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Consent, Aesthetics, and the Boundaries of Sexual Privacy after Lawrence v. Texas

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CONSENT, AESTHETICS, AND THE BOUNDARIES OF SEXUAL PRIVACY AFTER *LAWRENCE V. TEXAS*

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INTRODUCTION

Justice Antonin Scalia raised eyebrows in a September 20, 2004 speech, stating that he could "accept for the sake of argument . . . that sexual orgies eliminate social tension and ought to be encouraged."[1] After a journalist misunderstood Justice Scalia to be endorsing group sex, the speech generated headlines.[2]

What Scalia said next drew less attention, which is a shame because Scalia was being serious and the issue he raised was interesting. Scalia began ridiculing a European Court of Human Rights decision,[3] which had held that because of privacy rights, the state could not punish five men who had engaged in a sex act within one of the participant's homes.[4] Justice Scalia wondered aloud how "privacy" could possibly cover five people, let alone some larger number, such as "the number of people required to fill the Coliseum."[5]

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1. *Some Non-Judicious Comments - for a Supreme Court Justice*, HOUS. CHRON., Oct. 2, 2004, 2004 WL 83669865.

2. The *Harvard Crimson* misquoted Scalia as having said, "I even take the position that sexual orgies eliminate social tension and ought to be encouraged." Al Kamen, *Voice of Doubt Won't Go Away*, WASH. POST, Oct. 4, 2004, at A21.

3. *See* A.D.T. v. United Kingdom, 31 Eur. H.R. Rep. 803 (2000) (invalidating the prosecution of an individual, who engaged in consensual sex with four other men in his home, after police obtained a videotape of the group sex act from the defendant's home).

4. *Some Non-Judicious Comments*, *supra* note 1.

5. *Id.* Justice Scalia seems particularly interested in sex acts in stadiums. He invoked the same hypothetical in his concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991), a 1991 nude dancing case:

> The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral . . . .

Id. at 575 (Scalia, J., concurring) (citations omitted).

Justice Scalia's comments effectively used the ambiguity over privacy's meaning to nudge his audience down a slippery slope, toward a seemingly absurd result. Indeed, Scalia's dissent in *Lawrence v. Texas* was premised on the parade of horribles that a society unable to regulate morality for its own sake would confront.[6]

The question of sex involving multiple participants is by no means purely academic. States have prosecuted this behavior in the past, and one can expect that some prosecutors will test *Lawrence* by trying to do so in the future.[7] Indeed, *Lawrence* and Justice Scalia's widely publicized comments provide an opportunity to revisit the leading American group sex case, the Fourth Circuit's 1976 opinion in *Lovisi v. Slayton*.[8]

The facts of *Lovisi* are as follows: The Lovisis were a married couple who found themselves in jail after violating Virginia's law criminalizing sodomy.[9] Aldo and Margaret Lovisi had invited Earl Dunn into their home to join them in a ménage à trois.[10] Margaret performed oral sex on both men.[11] They also used a Polaroid camera to take pictures of the sex act, and one of Margaret's daughters later found another sexually explicit photograph at home and took it to school.[12] The authorities were informed, and the police obtained a warrant to search the house, where they found hundreds of Polaroid snapshots that the defendants had taken.[13] These snapshots provided the basis for the state's prosecution of the Lovisis.[14]

The *Lovisi* court, writing after *Roe v. Wade*[15] but before *Bowers v. Hardwick*,[16] assumed that the couple had a privacy right to engage in consensual sex in their bedrooms.[17] As the court put it, "What they do in the privacy of the marital boudoir is beyond the power of the state to scrutinize."[18] But the court proceeded to hold that after Mr.

6. *See* Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

7. *See, e.g.*, Justin Bergman, *Va. Anti-Sodomy Code Challenged; Convict's Case Cites High Court Ruling Abolishing Texas Law*, RICHMOND TIMES-DISPATCH, July 14, 2004, 2004 WL 61910037.

8. 539 F.2d 349 (4th Cir. 1976).

9. *Id.* at 350.

10. *Id.*

11. *Id.*

12. *Id.* at 350–51; Lovisi v. Slayton, 363 F. Supp. 620, 622–23 (E.D. Va. 1973).

13. *Lovisi*, 539 F.2d at 351.

14. *Id.* at 350.

15. 410 U.S. 113 (1973).

