of the statutes was to protect citizens from injury.¹⁰² In *Van*, the Court highlighted two important factors when analyzing the question of Van’s constitutional claims: consent and injury.¹⁰³ As will be argued later in this Note, these two factors are the crux of the holding in *Lawrence*, and are the standards that should be used when analyzing future cases, though with more flexibility than an outright rejection of the legality of BDSM, which has been seen at the state level.

Recently, the constitutional claim has also been rejected at the federal level; in *Doe v. Rector & Visitors of George Mason University*,¹⁰⁴ a student, Doe, was found guilty of sexual misconduct and sued his public state university for a violation of his right to due process.¹⁰⁵ Doe argued, in part, that he had a fundamental right under substantive due process to practice BDSM, and that the school was legally obligated to adjudicate his sexual misconduct charge within the context of BDSM.¹⁰⁶ Though the district judge found in Doe’s favor under a procedural due process violation, the judge also addressed the sexual privacy argument.¹⁰⁷ The court relied on the analysis in *Washington v. Glucksberg*,¹⁰⁸ which held that for a fundamental liberty interest to be judicially enforceable, the liberty interest must be “deeply rooted in the nation’s history” and “implicit in the concept of ordered liberty.”¹⁰⁹ The court then determined that BDSM did not meet these requirements and therefore Doe did not have a liberty interest at stake when participating in BDSM activities.¹¹⁰

This Note does not argue against the *outcome* in each of these cases. However, the legal argument that sexual privacy does not extend to BDSM activities has the potential to result in erroneous decisions that are against the interests of justice.

punish him. *Id.* at 610. The victim testified that though the arrangement with Van was initially consensual, at some point he revoked consent and was held against his will. *Id.* at 610–12.

¹⁰⁰ *Id.* at 614.

¹⁰¹ *Id.*

¹⁰² *Id.* at 615.

¹⁰³ *See id.* at 613–15.

¹⁰⁴ 149 F. Supp. 3d 602 (E.D. Va. 2016).

¹⁰⁵ *See id.* at 608.

¹⁰⁶ *Id.* at 631–34.

¹⁰⁷ *Id.* at 617–22, 631–34.

¹⁰⁸ 521 U.S. 702, 721 (1997).

¹⁰⁹ *Doe*, 149 F. Supp. 3d at 632 (citing *Glucksberg*, 521 U.S. at 721).

¹¹⁰ *Id.* (“There is no basis to conclude that tying up a willing submissive sex partner and subjecting him or her to whipping, choking, or other forms of domination is deeply rooted in the nation’s history and traditions or implicit in the concept of ordered liberty.”).

BDSM should not be used as a blanket defense. At the same time, however, adults should have the right to engage in consensual BDSM activities without fear of an overzealous prosecutor.

III. BDSM AND THE CONSTITUTION

A. Why BDSM Should Be Protected Under the Right to Privacy

In the majority opinion in *Lawrence*,¹¹¹ the Court held that Texas could not outlaw homosexual sodomy.¹¹² In order to come to this conclusion, it first described the precedents set by *Griswold*, *Eisenstadt*, and *Roe v. Wade*, each of which found that “the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”¹¹³ Then, the Court walked through the analysis of *Bowers*, which had held that sodomy was not protected under the right to privacy, and determined that the *Bowers* Court had “misapprehended the claim of liberty there presented to it,”¹¹⁴ and therefore decided incorrectly.¹¹⁵

Before engaging in their analysis of the *Bowers* decision, the Court first described a general rule for state regulation of sexual activity:

The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control 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.¹¹⁶

There, the Court was describing the relationship between regulating the sexual activity and regulating peoples’ relationships with one another, in the context of homosexuality, and wrote that states should avoid legislating in this area.¹¹⁷ As a general rule, this can also apply to BDSM; for example, a popular practice within BDSM is domination/submission, otherwise known as power exchange, in which one person chooses to give up control to another person.¹¹⁸ Within this practice,

¹¹¹ 539 U.S. 558 (2003).

¹¹² *Id.* at 578–79.

¹¹³ *Id.* at 565.

¹¹⁴ *Id.* at 566–67.

¹¹⁵ *Id.* at 567–78.

¹¹⁶ *Id.* at 567.

¹¹⁷ *Id.*

¹¹⁸ See generally WISEMAN, *supra* note 50, at 245.

sexual partners may choose to engage in what is called consensual non-consent, where it is pre-negotiated to participate in certain activities, even if the other person verbally denies consent while the activity is taking place.¹¹⁹ Laws that criminalize this practice would therefore not only regulate the activity, but would also regulate the relationship dynamic that exists between the partners. However, the Court in *Lawrence* did qualify this general rule to exclude relationships where people are injured.¹²⁰ Though this exclusion is important to help protect people from domestic violence and sexual assault, it also implies that states can regulate a sexual activity if there is injury to the person,¹²¹ the risks of which can be inherent for certain types of BDSM play.¹²²

Next, the Court delved into the analysis of *Bowers*; first, it examined the determination that consensual sodomy is not deeply rooted in history and tradition.¹²³ The Court reasoned that, though centuries of American law had banned certain non-procreative sexual activities, such as “sodomy, buggery, and crime[s]-against-nature,” actual prosecutions between consenting adults were quite rare, likely given the private nature of the activities.¹²⁴ This implied a quiet acceptance of the right to engage in homosexual sodomy, even though officially it was forbidden.¹²⁵ Furthermore, though historically homosexuality had been publicly condemned as immoral by American society, the Court quoted *Casey*, stating, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”¹²⁶ The Court also pointed to the emerging legal trend before, during, and after *Bowers* of states removing laws that regulated private, sexual decisions made by consenting adults.¹²⁷

Applying this standard to BDSM would likely result in a similar outcome. First, unlike sodomy, BDSM has not been explicitly banned in and of itself.¹²⁸ Arguably, a person could be charged with a crime against nature, or charged with battery or sexual assault; however, prosecutions for consensual BDSM would likely have been exceedingly rare.¹²⁹ Furthermore, given the number of people who engage in or fantasize

¹¹⁹ See *id.* at 47–49.

¹²⁰ *Lawrence*, 539 U.S. at 567, 578.

¹²¹ See *id.*

¹²² See generally WISEMAN, *supra* note 50, at 307; Marion, *supra* note 55.

¹²³ *Lawrence*, 539 U.S. at 568.

¹²⁴ *Id.* at 568–76.

¹²⁵ See *id.*

¹²⁶ *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

¹²⁷ *Id.* at 572 (“In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for “criminal penalties for consensual sexual relations conducted in private.” It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” (internal citations omitted)).

¹²⁸ See *supra* notes 10–17, 19 and accompanying text.