16. 478 U.S. 186 (1986).

17. *Lovisi*, 539 F.2d at 351.

18. *Id.* at 351.

Dunn entered the room, the Lovisis lost any constitutional right to privacy.[19] In the court's words,

> Once a married couple admits strangers as onlookers, federal protection of privacy dissolves. It matters not whether the audience is composed of one, fifty, or one hundred, or whether the onlookers pay for their titillation. . . . [T]hey cannot selectively claim that the state is an intruder. . . . Nor should [the case] turn upon the fact that the onlookers, however many, are not only passive observers but are participants themselves in sexual activity, some of it with one or more of the partners to the marriage. In either such event, the married couple has welcomed a stranger to the marital bedchamber, and what they do is no longer in the privacy of their marriage.[20]

Thus, according to the *Lovisi* court, sexual privacy disappears as soon as a third person is exposed to the sex act.

Even though it cited the *Griswold v. Connecticut*[21] line of cases, which is commonly understood as decisional privacy authority, *Lovisi*'s conception of sexual privacy seems to invoke information privacy concepts. After all, the result seems inconsistent with decisional privacy analysis: If one sets tradition and existing norms aside, it is difficult to explain why the decision to have sex with one's spouse deserves more protection than the decision to have sex with one's spouse and another person at the same time. The result also seems inconsistent with notions of associational privacy and the privacy-as-dignity thread that appears occasionally in *Lawrence*.[22] The Lovisis and Dunn were involved in an intimate association. For all we know, they were as likely to engage in a persistent relationship as Lawrence and Garner were. And punishing the Lovisis for this action seems to offend a dignity-based notion of privacy. So we can read *Lovisi* as articulating an information-privacy-based vision of sexual privacy.[23]

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19. *Id.*

20. *Id.*

21. 381 U.S. 479 (1965).

22. *See* Lawrence v. Texas, 539 U.S. 558, 567, 575 (2003).

23. A similar vision emerges from *Kraus v. Village of Barrington Hills*, 571 F. Supp. 538 (N.D. Ill. 1982). That case involved a "swinger's club" consisting of 250 couples who met in private homes for consensual partner-swapping (although presumably not all the members got together at once). *Id.* at 548. The court noted that the club "conducts its meetings and activities entirely within the residence of plaintiff. We do not believe that sexual activities behind closed doors jeopardize the public peace; nor does it appear at this stage of the proceeding that the activity is 'open' within the meaning of criminal statutes" barring public indecency. *Id.* at 541–42. The court then dropped a fascinating footnote immediately following this text:

> It might be argued that the activity which occurs at plaintiff's home is "open and notorious" as far as members of the group are concerned. . . . The requirement that the conduct be "open and notorious" was designed to put "private" conduct beyond the reach of the criminal law. It is not clear from the complaint whether the sexual activi-

By bringing the information privacy style analysis into a constitutional, sexual privacy dispute, *Lovisi* provided a novel, interesting, and in some respects, appealing take on sexual privacy. Of course, *Bowers* rendered *Lovisi*'s analysis a dead end by reaffirming the legitimacy of legislation based solely on morality.[24] If the state could prevent two men from having sex with each other, regardless of any privacy interest, then the state could prevent two men from having sex with a woman. Now that *Lawrence* has overruled *Bowers*, it is time to contemplate the *Lovisi* approach and figure out how far *Lawrence*'s "privacy" principle ought to go. To begin that inquiry, we should turn to *Lawrence*'s text.

There are two critical passages in *Lawrence*, both of which appear in the last few paragraphs of the majority opinion. The first paragraph of note provides the Court's philosophical basis for rejecting the rationale of *Bowers v. Hardwick*, which had upheld Georgia's anti-sodomy law.[25]

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:
>
> > "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

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ties engaged in by members of [the club] are in the open view of other members or not. The complaint is silent on the point. The matter could be a function of how many members attend a meeting, the number in attendance who engage in sexual activities, and the number of rooms available for the activity.

Id. at 542 n.3.

24. *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

25. In *Bowers*, the Court stated:

[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. [Respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id.

> Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.[26]

In this passage, the Court rejected the idea that the state has the authority to enforce legislation that is spurred exclusively by the moral views of the majority of its citizens. Something else, namely a harm to some third party, is required for the state to engage in this form of morality legislation, where such legislation imposes harms on an individual's protected liberty interests. In so doing, the Court evidently embraced the "harm principle."[27]

The second critical passage in *Lawrence* appears shortly thereafter, largely as an attempt to limit the scope of the paragraph excerpted above.[28] It suggests that substantial restrictions on sexual conduct are consistent with the harm principle.[29]

> 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*. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. 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 Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and *private* life of the individual.[30]

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26. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (quoting *Bowers*, 478 U.S. at 216) (Stevens, J., dissenting).

27. *See* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1089 (2004); James E. Fleming, Lawrence*'s Republic*, 39 TULSA L. REV. 563, 574 (2004); Adil Ahmad Haque, Lawrence v. Texas *and the Limits of the Criminal Law* 6 n.15 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616942. *See also* Steven D. Smith, *The Hollowness of the Harm Principle* 4 (Univ. of San Diego Law School, Legal Studies, Research Paper No. 05-07, Sept. 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=591327 (noting that "some commentators have argued that the recent case of *Lawrence v. Texas*, in which the Supreme Court invalidated a Texas law prohibiting homosexual sodomy, effectively constitutionalized the harm principle." (footnotes omitted)). *But see* Miranda Oshige McGowan, *From Outlaws to Ingroup*: Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1315–32 (2004) (arguing that *Lawrence*'s embrace of the harm principle is merely rhetorical). For an extended discussion of the harm principle, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999). Harcourt argues that courts and commentators increasingly adopted the harm principle during the twentieth century but simultaneously expanded the universe of "harms" that could form the predicate for state restrictions on individual liberty. *Id.* at 113–15. For further discussion of the harm principle, see JOEL FEINBERG, HARM TO OTHERS (1984).

28. *See Lawrence*, 539 U.S. at 578.

29. *See id.*

30. *Id.* (emphasis added).

This part of the opinion seems designed to respond to the parade of horribles Justice Scalia evoked in his *Lawrence* dissent.[31] Yet it is trying to do more than that. The majority recognized, as any first-year law student would, that its intonation that "this case does not involve public conduct or prostitution" was an inadequate reply to Justice Scalia's suggestion that the implications of the majority's holding seem to open the door for an invalidation of laws against public sex and prostitution.[32] Justice Kennedy tried to write a landmark opinion in *Lawrence* that would stand the test of time, and one cannot help reading his second excerpted paragraph as an attempt to highlight limiting *principles*, not mere limitations on the holding.

Much of what Justice Kennedy articulated related to privacy interests, and references to privacy were pervasive in the majority opinion.[33] Why invoke privacy so often? His distinction between private and public conduct would be irrelevant if *Lawrence* was simply a case about individual liberty. When we read the two paragraphs together, we begin to suspect that the harm principle only applies to private acts. If an act occurs in public, then it can impose harms on those who see it, and these harms form the predicate for state intervention. If it occurs in private, then the only harms that might arise involve harms to the participants (which, the Court implies, do not count) and related negative externalities (which, I argue, probably do not count either). Privacy's important role in *Lawrence* actually cements an understanding of Justice Kennedy's opinion as an embrace of the harm principle.

In the pages that follow, I examine the interplay between these two juxtaposed paragraphs and say more about how they can be reconciled. My effort will be to read *Lawrence* faithfully and see whether coherent principles underlie its notions of privacy, consent, and moral-

31. Justice Scalia suggested that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision." *Id.* at 590 (Scalia, J., dissenting).

32. *See generally id.*

33. Randy Barnett has suggested that *Lawrence* is not an opinion about privacy. His widely read paper emphasized that while the majority opinion in *Lawrence* made just a single reference to a "right of privacy," the majority opinion used the word "liberty" at least twenty-five times. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas 13 (Boston Univ. School of Law, Working Paper No. 03-13, 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422564. Barnett's methodology turns out to be rather misleading. While "right of privacy" appears only twice in the Supreme Court's opinion, the words "private" or "privacy" make a grand total of twenty-eight appearances, edging out "liberty" by a nose. Among the alternative concepts that might have driven *Lawrence*'s analysis, "privacy" appears the most, followed by "liberty" (twenty-five mentions), "consent" (twenty-two mentions), "intimacy" (eleven mentions), and then the also-rans: "dignity" (three mentions) and "equality" (one mention).

ity. This inquiry will in turn shed light on several issues left open by *Lawrence* regarding the scope of the constitutional right recognized therein. Does *Lawrence* protect the rights of more than two individuals to engage in sex acts in each other's presence? Does it offer protection to sex acts that occur outside the home? Is it even possible to draw a line between private and public sex?

I argue that under *Lawrence*'s harm principle, the state retains authority to regulate aesthetics but loses any authority to regulate morality. The essential difference between aesthetics and morality is that the unwitting bystander can perceive, with his own senses, offenses to aesthetic interests but not offenses to moral interests. Although I am ambivalent about the normative appeal of the harm principle as a foundational rule in constitutional law, I conclude that *Lawrence*'s apparent embrace of both the principle and a public-private dichotomy lends itself to workable legal rules.

This symposium contribution proceeds as follows. Part II examines the legal relationship between consent and privacy. It suggests that in both the information privacy and decisional privacy lines of authority, privacy rarely means solitude but reflects limited sharing of information with people who consent to be exposed to it. Part III explores the boundary between "public" sex and "private" sex, only the latter of which *Lawrence* purports to protect. It argues that a binary conception of "public versus private" oversimplifies the social and spatial aspects of privacy. This Part attempts to sketch out a more sophisticated understanding of "relatively public" sex, grounded in information privacy law. Part IV discusses the problems created by relatively public sex and the rationales for limiting it. Part V asks "what might be said on behalf of public sex?" and concludes that the case for limiting such conduct is strong in places to which everyone has access but weak in places to which the general public's access can be restricted. Part VI revisits *Lovisi v. Slayton*.

II. Different Conceptions of Privacy and Consent

Privacy law encompasses many different types of legal protections. Most relevant for the purposes of this Article, however, are "information privacy" (an individual's ability to control what others know about him)[34] and "decisional privacy" (an individual's right to make

34. Information privacy implicates the tort for public disclosure of private facts; the Fourth and Fifth Amendments; the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000); the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 104 Pub. Law No. 191, 110 Stat. 1936; The Privacy Act, 5 U.S.C. § 552(a) (2000); *Whalen v. Roe*'s, 429 U.S. 589 (1977), right to privacy; and most of what we think of as "privacy law" in the United States.

decisions about his private affairs without undue state interference).[35] In this Article, I focus on those decisional privacy rights that protect sexual privacy.

Consent reflects voluntariness in both the information and decisional contexts. In the case of information, consent means that the subject of the information (i.e., the person to whom the information relates) agrees to its dissemination. If the subject has consented, then someone who disseminates that information cannot be liable in tort. In the case of sex, consent means that all participants in the sex act must freely agree to participate. For both varieties of consent, the law holds that certain people, such as minors or the mentally ill, are often presumed incapable of consenting. Moreover, in both the decisional and information privacy context, the law will focus on the consent of someone other than the person whose conduct is the subject of attempted regulation.[36]

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35. Decisional privacy manifests itself most prominently in opinions like *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and now confines itself largely to substantive due process claims under the Fourteenth Amendment.

Privacy scholars also refer to "associational privacy" as well as "privacy as dignity." *See, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1394; Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–95 (2001). Associational privacy includes, on the narrow reading, little more than a political association's First Amendment rights to maintain secret membership rolls. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960) (invalidating a state ordinance that required the NAACP to disclose the identities of its members and contributors); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (holding that under the First Amendment freedom of association, the NAACP need not disclose its membership lists to the state). Broader conceptions of associational privacy have been advanced most eloquently by Kenneth Karst. *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (arguing that associational privacy also encompasses the right to choose one's friends and lovers without the interference of neighbors or the state). The comparativist Jim Whitman reminds us that there is a very different, European conception of privacy, which protects against affronts to human dignity and which casts the press, not the government, in the role of villain. *See generally* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

One of the interesting things about *Lawrence* is that we can plausibly ground it in any of these four conceptions of privacy. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896–97 (2004). Perhaps *Lawrence* is about keeping Texas police officers from coming into a bedroom and arresting him on the basis of what they see. *See id.* at 1897. Perhaps *Lawrence* is about permitting gay couples to make decisions about how to live their lives without the state's interference. *See id.* at 1896. Perhaps *Lawrence* is about respecting intimacy established within homosexual relationships. *See id.* Or perhaps *Lawrence* is about protecting the dignity of homosexuals and rejecting Texas's efforts to make second-class citizens out of them because anti-sodomy laws stigmatized and triggered further discrimination against gays and lesbians. *See id.*

36. DAN DOBBS, THE LAW OF TORTS § 100 (2000). In other words, when *A* is sued in tort, it is the consent of *B*, the subject of the private information that *A* disseminated, that may prove decisive. Similarly, if *A* is accused of violating a state sodomy law, then he can only claim constitutional protection if *B*, his partner, consented to the sex act in question, and vice versa.