¹²⁹ It is difficult to know how many of these cases would have existed. In modern cases, BDSM is usually brought up as a defense to sexual assault. See, e.g., *supra* Section II.B.

about some aspect of BDSM,¹³⁰ there would likely be even more of a quiet acceptance of the right for adults to privately engage in those activities. BDSM shares a similar history with homosexual sodomy of being decried as immoral and taboo by leaders within society, evidenced by obscenity laws which have banned public depictions of people engaging in BDSM.¹³¹ However, like homosexuality, there has been a growing acceptance of BDSM activities and culture, which have resulted in a relaxing of those obscenity laws and an increase of people openly admitting that they have a kink or a fetish.¹³² One issue that does separate BDSM from the legal acceptance of homosexual sodomy is, again, the risk of injury or harm.¹³³ Certain activities, in particular the infliction of pain, cannot only leave marks on the body, but if done incorrectly can also result in serious injury, permanent disability, or even death.¹³⁴ Therefore, even though moral outrage may not constitute a good reason to regulate BDSM, the fact that peoples' health and safety could be at risk is a legitimate justification for criminalization.

The Court, in *Lawrence*, also examined the liberty interests at stake for homosexual sodomy; again, it quoted *Casey*:

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.¹³⁵

¹³⁰ See Tanya Bezreh et al., *BDSM Disclosure and Stigma Management: Identifying Opportunities for Sex Education*, 7 AM. J. SEXUALITY EDUC. 37–61 (2012) (citing studies that illustrate the prevalence of BDSM); see also Eveleth, *supra* note 7.

¹³¹ See RICHARD F. HIXSON, *PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM* 146–56 (1996) (discussing the standards used to determine what is obscenity, including the “Miller Test”); see also, e.g., PEAKMAN, *supra* note 59, at 8–9.

¹³² See *supra* notes 1–5 and accompanying text; *Lawrence*, 539 U.S. at 572–73; Tim Wu, *American Lawbreaking: How Laws Die*, SLATE (Oct. 15, 2007, 7:29 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/how_laws_die.html [<https://perma.cc/3YW3-ABZF>] (“Over the last decade, and without repeal of a single law, the United States had quietly and effectively put its adult obscenity laws into a deep coma, tolerating their widespread violation with little notice or fanfare.”). Though over the past decade there has been a relaxing of obscenity prosecutions, very recently, now Attorney General, Jeff Sessions, indicated during his confirmation hearings that he may be more proactive about investigating obscene material. *Sessions Hearing: Obscenity*, C-SPAN (Jan. 10, 2017), <https://www.c-span.org/video/?c4644425/sessions-hearing-obscenity> [<https://perma.cc/2R94-5AFW>]; see *Lawrence*, 539 U.S. at 572–77.

¹³³ See generally WISEMAN, *supra* note 50; Marion, *supra* note 55.

¹³⁴ Russell Goldman, *Love Hurts: Sodomasochism's Dangers*, ABC NEWS (Feb. 14, 2008), <http://abcnews.go.com/Health/story?id=4285958&page=1> [<https://perma.cc/T377-G5C2>].

¹³⁵ *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

The Court concluded that the right to engage in homosexual activity is one that pertains to personal dignity and autonomy, and that banning homosexual sodomy would deny a right that is at the heart of the concept of liberty.¹³⁶

Applying this standard to BDSM would likely result in a similar finding. How a person experiences sexual pleasure with their partner would likely be considered an intimate and personal choice that defines one's own existence in the same way that engaging in homosexual sex is a manifestation of a person's sexual identity. There are many people who consider BDSM to be both a defining feature of their identity and also the foundation of their romantic and sexual relationships with others.¹³⁷ People also use BDSM therapeutically or spiritually to heal past trauma or better connect with other people and their surroundings.¹³⁸ Therefore, there is a strong liberty interest in allowing people to engage in taboo sexual practices within the privacy of their own home and with other consenting adults.

The majority opinion in *Lawrence* overturned *Bowers* and affirmed the existence of a right to sexual privacy by quoting the *Bowers* dissent, which stated that immorality is not a sufficient justification for prohibiting sodomy and that decisions concerning the intimacies of physical relationships, regardless of whether it concerns procreation, or whether people are married, are a liberty interest protected under the Fourteenth Amendment.¹³⁹ The Court in *Lawrence* then proceeded to explain:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.¹⁴⁰

¹³⁶ *Id.*

¹³⁷ Meg Barker et al., *Kinky Clients, Kinky Counselling? The Challenges and Potentials of BDSM*, in *FEELING QUEER OR QUEER FEELINGS? RADICAL APPROACHES TO COUNSELLING SEX, SEXUALITIES AND GENDERS* 106–24 (Lyndsey Moon ed., 2008). It is important to note that this book was published before the DSM V was published, which removed BDSM from its list of pathological disorders in 2010. See Merissa Nathan Gerson, *BDSM Versus the DSM: A History of the Fight that Got Kink De-Classified as Mental Illness*, ATLANTIC (Jan. 13, 2015), <https://www.theatlantic.com/health/archive/2015/01/bdsm-versus-the-dsm/384138/> [<https://perma.cc/K6TG-3CPV>].

¹³⁸ See generally BROKEN TOYS: SUBMISSIVES WITH MENTAL ILLNESS & NEUROLOGICAL DYSFUNCTION (Del Tashlin & Raven Kaldera eds., 2014) (discussing how dominant partners can use power exchange and BDSM to help their submissive partners cope with, or heal from, mental illness); Nichols, *supra* note 51, at 285.

¹³⁹ *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

¹⁴⁰ *Id.* at 578.

This statement appears to express the rule for sexual privacy created by the Court. When adults choose to engage in a sexual practice with mutual consent, that private sexual conduct cannot be criminalized by the state, especially if that sexual practice is a part of the person's identity.

Using this rule in isolation would likely result in a finding that supports BDSM as a fundamental right. First, BDSM does not depend inherently on the participation of people under the age of consent, because the sexual activities for BDSM participants could be subject to the same age restrictions that apply to non-BDSM sexual contact. The issue of "full and mutual consent" is slightly more complicated, though it is possible to compare the ability to consent to BDSM to a number of other activities that can also lead to injury.¹⁴¹ However, in general, even when people are practicing "consensual non-consent," which is when partners negotiate to remove the requirement of consent for certain activities, it is common practice for there to be a "safe-word" which is meant to be a substitute for revoking consent.¹⁴² Therefore, BDSM would likely meet the requirement of full and mutual consent.

Finally, many people who engage in BDSM do consider it an important part of their lives and identities.¹⁴³ For the state to intervene in their private relationships and criminalize intimate and sexual conduct would likely violate the liberty interest that people have for defining and manifesting their own identity.¹⁴⁴ The criminalization and prosecution of people for their private sexual activities would demean their existence by outing them to their friends and family, putting them on public display, and categorizing their actions as immoral and wrong.

However, this rule was not written in isolation; the Court buffered sexual privacy with several implied exclusions.¹⁴⁵ First, it described the issues that were not in play with the Texas sodomy law: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."¹⁴⁶ The Court also made a determination in terms of the judicial review for the Texas law that regulated homosexual sodomy, writing, "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."¹⁴⁷

¹⁴¹ See Michele C. Nielson, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prison*, 64 UCLA L. REV. 230, 248–54 (2017).