In privacy tort law, there are close connections between privacy and consent. The law does not treat any fact about a person as inherently private. If I chose to publish my social security number in this Article, then I would have no public disclosure of private facts suit against someone who published it elsewhere.[37] Thus, an individual can transform previously private information into public information through express consent to such a transformation, and this consent need not be explicit in all cases.[38] Similarly, privacy rights can be protected by contract.[39] If *A* secures private information about *B* after promising *B* confidentiality and then disseminates that information to a wider audience, then *B* can sue *A*, either on a contract theory (for breach of confidentiality) or a tort theory (for violating *B*'s reasonable expectations of privacy).

It is worth pausing to consider why the law of information privacy should defer so much to individual consent. After all, people sometimes regret earlier decisions to share private information with third parties.[40] Individuals' decisions to share details of their personal lives also might create negative externalities by, for example, coarsening public discourse, causing others to become too cautious in sharing their own personal information, or demystifying aspects of human life that ought to remain under wraps.[41] Despite this, the law rarely limits the individual's ability to share private information about one's self with others. Only when children are involved, or obscene personal information that is likely to offend or harass listeners is implicated, does the law prohibit these kinds of dissemination.[42]

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37. I might still have a claim against the person who misused my social security number, for example, to commit identity theft. But such a claim would have to rely on some other substantive provisions of tort law.

38. KIM LANE SCHEPPELE, LEGAL SECRETS 199–200 (1988).

39. *Id.* at 222–26.

40. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975) (adjudicating a claim by a surfer who provided a *Sports Illustrated* reporter with extensive information about his personal life, and then changed his mind and sought to prevent the story's publication); Mark Schwed, *Girls Gone Wild to Shoot at Jupiter Club*, PALM BEACH POST, *at* http://palmbeachpost.com/local_news/content/epaper/2005/03/12/C1C_wild_0312.html (discussing a lawsuit filed by a college student against the producers of *Girls Gone Wild* videos after she regretted her earlier decision to disrobe on Bourbon Street during Mardi Gras).

41. *See* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy* 5–6 (Univ. of Chicago John M. Olin Law & Econ. Working Paper, 2d Series No. 230, Dec. 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629283 (forthcoming 72 U. CHI. L. REV. (Aug. 2005)). *See also* CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY 42 (1977).

42. *See, e.g.*, Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1170 (N.D. Iowa 2000) (holding that an employee's statements to a co-worker about their own sexual experiences and her role in a co-worker's sexually explicit dreams could create a hostile work environment under Title VII); John D. v. Dep't of Soc. Servs., 744 N.E.2d 659, 664 (Mass. App. Ct. 2001) (holding that a stepfather's repeated nudity in the presence of his teenage daughter, combined with other sexual

Society's general reluctance to punish the dissemination of private information is perhaps explained by First Amendment concerns or an understanding that people usually will act to protect their private information unless they have strong reasons for failing to do so. The First Amendment implications of a law that barred individuals from discussing their private thoughts or experiences are obvious enough. The anti-paternalism argument is more complicated and warrants attention. Surely there are instances where limiting people's ability to disclose information about themselves would enhance social welfare.[43] And we have little reason to expect that individuals will appreciate or respond to the social costs associated with their disclosure of private information about themselves. That said, we ought to worry about the capacity of government to identify those situations in which the social costs of information suppression exceed the social costs of dissemination with much accuracy or cost-effectiveness. Indeed, the social cost calculations are probably so complicated that the law properly deems private costs the only relevant consideration and defers to the individual, who is usually in the best position to analyze the private costs and benefits of dissemination and has the right incentives to maximize private welfare. In the tort context, the law therefore typically concludes that the costs associated with having the government second-guess individual decisions about what personal information to disclose exceed the benefits from doing so.[44] It is only where the parties to a communication disagree about whether the communication is desirable (e.g., a hostile work environment claim by an employee), or where one party to a communication is not in a position to consent fully (e.g., a child exposed to sexually explicit information), that the state intervenes.[45]

Consent plays a similar role in decisional privacy cases. As with information privacy, there might be negative externalities associated with allowing people to make decisions for themselves. Some people will regret their decisions after the fact, and their decisions to have abortions, engage in consensual sodomy, or educate their children in a certain way might have adverse effects on third parties. In instances involving decisional privacy, unlike information privacy, legislators

communications, constituted child abuse, notwithstanding the lack of physical contact between the daughter and stepfather).

43. For example, barring individuals from disclosing their credit card numbers or other financial payment information to strangers who call them at home might well prove welfare-maximizing, because it would shut off a popular avenue for fraud and might prevent more unwanted telemarketing calls than a Do-Not-Call registry.

44. *See* Strahilevitz, *supra* note 41, at 10 n.23.

45. *Cherry*, 101 F. Supp. 2d at 1170; *John D.*, 744 N.E.2d at 664.

have demonstrated an activist streak, choosing to enact laws that prohibit abortion, sodomy, and the teaching of German in schools.[46] Yet, again, there are two kinds of arguments for state noninterference with decisions made by consenting adults. There is a constitutional argument—this time invoking the Due Process Clause of the Fourteenth Amendment—and a more pragmatic one, suggesting that the government will be unable to distinguish accurately between an individual's decisions likely to be regretted or harmful to third parties, and those that are not. The harm principle seems to be, in part, an effort to channel the pragmatic argument into the constitutional argument.

Note, however, that in this decisional privacy context, consent is not always decisive. Consent certainly functions to distinguish between those exercises of individual liberty that can be proscribed unquestionably and those that the state might or might not be able to prohibit. Thus, there is plainly no right to commit rape or to force an unwilling physician to assist in euthanasia.[47] However, the Court so far has been unwilling to embrace the proposition that if everyone who is directly affected by an activity consents to it, it is protected by a fundamental right; hence the Court's rejection of the right to consensual euthanasia in *Washington v. Glucksberg*.[48]

III. THE BORDER BETWEEN PRIVATE AND PUBLIC SEX

Now that we have spent a little bit of time thinking about consent, it makes sense to devote some thought to the meaning of privacy. The Supreme Court in *Lawrence* emphasized that the right it was protect-

46. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (involving a legislative ban on sodomy); Roe v. Wade, 410 U.S. 113 (1973) (invalidating a ban on abortion); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a law that barred public and private schools from teaching any language other than English to students who had not passed the eighth grade).

What are we to make of legislatures' general deference to individuals' decisions about sharing information, but their comparable lack of deference to individuals' decisions about procreation or sex partners? One explanation might be that third parties are more offended by deeds than they are by words. But even if that is true, there is something peculiar afoot. Abortions and consensual sodomy are typically carried out within closed spaces, far from public view. Few people, other than the participants, generally witness acts of sodomy or abortions. The communication of previously private information, by contrast, sometimes occurs in highly visible ways—via the mass media. Leaving constitutional considerations aside, it would be surprising that a legislature would want to ban a couple from engaging in sodomy behind closed doors but permit an individual to tell 500 people that he is a homosexual.

47. Sometimes, however, the courts are willing to recognize fundamental rights to engage in activity that harms nonconsenting third parties. For example, courts have generally struck down requirements that a pregnant woman obtain the consent of the fetus's father in order to obtain an abortion. *See* Geoffrey P. Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 IND. L. REV. 691, 717–25 (2000) (discussing the Supreme Court's jurisprudence with respect to a prospective father's right to prevent an abortion).

48. 521 U.S. 702 (1997).

ing consisted of a right for two people to engage in "private," "consensual" conduct.[49] Framing the right in this way raises a number of interesting questions about the meaning of privacy. To begin this inquiry, it will be helpful to conceptualize privacy as arising in two related dimensions: social and spatial. Intuitively, when trying to gauge whether an activity was "private," we will want to know where it took place and who was there.