¹⁴² WISEMAN, *supra* note 50, at 52–55. For example, partners may negotiate that even if they say the word "no" or "stop," the other person may continue the activity if they so choose. *Id.* However, if they say the word "red," which is a common safe word, the activity must cease immediately, because consent has been revoked. *Id.*

¹⁴³ See generally Barker et al., *supra* note 137.

¹⁴⁴ See generally *id.*; *Lawrence*, 539 U.S. 558.

¹⁴⁵ See *Lawrence*, 539 U.S. at 578 (stating *Lawrence* did not address minors or those who might be coerced or injured).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Though the Court did not specifically address whether BDSM is a fundamental right, these qualifiers suggest that the Court intended to limit the extent of sexual privacy, without explicit line-drawing. First, rather than stating that the privacy is limited by the listed exclusions, the Court wrote that these issues simply were not at play when analyzing homosexual sodomy.¹⁴⁸ Therefore, it did not make an official determination that the possibility of injury, coercion, or non-consent are automatically unprotected. This complicates the realm of legal analysis for BDSM because it could arguably cut both ways in terms of precedent. On one hand, it appears that the Court is attempting to differentiate between harmful (unprotected) and harmless (protected) sexual activities, which could set a precedent that BDSM is unprotected. On the other hand, the careful balancing act of excluding certain activities could mean that there may be other potential areas of sexual privacy that the Court did not wish to address in the context of homosexuality because they are more controversial.

The Court in *Lawrence* also determined that anti-sodomy laws did not further any legitimate state interest.¹⁴⁹ The Court would not likely come to the same conclusion for BDSM, because the state does have a legitimate interest in protecting the health and safety of its population.¹⁵⁰ Not all of the activities involved in BDSM involve an inherent risk of injury, particularly when time-tested safety precautions are in place and followed correctly.¹⁵¹ However, risk can never be eliminated completely, and accidents do happen.¹⁵² For example, bondage can involve the restriction of blood flow, domination can lead to an abuse of power and psychological harms, and sadomasochism, which directly involves the infliction and reception of pain, can result in serious bodily injury, including broken bones.¹⁵³ If the state wanted to regulate or ban certain practices within BDSM, it would likely succeed in the argument that there is a legitimate state interest in preventing physical and psychological harm.

However, states cannot eliminate all risk for every activity; even non-BDSM sexual activity can result in injury or infection.¹⁵⁴ For example, sexually transmitted infections (STIs) are prevalent in the United States amongst adults,¹⁵⁵ yet this is not a justification for the state to ban sex. Rather, it requires a more nuanced legal response. To continue with the STI example, states can require disclosure and consent, as well as legal recourse for victims of purposeful and malicious exposure.¹⁵⁶ However,

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (stating states have a legitimate interest in protecting the life of women in abortion cases).

¹⁵¹ *See WISEMAN, supra* note 50, at 305–07.

¹⁵² *See id.* at 305.

¹⁵³ *Id.*

¹⁵⁴ *See generally, e.g.*, CTRS. FOR DISEASE & PREVENTION, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2015 (2016), <https://www.cdc.gov/std/stats15/std-surveillance-2015-print.pdf> [<https://perma.cc/7WS3-QW7K>].

¹⁵⁵ *E.g., id.* at 1–2.

¹⁵⁶ *See generally* PUB. HEALTH RESEARCH, CTRS. FOR DISEASE CONTROL & PREVENTION,

despite the risk of injury, adults have the right to privately engage in sexual activity with consenting partners.¹⁵⁷ *Lawrence* provides this protection and therefore these justifications are not sufficient to allow states to ban or regulate BDSM without some form of heightened scrutiny.¹⁵⁸

B. Why BDSM Is Not Likely Protected Under Equal Protection

The *Lawrence* opinion also addressed the issue of Equal Protection.¹⁵⁹ The Texas law specifically banned homosexual sodomy, but not opposite-sex sodomy, and therefore, there was another Fourteenth Amendment argument that challenged the constitutionality of same-sex sodomy laws.¹⁶⁰ The Court agreed that there was a strong argument for equal protection in this case, but chose to directly overturn *Bowers* in order to emphasize the importance of privacy.¹⁶¹

However, O'Connor's concurrence in *Lawrence* addressed some of the substance of the equal protection claim.¹⁶² First, O'Connor drew a distinction between the Georgia sodomy law in *Bowers* that banned sodomy, and the Texas law that banned homosexual sodomy, stating that although morality can serve as a justification for rational basis review, morality may not be used to justify treating one group of people differently from another.¹⁶³ Highlighting the rule, she wrote, "the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law."¹⁶⁴ O'Connor did not recognize homosexuals as a protected class, and wrote that states could treat heterosexual and homosexual people differently for other reasons.¹⁶⁵ However, she drew the line at criminalizing homosexuality.¹⁶⁶

The most recent Supreme Court case to address the equal protection of homosexuals was *Obergefell v. Hodges*.¹⁶⁷ Like in the majority opinion for *Lawrence* and O'Connor's concurrence, the Court did not affirm that gay people were a constitutionally protected class.¹⁶⁸ Instead, the Court found that there is a fundamental right

STATE STATUTES EXPLICITLY RELATED TO SEXUALLY TRANSMITTED DISEASES IN THE UNITED STATES, 2013 (2014), <https://www.cdc.gov/std/program/final-std-statutesall-states-5june-2014.pdf> [<https://perma.cc/QK6V-YLTK>].

¹⁵⁷ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵⁸ See *id.* at 578–79.

¹⁵⁹ *Id.* at 574–75.

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at 574–79.

¹⁶² *Id.* at 581 (O'Connor, J., concurring).

¹⁶³ *Id.* at 583.

¹⁶⁴ *Id.* at 584.

¹⁶⁵ *Id.* at 585.

¹⁶⁶ *Id.*

¹⁶⁷ 135 S. Ct. 2584 (2015).

¹⁶⁸ See generally *id.*

to marriage, and prohibiting access was a violation of the right to due process.¹⁶⁹ Defining the right to marriage, the Court wrote that the Fourteenth Amendment “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”¹⁷⁰ *Obergefell* greatly expanded the concept of liberty by including identity and self-definition as a fundamental right, as opposed to the more narrow view in *Glucksberg* that it must be deeply rooted in history and implicit in ordered liberty.¹⁷¹

Given these legal precedents, and the fact that the Court was unwilling to recognize homosexuality as a constitutionally protected class of people, it is highly unlikely that practitioners of BDSM would be given protected status. Though homosexuality and BDSM do share some characteristics, they are also quite different. Speaking in generalities, homosexuality is an identity based on sexual attraction,¹⁷² whereas BDSM is an identity based on sexual practices.¹⁷³

If a person were to argue for equal protection based on their BDSM practices, they would have to overcome several hurdles. First, they would have to qualify as a protected class by showing that their sexual preferences are an immutable characteristic, that their group has suffered a history of discrimination, and that they lack political power.¹⁷⁴ Next, they would have to show that the state is engaging in some form of line-drawing, treating them differently based on their collective identity.¹⁷⁵ Finally, they would have to show that laws banning or regulating BDSM activity would not pass heightened review.¹⁷⁶

There is some evidence to support a genetic or biological predisposition for sexual preferences, and specifically for certain types of kinks and fetishes.¹⁷⁷ The mythology behind a preference for BDSM either being a result of a psychological disorder, or being a psychological disorder itself, has largely been debunked, and it has since been removed from the DSM V.¹⁷⁸ Furthermore, studies have shown that some people are just naturally aroused by certain things and others are not,¹⁷⁹ which means

¹⁶⁹ See *id.* at 2605.