Consider social privacy first. Under a quite narrow understanding of information privacy, information ceases to be private as soon as it is shared with a third party.[50] But conceptualizing *Lawrence* as an information privacy case helps reveal the problems with this logic. If sexual privacy is really about information privacy, then is it not the presence of a *second* person in the room that is problematic? After all, there are numerous cases of betrayal involving kissing and telling, surreptitious videotaping and subsequent dissemination, and the like, where just two people took part in a sex act.[51] Surely the realm of protected sexual activity cannot be limited to *Stanley v. Georgia* situations, where a solitary person alone in his home uses pornographic films for sexual gratification.[52] As soon as we get to *Griswold*, or *Roe*, or *Lawrence*, there is necessarily a "stranger" in the room, and one runs the risk that one's sexual conduct will be exposed. On this conception of sexual privacy, we need to address the fundamental question of why Tyron Garner's presence in the room with John Geddes

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49. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003).

50. *See* Strahilevitz, *supra* note 41, at 22–25 (discussing cases that adopt this "hard-line" conception of privacy).

51. *See, e.g.*, Michaels v. Internet Entm't Group, 5 F. Supp. 2d 823 (C.D. Cal. 1998). The Bill Clinton-Monica Lewinsky affair is perhaps the most momentous "kiss and tell" incident in American history. *See, e.g.*, James Bennet, *Testing of a President: The Overview; Clinton Admits Lewinsky Liaison to Jury; Tells Nation "It Was Wrong," But Private*, N.Y. TIMES, Aug. 18, 1998, at A1.

52. *See generally* Stanley v. Georgia, 394 U.S. 557 (1969).

Katherine Franke has criticized the majority's opinion on the grounds that it demeans homosexual sex by demanding that it be hidden from public view. *See generally* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004). Franke states:

> To a troubling degree . . . the privatized liberty of *Lawrence* leaves lower courts free to cabin protection of, and thus interpret, non-normative sexualities in ways similar to *Stanley v. Georgia*, in which the Court tolerated obscenity at the price of demeaning it, characterizing it as "a base thing that should nonetheless be tolerated so long as it takes place in private." The work done by the public/private distinction . . . may portend a *Stanley*-like treatment of privacy and privatized liberty rights for nonnormative sexualities: Unless they are expressed in respectable private contexts, they may not seek refuge in the Constitution.

Id. at 1407 (footnote omitted) (quoting Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL L. REV. 521, 537 (1989)).

Lawrence does not transform Lawrence's sexual activities into the kind of "public sex" that seems to worry Justice Scalia so much.[53]

Information privacy law actually has a relatively good answer to this question. Under the approach now followed in a plurality of states, disclosing information to a network of friends, relatives, and even some strangers, does not necessarily waive a plaintiff's reasonable expectation of privacy for the purposes of tort law.[54] For example, a court has permitted a plaintiff to sue for tortious disclosure of his HIV positive status to television viewers even though that same plaintiff had willingly disclosed his status to sixty friends, relatives, co-workers, and participants in an HIV support group.[55] You can tell sixty people a fact about yourself, and still have it be "private" for the purposes of privacy tort law.[56]

Now consider the spatial dimensions of privacy. It is perhaps tempting to juxtapose a geographic zone of privacy against a public sphere. But a binary conception of spatial privacy is not workable. There are many semi-private spaces: A health club's locker room, a car parked in a residential driveway, or a recovery room at a hospital containing multiple beds. Here too, courts have been willing to protect privacy within controlled environments: One can expect privacy against outsiders, while not expecting privacy with respect to insiders.[57] When nonlawyers write about sexuality in public, they often struggle with the ambiguity surrounding what it means for a place to be public or private.[58] For example, Laud Humphreys, author of the leading case study on public sex, excludes locales such as gay bars or

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53. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

54. Strahilevitz, *supra* note 41, at 18–22.

55. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494 n.1 (Ga. Ct. App. 1994). *See also* M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623 (2001) (holding that a little league baseball photo is private despite circulation within community); Times Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420, 1427 (1988) (holding that a murder witness's identity is private despite disclosure to friends, neighbors, family, and police); Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985) (holding that limited disclosure of plastic surgery to family and friends does not render the information public); Y.G. v. Jewish Hosp., 795 S.W.2d 488 (Mo. Ct. App. 1990) (holding that in vitro fertilization is private despite disclosure to fellow participants and medical personnel).

56. *See* Strahilevitz, *supra* note 41, at 21–22.