¹⁷⁰ *Id.* at 2597.

¹⁷¹ See Tobias Barrington Wolff, *The Three Voices of Obergefell*, L.A. LAW., Dec. 2015, at 28, 32–33.

¹⁷² See generally Balog, *supra* note 72.

¹⁷³ See generally Barker et al., *supra* note 137.

¹⁷⁴ See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146–47 (2011) (discussing the factors used to measure the suspectness of a particular group and how these factors are often ill-defined, duplicative, and inconsistent).

¹⁷⁵ *Id.* at 146, 150–53.

¹⁷⁶ *Id.* at 136–37.

¹⁷⁷ Nichi Hodgson, *The Science of What Excites Kinky People Doesn't End with Armchair Psychology*, GUARDIAN (Feb. 14, 2015, 8:15 AM), <https://www.theguardian.com/commentisfree/2015/feb/14/science-bdsm-kink-biology-psychology-fifty-shades> [<https://perma.cc/CWT8-8U8V>].

¹⁷⁸ See Gerson, *supra* note 137.

¹⁷⁹ Cf. Meredith L. Chivers et al., *Agreement of Self-Reported and Genital Measures of*

that it is possible that enjoying certain kinks or fetishes is an immutable characteristic, one that people are biologically or genetically predisposed to.¹⁸⁰ However, unlike race, which cannot be changed, a preference for kink is just that: a preference.¹⁸¹ If homosexuality has not been determined to be a protected class, despite decades of scientific evidence indicating that sexual orientation is something people are born with,¹⁸² it is unlikely that BDSM would qualify. Therefore, it makes more sense to conceptualize BDSM as a privacy right under substantive due process.

IV. BALANCING INDIVIDUAL AND STATE INTERESTS: A CONSTITUTIONAL TEST FOR BDSM

BDSM poses a unique issue in terms of sexual privacy. Unlike other sexual acts that people would consider private, most notably the right to engage in sodomy,¹⁸³ BDSM has a different set of risks.¹⁸⁴ Therefore, it goes beyond the scope of the protections directly afforded in *Lawrence*, because the state has a compelling interest in protecting the physical well-being of its citizens.¹⁸⁵ At the same time, however, intuitively many people would likely feel that what happens in the bedroom between consenting adults should stay in the bedroom. For example, should the state be allowed to criminalize hickies?

Therefore, to balance the rights of individuals and the interests of the state, BDSM should qualify as a right to sexual privacy under *Lawrence*, and the courts should use a heightened level of scrutiny to analyze whether a state has violated that right, while still leaving room for states to be able to regulate very risky or injurious actions. The following test balances the level of consent and injury involved in the activity to determine whether it passes this heightened level of scrutiny.¹⁸⁶ This test has been designed to apply to any activity that a person may assert is a protected right under sexual privacy.

Sexual Arousal in Men and Women: A Meta-Analysis, 39 ARCHIVES SEX BEHAV. 5 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/20049519> [<https://perma.cc/3PQK-HXPR>] (conducting a meta-analysis of studies about sexual arousal which found gender differences in what is sexually stimulating).

¹⁸⁰ See Tess M. Gemberling et al., *BDSM As Sexual Orientation: A Comparison to Lesbian, Gay, and Bisexual Sexuality*, 1 J. POSITIVE SEXUALITY 56 (2015).

¹⁸¹ Cf. Hébert & Weaver, *supra* note 6, at 106 (“BDSM refers to a range of sexual preferences . . .”).

¹⁸² See generally Balog, *supra* note 72, at 571.

¹⁸³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

¹⁸⁴ See generally WISEMAN, *supra* note 50; Marion, *supra* note 55.

¹⁸⁵ Cf. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (stating in a case concerning warrantless breath tests incident to arrest for drunk driving, the state has a “paramount interest” in public highway safety (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979))).

¹⁸⁶ See *infra* Table A for a simplified illustration of this test.

A. Threshold

For an activity to qualify for protection under sexual privacy, there are certain elements that must be present. These elements have been mentioned in all of the major Supreme Court opinions that have addressed the issue of the right of the individual to make decisions about their personal, sexual choices.¹⁸⁷

First, the people who are participating in the activity must be adults; that is, at or above the age of consent for their jurisdiction.¹⁸⁸ Not only has the Supreme Court emphasized in the major privacy cases that the people involved in the activity—in particular the right to engage in oral or anal sex—are adults,¹⁸⁹ but legal jurisprudence has long held that children do not have the same rights as adults.¹⁹⁰ Furthermore, children receive special protection for sexual activity because of the potential for sexual abuse.¹⁹¹ Though it is theoretically possible that children do have a right to some form of sexual privacy, that has yet to be recognized and is generally left to the states to determine.¹⁹²

Second, for an act to be protected under the precedent of sexual privacy, it must be private.¹⁹³ Here, the distinction can be drawn by differentiating private acts from public acts. In *Griswold*, when the Court first recognized any concept of sexual privacy, it determined that substantive due process creates “zones of privacy.”¹⁹⁴ Comparing the right to privacy with a case about search and seizure rights, the Court in *Griswold* described

¹⁸⁷ See, e.g., *Lawrence*, 539 U.S. at 564 (“The petitioners were adults at the time of the alleged offense. Their conduct was private and consensual.”).

¹⁸⁸ See, e.g., *id.* at 564, 567, 577 (discussing protected private conduct as between consenting adults).

¹⁸⁹ *Id.*

¹⁹⁰ See, e.g., *J. D. B. v. North Carolina*, 564 U.S. 261, 273–75 (2011).

¹⁹¹ See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 4–40 (1997).

¹⁹² See Joanne Sweeny, *Do Sexting Prosecutions Violate Teenagers’ Constitutional Rights?*, 48 SAN DIEGO L. REV. 951 (2011) (describing the privacy interests and constitutional rights of a person under the age of majority). Sexual privacy rights for children can be a controversial topic. For example, access to birth control or abortion vary by state, as does the age of consent and the age at which someone can engage in specific types of sexual activity. For example, New Hampshire differentiates between penetrative and non-penetrative sex. See Mark Joseph Stern, *The Odd Sexual-Consent Law that Explains the Bizarre Owen Labrie Verdict*, SLATE (Aug. 28, 2015, 5:56 PM), http://www.slate.com/blogs/xx_factor/2015/08/28/owen_labrie_verdict_it_s_confusing_because_of_a_new_hampshire_sexual_consent.html [<https://perma.cc/PLV5-CH8D>].

¹⁹³ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“Such a law [referring to the forbidding of contraception] cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’” (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964))); see also *Lawrence*, 539 U.S. at 564.

¹⁹⁴ *Griswold*, 381 U.S. at 484.

it as “the sanctity of a man’s home and the privacies of life.”¹⁹⁵ Therefore, places where people have a reasonable expectation of privacy that are shielded from public view, specifically within their home or dwelling, would qualify as a zone of privacy.¹⁹⁶

Finally, the act must be sexual or recognized as a category of BDSM. Originally, the right to privacy was predicated on the right to decide whether to procreate.¹⁹⁷ Implied in this right is the ability to have non-procreative sex, which became the basis for sexual privacy in general, eventually extending to the right to engage in sodomy.¹⁹⁸ When describing this right, the Court has relied on the concept of intimacy; in *Casey*, which was quoted in *Lawrence*, the Court defined the decision as a “matter[] involving the most intimate and personal choices.”¹⁹⁹ In Blackmun’s dissent in *Bowers*, he referred to it as “sexual intimacy.”²⁰⁰ Finally, the Court in *Lawrence* referred to it as “private sexual conduct.”²⁰¹ However, the Court has not defined what exactly is “sexual” when it comes to protecting privacy rights.²⁰²

What is and is not sexual is extremely subjective and individualized. For example, “sexual” can be defined as physical conduct, which is contact with sexual organs such as the genitalia and breasts.²⁰³ Sexual can also be used to describe the gratification or pleasure received from some form of stimulation.²⁰⁴ However, there are activities that involve physical contact with the genitals that are not sexual (i.e., a doctor’s exam) and activities that can lead to sexual gratification that might not traditionally be seen as inherently sexual (i.e., spanking). Furthermore, though BDSM is largely considered to be sexual, and is even defined as such,²⁰⁵ many of the activities are not inherently sexual activities, and there are many people who engage in BDSM whose primary focus is something other than sexual gratification.²⁰⁶

However, what does seem to be key is the concept of “intimacy.” Intimacy is the closeness created through shared experience.²⁰⁷ Intimate choices are the choices that

¹⁹⁵ *Id.* (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

¹⁹⁶ *See, e.g., id.*

¹⁹⁷ *See Lawrence*, 539 U.S. at 565.

¹⁹⁸ *See id.* at 574 (concluding that the right to engage in homosexual activity was one of personal dignity and autonomy and a choice central to liberty).

¹⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

²⁰⁰ *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

²⁰¹ *Lawrence*, 539 U.S. at 578.

²⁰² *See, e.g., id.* at 568, 573, 578 (referring throughout the opinion to vague notions of “homosexual conduct,” “sexual conduct,” “sexual practices,” and “relevant conduct,” but thus not explicitly defining what “sexual” is or means). The Court does refer to sodomy, but it is clear that the protection of privacy relating to sexual conduct is more expansive. *Id.* at 578.

²⁰³ *See, e.g.,* P.R. Abramson, (*Healthy*) *Human Sexuality*, in *ENCYCLOPEDIA OF MENTAL HEALTH* 301, 301–04 (Howard Friedman ed., 2d ed. 2016).

²⁰⁴ *Id.*

²⁰⁵ Hébert & Weaver, *supra* note 6, at 106.

²⁰⁶ *See Nichols*, *supra* note 51, at 285–86. *See generally* Barker et al., *supra* note 137.

²⁰⁷ Barry F. Moss & Andrew I. Schwebel, *Defining Intimacy in Romantic Relationships*, 42 *FAM. REL.* 31, 31–32 (1993) (explaining the various ways in which intimacy can be defined).

individuals make about their bodies and their physical autonomy in connection to others.²⁰⁸ Therefore, to restrict sexual privacy only to those acts which are physically and overtly sexual would exclude other intimate acts and choices that evoke the same issue of respect for bodily autonomy. To ensure the inclusivity of the various range of practices under BDSM, to qualify for protection, acts should be either sexual *or* a recognized category of BDSM.²⁰⁹

B. Consent

Once an activity meets the required threshold elements, the next step for the courts is to determine whether all of the people involved are fully consenting. States have various configurations of what qualifies as consent for sexual activity.²¹⁰ Several different configurations of consent include “no means no” laws, which state that if a person indicates that they do not consent to sexual contact either orally or physically, then a sexual assault has taken place.²¹¹ Other states have “affirmative consent” laws, which state that “yes means yes.”²¹² These laws require that a person obtain consent before engaging in any sort of sexual contact.²¹³ A lot of progress has been made in the legal construction of qualifying consent and non-consent, however, laws are far from perfect in their application. Many sexual assaults still go unprosecuted, and success rates for prosecutions are lower than for other types of crimes.²¹⁴

BDSM can further complicate legal constructions of consent because of the prevalence of “consensual non-consent” play. In this category of BDSM, people negotiate

²⁰⁸ *Id.*

²⁰⁹ To determine whether an activity is a recognized category of BDSM, states and courts can rely on experts in the field of human sexuality. For example, Febrissy had two experts testify on his behalf to explain the activities in the video pertaining to BDSM. *See People v. Febrissy*, No. C049033, 2006 WL 2006161, at *2 (Cal. Ct. App. July 19, 2006). There are many resources available that discuss the variety of different forms of play that people engage in, as well as guides on how to minimize risk. *See generally* BRENDA LOVE, *THE ENCYCLOPEDIA OF UNUSUAL SEXUAL PRACTICES* (1992); WISEMAN, *supra* note 50.

²¹⁰ *See* David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 *PSYCHOL. PUB. POL’Y & L.* 227, 232–36 (2015) (detailing a study of all U.S. state statutes relating to sexual assault and noting, among other results, how consent was either undefined or ill-defined, thereby leading to issues in the adjudication of campus sexual assault).

²¹¹ *See* Susan Ehrlich, *Post-Penetration Rape: Coercion or Freely Given Consent?*, in *DISCURSIVE CONSTRUCTIONS OF CONSENT IN THE LEGAL PROCESS* 47 (Susan Ehrlich et al. eds., 2016) (focusing on *Maouloud Baby v. State*, 916 A.2d 410 (Md. Ct. Spec. App 2007), as an example of post-penetration rape and how consent must be uncoerced to be considered consent at all).

²¹² *See id.* at 47.

²¹³ *Id.*

²¹⁴ THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION* 16–18 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report-1-21-14.pdf [<https://perma.cc/J3XT-EKK7>].

to allow their partner to do certain things to them even if they say “no” or fight back.²¹⁵ Depending on how a state constructs their sexual assault laws, a person could be breaking the law despite the fact that they are doing something their partner has requested them to do.²¹⁶

Therefore, consent should be inclusive of safewords and safety signals, which act as another way of withdrawing consent.²¹⁷ For example, common safewords are “yellow” (slow down or pause) and “red” (stop completely).²¹⁸ Partners essentially negotiate an alternative form of indicating consent and non-consent. However, as stated by the Nebraska Supreme Court, there is nothing in the Constitution that supports the premise that once consent has been given, it cannot be withdrawn.²¹⁹ *Lawrence* also specified that protecting sodomy as a right under substantive due process is qualified by the requirement of consent.²²⁰ Therefore, BDSM activities that do not allow a person to withdraw consent would not qualify as a right under *Lawrence*.

C. Injury

BDSM includes a wide range of various practices, which are then negotiated and individualized to create an intimate experience for those who choose to engage in those activities, and there is no end to the creative ways in which people can incorporate elements of BDSM in their sexual experiences.²²¹ BDSM can be both physical and psychological.²²² For example, sadomasochism often involves the purposeful infliction of pain, while domination can be as simple as having a person verbally direct the physical interaction.²²³ Some of the activities in BDSM are done in such a way as to create marks,²²⁴ while other activities only induce fear or create pain without any form of injury.²²⁵

²¹⁵ See WISEMAN, *supra* note 50, at 52–55. One example of consensual non-consent is rape-play, where consenting adults will role-play a rape scene; though rape is considered an abhorrent crime, fantasies about forced sexual intercourse are incredibly common, particularly amongst women. See Jenny Bivona & Joseph Critelli, *The Nature of Women’s Rape Fantasies: An Analysis of Prevalence, Frequency, and Contents*, 46 J. SEX RES. 33, 39, 42 (2009) (conducting a study where the results indicated that 62% of female undergraduates at two universities in the southwestern United States have had a rape fantasy).

²¹⁶ See JILL D. WEINBERG, *CONSENSUAL VIOLENCE: SEX, SPORTS, AND THE POLITICS OF INJURY* 5, 11 (2016).

²¹⁷ WISEMAN, *supra* note 50, at 54–55.

²¹⁸ *Id.* at 52–53.

²¹⁹ *State v. Van*, 688 N.W.2d 600, 614 (Neb. 2004).

²²⁰ *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (applying Justice Stevens’s dissenting opinion in *Bowers v. Hardwick* as the controlling rationale to the case at hand).

²²¹ See Hébert & Weaver, *supra* note 6, at 106.

²²² See *id.* at 106–07.

²²³ See *id.*

²²⁴ WISEMAN, *supra* note 50, at 307–10.

²²⁵ See Hébert & Weaver, *supra* note 6, at 106–07.

The state has an interest in protecting the health and safety of its citizens, including from themselves. For example, people do not have a right to commit suicide or to consent to be killed.²²⁶ However, states do not prohibit all of the activities that cause injury; for example, contact sports, in particular fighting sports like Mixed-Martial Arts (MMA), are legal (though regulated).²²⁷ In general, states rely on the professional fighting industry to self-regulate to ensure that rules are enforced, rules that decrease risk and increase the level of safety.²²⁸ Criminal liability is therefore limited, and fighters are allowed to engage in mutual combat as long as they consent and agree to abide by the rules of the sport.²²⁹ Under these circumstances, the law recognizes a shift in what a person can and cannot consent to, despite the fact that the risk of injury is high, and the activity can even result in death.²³⁰

However, allowing people to consent to engage in mutual combat for sport does not provide an absolute immunity; though prosecutions are rare, states have sought to find people criminally liable when they violate the rules of the sport or engage in a level of violence that exceeds the norms of the sport.²³¹ One of the ways that the law attempts to differentiate between when a person should be prosecuted for sports violence is the difference between what is reasonable or unreasonable in the sport itself, essentially giving legal deference to the self-created rules of the industry.²³² A similar construction can be used to assess the legality of a BDSM activity, though there are a few key differences.

One of the main differences is that BDSM can qualify as a fundamental right under sexual privacy, whereas contact sports are not a right, but are instead carved out as an exception to state laws on assault and battery because of their social acceptability.²³³ However, BDSM also differs in both its format and internal regulation; for example, in MMA fighting, both people are fighting each other.²³⁴ However, in BDSM, many of the activities are one person dominating the other and can involve restraints.²³⁵ The inability or lack of will to fight back changes the mutuality of the activity, which can affect what is considered reasonable or unreasonable. Another

²²⁶ See *Washington v. Glucksberg*, 521 U.S. 702 (1997); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599 (2000) (discussing the history of the right to suicide); *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG (Feb. 21, 2017, 12:58 PM PST), <http://euthanasia.procon.org/view.resource.php?resourceID=000132> [<https://perma.cc/8V5W-LH6C>].

²²⁷ See generally WEINBERG, *supra* note 216.

²²⁸ *Id.* at 66–67.

²²⁹ *Id.* at 66.

²³⁰ *Id.* at 65–66.

²³¹ *Id.* at 93.

²³² *Id.* at 94–95.

²³³ See *id.* at 65–67, 93–95.

²³⁴ *Id.* at 66–67.

²³⁵ See Hébert & Weaver, *supra* note 6, at 106–07.

issue is the concept of internal regulation. Though there are many books, resources, and classes on how to decrease risk, there is no set manual.²³⁶ BDSM communities have systems in place to increase safety and regulate acceptable and unacceptable behavior.²³⁷ However, the ability to self-police is limited because there are no set standards that apply to the entire community.²³⁸ Private events can, and generally do, have a list of rules that attendees must follow, though these rules are not universal and vary by geographic area or the culture of the group.²³⁹

The standard for determining the line of protection for BDSM, therefore, must be *different* than that which is used for contact sports, though it can be similar. Once consent has been established, courts can utilize modern legal understandings of criminal and civil liability, modified to ensure that people still maintain their right to sexual privacy. Therefore, to assess the physical risks of engaging in BDSM and determine where an act loses protection under sexual privacy, the courts should balance the consent of the parties involved with the extent of the injury (or potential injury) received as a result of the activity.

The way in which courts should draw the line between protected and unprotected acts under sexual privacy is whether it requires professional, medical attention. If the act requires professional medical attention, then courts should examine the intent of the people involved, in particular the intent of the person who was topping or inflicting violence onto the injured party.

To simplify this standard, acts can be categorized by determining whether there is purposeful infliction of pain and whether an injury results in necessary, professional medical intervention.²⁴⁰ If a private, intimate act is consensual and causes no pain or injury, then it is protected under the right of sexual privacy. This would include anal and oral sex, which the Supreme Court has already clarified,²⁴¹ but could also include sexual acts involving more than two consenting adults. If there is purposeful infliction of pain, which means that creating pain is an intentional goal of the activity, but there is no injury, then this is also protected. This would include certain types of bondage, where people are consensually restrained, or light impact play. For these activities, the risk of injury is so small that there is no rational basis for state regulation, other than moral objection. However, given that sexual privacy is a fundamental right, the state would have to fulfill a higher burden.²⁴²

²³⁶ See WEINBERG, *supra* note 216, at 91–92. See also generally WISEMAN, *supra* note 50.

²³⁷ See WEINBERG, *supra* note 216, at 69.

²³⁸ See *id.* at 73–74.

²³⁹ *Id.* at 70.

²⁴⁰ See *infra* Table A.

²⁴¹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁴² See generally *id.*; Jamie Iguchi, Comment, *Satisfying Lawrence: The Fifth Circuit Strikes Ban on Sex Toy Sales*, 43 U.C. DAVIS L. REV. 655, 669 (2009).

Even if there is injury, however, if it does not intentionally cause major physical trauma, internal damage, or death, then likely this will also be protected under sexual privacy. For example, for many people who participate in sadomasochism, receiving bruises and abrasions are a vital aspect of the experience.²⁴³ Furthermore, within the context of everyday life, people consent to many different types of activities that can cause injury, such as contact sports, body modifications, and all sorts of adrenaline-inducing adventures.²⁴⁴ People are able to consent to a certain level of risk and injury,²⁴⁵ and this should apply to BDSM as well, particularly since it has a layer of constitutional protection under sexual privacy.

However, if an injury is severe enough to necessitate professional medical treatment or results in death due to reckless, negligent, knowing, or purposeful behavior, which is the standard for criminal liability in the Model Penal Code,²⁴⁶ then there should be legal recourse for criminal or civil liability. Though arguably BDSM could be considered to inherently meet this standard, the existence of safety precautions, education, general rules of engagement, and a level of community policing mitigate the standard. Like in many activities that involve an inherent level of risk, a person loses their right to engage in the activity if they go beyond the accepted and safe practices of the activity.²⁴⁷

If it is truly an accident, and all of the reasonable safety precautions were in place to prevent or reduce the risk of injury, and the person is fully aware when consenting of the risk of injury, like with any activity, there should be no liability. However, if a person causes a severe injury because they recklessly mishandle an instrument or purposefully break someone's bone, the state's interest in protecting its citizens overrides the right to privacy.

²⁴³ Though there is little written about this phenomena in academia, visiting kink-related sites, such as Fetlife.com, reveals a plethora of people who show off their injuries. See FETLIFE, <http://www.fetlife.com> [<https://perma.cc/U9ZS-PSDS>] (last visited Feb. 21, 2018). This website is private so that only members have access to its content. As of January 19th, 2018, the Fetlife Terms and Policies still allowed these types of photographs to be posted. *Terms of Use*, FETLIFE, <https://fetlife.com/legalese/tou> [<https://perma.cc/DM43-HNPF>] (last visited Feb. 21, 2018). However, it is possible that this may change, as the website has recently begun to become more strict. See Ellen Scott, *Why Did FetLife Remove a Woman's Public Photo of Her Period Blood?*, METRO (U.K.) (Aug. 11, 2017, 11:17 AM), <http://metro.co.uk/2017/08/11/why-did-fetlife-remove-a-womans-public-photo-of-her-period-blood-6845025/> [<https://perma.cc/DQ2N-8LQC>].

²⁴⁴ Just to name a few: boxing, football, roller derby, wrestling, base-jumping, parachuting, circus-performing, skateboarding, piercings, tattoos, ice-skating, etc.

²⁴⁵ See *supra* notes 233–43 and accompanying text; see also WEINBERG, *supra* note 216, at 94–95 (discussing, in part, consent to the violent contact sport MMA).

²⁴⁶ See MODEL PENAL CODE § 2.02 (AM. LAW. INST. 1985).

²⁴⁷ For example, if a fighter participating in MMA has their nose broken during a fight, the other fighter would not face assault charges; however, if the bell rings indicating the fight is over, and then a fighter walks over and breaks another fighter's nose, that would be an assault. Cf. WEINBERG, *supra* note 216, at 93.

V. APPLICATION: THE TEST AND ITS LEGAL IMPLICATIONS

How exactly would this test work if applied to various sexual practices, including BDSM? This section will analyze several different scenarios to both explain the test and the legal impacts of recognizing BDSM, and other sexual activities, under the right to sexual privacy. This common-sense approach is designed to accurately reflect the reality of the complexity of the intimate relationships between adults.

Hypothetical scenario 1: A state has a law outlawing homosexual sodomy. Two adult men, in the privacy of their own bedroom, engage in anal sex and are caught by police. They are charged and convicted of homosexual sodomy.

The test proposed in this Note is designed to fit the precedent set by the Supreme Court in *Lawrence*, where the Court recognized a right to engage in homosexual sodomy under sexual privacy.²⁴⁸ Therefore, this scenario should easily qualify under the test. First, both of the men involved were adults. They engaged in a sexual act in the privacy of their own home. Second, they both consented to participate in the act. Third, was there a risk of severe bodily injury that necessitated professional medical treatment or resulted in death? In general, sodomy has a very low risk of injury, and specifically in this instance there was no severe injury. Therefore, this act would qualify as a protected act under sexual privacy.

Hypothetical scenario 2: Neighbors hear what sounds like someone being hit in the apartment next door. Police investigate and the couple admit that they were engaging in consensual BDSM. The dominant male partner, who had been hitting a submissive female partner with a wooden paddle, is arrested and charged with assault. During the trial, the judge instructs the jury that assault does not contain an element of consent, and therefore if they find that the defendant hit his partner, they must find him guilty. He is subsequently convicted.

In this scenario, two adult partners engaged in BDSM activity in the privacy of their home. During the investigation, both partners indicated that they consented to the activity. Finally, though there was the purposeful infliction of pain, and a wooden paddle is capable of inflicting an injury, there is no evidence that the activity required any form of professional, medical treatment. Furthermore, there is no evidence that the dominant was utilizing the tool in a way that could recklessly cause injury. Here, this conviction should be overturned because the application of the assault statute violated the right to sexual privacy by barring the use of a defense of consent.

Hypothetical scenario 3: Two adults meet over the internet and agree to engage in BDSM play in a hotel room. The dominant partner explains to the submissive that they do not believe in limits. Therefore, no safeword will be used and once they begin the submissive cannot leave for any reason.²⁴⁹ The submissive consents. The dominant

²⁴⁸ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁴⁹ This scenario is partially based on a real-life case that, at the time this Note was being written, was being investigated by Australian authorities. A man called “The Wolf” is alleged to have sexually assaulted dozens of women under the guise of BDSM and consensual non-consent.

restrains and rapes the submissive, punching the submissive in the face when they attempt to escape. This results in a broken jaw and large facial abrasions.

Several issues in this scenario would disqualify it from any form of protection under sexual privacy. Though both participants were adults engaging in a sexual act in the privacy of a hotel room, meeting the threshold, the act itself would not pass scrutiny. First, the level of consent would not qualify because there was no ability to withdraw consent. Second, when the submissive attempted to withdraw consent, the dominant did not stop, which means that every action after the attempt to withdraw consent (in the absence of an alternatively negotiated signal) was a form of assault. Third, the dominant used a closed fist to punch the submissive in the face, which would likely be, at the very least, a reckless form of impact play. This is evidenced by the resulting injury, a broken jaw, which would necessitate professional medical intervention. Therefore, the perpetrator can and should be held criminally and/or civilly liable for these actions.

Hypothetical scenario 4: A local BDSM community leader in Virginia hosts BDSM parties at their private home on a monthly basis. Virginia has a law that outlaws “bawdy houses.”²⁵⁰ At this party, adults engage openly in sexual and BDSM activity. Identification is checked to ensure that all attendees are over the age of 18, and the house has trained, volunteer “dungeon monitors” to keep an eye out for safety issues and consent violations. The house has strict rules, including the universal use of “red” to mean stop. People take turns utilizing various stations to play with their partners, who are generally semi- or fully naked.

The police have heard of this house and, determining that it fits the definition of a bawdy house, decide to raid it. During a party, the police enter the home and arrest every attendee, charging each with attending a bawdy house. Furthermore, anyone who was caught in the act of engaging in BDSM activity as the top or dominant is arrested for assault. Police body cameras have video footage of this. The district attorney, who has a strong moral stance against BDSM and alternative sexual activity, is committed to pressing charges and humiliating the attendees in the process, by releasing their legal names to the press.

Here, consenting adults engaged in intimate, sexual activities and/or recognized categories of kink. The activities were, at least from what the police could see, completely consensual. Furthermore, none of the participants had injuries that required

See generally Ben McClellan & Ian Paterson, *Accused BDSM Rapist “The Wolf” Unveiled As Wealthy Sydney Businessman Liam Murphy*, DAILY TELEGRAPH (Austr.) (Nov. 13, 2016, 5:20 PM), <http://www.dailytelegraph.com.au/news/accused-bdsm-rapist-the-wolf-unveiled-as-wealthy-sydney-businessman-liam-murphy/news-story/8567d9879ac55d3ba83593e0851390b4> [<https://perma.cc/DCU9-8RMG>].

²⁵⁰ VA. CODE ANN. § 18.2-347 (2017) (“It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. . . . As used in this Code, “bawdy place” shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.”).

medical intervention. Furthermore, the house had extra safety precautions in place to decrease the risk of its attendees. Therefore, no one should have been charged with a crime because they were all engaging in constitutionally protected activity. Unless the police have evidence that a particular person had their consent violated or was seriously injured, arresting and prosecuting the participants is a violation of their rights.

Furthermore, the law itself should be deemed unconstitutional, because its broadness includes activities that people have a right to engage in. The exception would be prostitution, which is not a right under sexual privacy.²⁵¹ However, in the privacy of one's own home, people should have the right to engage in BDSM activities, not only with a single partner, but with a group of people as well.²⁵² However, if this house was charging admission fees, the event is less likely to be contained within the private sphere.²⁵³ I would argue that states can regulate public events where BDSM activities are taking place because people lose the constitutional protection of sexual privacy, though there may be other compelling arguments, such as First Amendment and the freedom of speech.

Hypothetical scenario five: A married couple is getting a divorce. They have two children and the custody proceedings are acrimonious, to say the least. While married, they engaged in a Dominant/submissive relationship that included sadomasochistic play. Specifically, the dominant spouse would beat the submissive spouse with various instruments and would write derogatory terms on their body. Afterwards, they would take pictures of the submissive spouse. These images showed ripped clothing, dark bruises and bleeding, and smeared makeup, evidence of crying. The couple frequently journaled their experiences publicly online, and those writing indicate that the submissive fully consented and, in fact, asked for this treatment.

Now that the relationship has soured, the submissive partner is threatening to reveal these photos to the police and the judge so that they can get full custody of the children. The children were never exposed to any of the BDSM activity, and it did not affect their upbringing or mental health.

Here, because the BDSM activities constitute an assault, technically the dominant spouse engaged in an illegal activity.²⁵⁴ Therefore, the risk of revealing their consensual sadomasochistic activities is labeling the dominant partner a criminal,

²⁵¹ See *Lawrence*, 539 U.S. at 578 (stating that this case did not involve prostitution as part of its ruling).

²⁵² In terms of policy, this can actually make these parties safer. Currently, these parties are generally held in secret, and so when problems do arise, such as consent violations or serious injury, participants are fearful of calling police or emergency services. Victims may fear reporting what has happened to them, for fear of both reprisal from the community for "outing" its members and from the police, who could arrest them for committing a crime. See generally WEINBERG, *supra* note 216; WISEMAN, *supra* note 50.

²⁵³ Cf. *Lawrence*, 539 U.S. at 567 (stating that the Constitution protects homosexuals' right to engage in sexual conduct in their private residences).

²⁵⁴ Cf. *People v. Davidson*, No. D064880, 2015 WL 4751166 (Cal. Ct. App. Aug. 12, 2015); *People v. Febrissy*, No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006).

which would absolutely impact the custody proceedings, despite the fact that both partners were doing it together. This also opens up the dominant partner to being blackmailed because of the risk of arrest.

Under this test, these issues would be mitigated because, as a constitutionally protected activity, BDSM would not automatically be criminal. The court could still weigh the fact that both partners engaged in BDSM when determining custody, because all relevant factors should be used to make a decision in the children's best interest. If the children were exposed to the dynamic, it would be very important for the court to know that they could be exposed to further risk. However, under these circumstances, two adults engaged in private, consensual BDSM activities, but only one is exposed to legal risk for criminal activity (the dominant), while the other is labeled a victim (the submissive) and given potentially preferential treatment. This is an unjust outcome, compared to treating BDSM as a sexual preference without the stigma of criminality.

CONCLUSION

Sexuality is an important aspect of human dignity. It defines our lives, our relationships, and our identities. As BDSM enters the mainstream of public discourse and consciousness, the law must adapt to ensure that justice ultimately prevails. Though recognizing that sexual privacy applies to activities other than homosexuality is an important first step, there are other areas of the law that also need to be developed in order to adapt to the increasing number of people openly engaging in BDSM. Several areas of the law include the investigation and prosecution of obscenity, civil lawsuits involving torts or defamation, family law and child custody, and the regulation of BDSM clubs, events, and venues.

It was only about 30 years ago that the Supreme Court determined that states could interfere in the private, sexual lives of consenting adults.²⁵⁵ In just 17 years, the Court reversed that decision, and rightfully held that the government should not, and cannot, ban adults from engaging in sexual practices that are central to their identity, relationships, and freedom.²⁵⁶ This test creates a consistent way to determine whether an activity is protected under sexual privacy. Its flexibility ensures that a wide range of human sexual activity is protected, while also allowing states to protect its citizens.

Courts should continue to uphold sexual privacy, and give practitioners of BDSM protection under the law. Not only is it required under the Constitution, but it can help reduce the shame and stigma of alternative sexualities. This, in turn, will lead to greater safety, better understandings of consent, and protection from persecution.

²⁵⁵ See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁵⁶ See generally *Lawrence*, 539 U.S. 558.

Table A

<u>Necessary elements:</u>	<u>Consent:</u>	<u>Injury:</u>
<p>1. All people engaged in the activity are adults</p> <p>2. The act is private</p> <p>3. Act is sexual or a recognized category of kink</p>	<p>Protected</p> <p>1. Full consent</p> <p>2. Pre-negotiated nonconsent with safewords</p> <p>Not protected</p> <p>3. Pre-negotiated consent, with no ability to withdraw</p> <p>4. No consent</p>	<p>Protected</p> <p>1. No purposeful infliction of pain, no injury</p> <p>2. Purposeful infliction of pain, but no injury</p> <p>3. Purposeful infliction of pain and injury that does not require professional, medical intervention</p> <p>Not protected</p> <p>4. Injury that requires professional, medical intervention or death</p>