57. *See, e.g.*, Doe v. B.P.S. Guard Serv., Inc., 945 F.2d 1422 (8th Cir. 1991) (holding that female models who undressed in each other's presence had a cause of action against "peeping Tom" security guards who used a security camera to leer at the models in various states of undress); Benitez v. KFC Nat'l Mgm't Co., 714 N.E.2d 1002 (Ill. App. Ct. 1999) (holding that male employees who spied on multiple undressing female employees intruded upon their seclusion even though the undressed co-workers disrobed in each other's presence); Huskey v. NBC, 632 F. Supp. 1282 (N.D. Ill. 1986) (holding that a prisoner who worked out in a prison's exercise cage had a reasonable expectation of privacy against being filmed for a television broadcast even though other inmates and prison guards could see him exercising).

58. Pat Califia's writing seizes on the ambiguity:

bath houses from his conception of "public," noting that naïve passersby are routinely warned at the entrance about what they will see if they continue into the establishment.[59] Such nuances underscore the connection between social privacy and spatial privacy. Both variables measure the extent to which information is nonsecret. Social privacy looks to the number of participants, and spatial privacy addresses the size and character of the potential audience.

To reflect these gradations of privacy, privacy law should borrow from property law, which delineates property regimes into private property, limited commons, and open access regimes.[60] Private property can give the owner nearly absolute rights to exclude outsiders.[61] Open access resources, like a public beach or urban streets, are open to whomever wishes to use them, provided users do not engage in conduct that violates the "rules of the road." Limited commons regimes lie somewhere in between: A collective permits its members to use a resource freely but excludes outsiders from the property. Examples of limited commons spaces include condominium lobbies, country club dining facilities, and many university libraries. Indeed, there are hybrids even within these categories. University libraries typically grant some students the equivalent of leasehold rights to particular

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> Most people who condemn public sex do not seem to know that the legal difference between public and private sex is not a simple matter of choosing either the bushes or your bedroom. There are many zones in between—a motel room, a bathhouse, a bar, an adult bookstore, a car, a public toilet, a dark and deserted alley—that are contested territory where police battle with perverts for control.
>
> . . . .
>
> There is almost always some kind of physical barrier—some bushes, a bathroom door, or a car—between the participants in public sex and the outside world. This barrier screens out the uninitiated. If more than two people are present, one of them usually acts as a lookout. Thus, this behavior is more properly called "quasi-public sex."
>
> People sitting behind the closed door of a bathroom or of a movie booth in an adult bookstore can reasonably assume they have privacy. You could make the same assumption if you were sitting in your car in a deserted location late at night. All of these are favored locations for so-called public sex. If people are going to see what is going on in these places, they must intrude.

PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 74–76 (1994). *See also* William L. Leap, *Introduction* to PUBLIC SEX: GAY SPACE 9 (William L. Leap ed., 1999). Leap states that "[i]n general usage, *public* vs. *private* does not refer to properties inherent in any locale, so much as it specifies two different interpretations . . . of the visibility or accessibility of a particular locale; that is, *public* identifies a location which appears to be 'open,' accessible." *Id.*

59. LAUD HUMPHREYS, TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES 160 (1975).

60. *See, e.g.*, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 553 (2001); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 154–62 (1998); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 457–58 (2002).

61. *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

carrels (private property), leave some tables open for students on a first-come, first-serve basis (limited commons), and permit the public to access government documents stored on the premises (open access).

As one moves from private property to limited commons to open access ownership regimes, an individual owner's ability to exclude outsiders diminishes. In the case of private property, the owner ordinarily can exclude everyone but civil servants performing emergency public functions, such as firemen fighting a blaze or police officers exercising a valid search warrant.[62] In a limited commons, the owners can exclude nonmembers but not members. In the open access case, the individual has no right to exclude anyone from entering the relevant space.

As these exclusion rights diminish, society's interest in regulating sexual conduct increases. Hence, the harm principle provides little justification for restricting sex inside a private home with the window shades drawn, a stronger justification for restricting sex in a health club sauna, and a very strong justification for restricting it on a sidewalk adjoining San Francisco's Haight Street in broad daylight.[63] These implications about social and spatial privacy reinforce common ideas about allowing third-party bystanders to avoid unwanted exposure to other people's sexual conduct.

IV. THE CASE FOR REGULATING PUBLIC SEX

Under the harm principle, the difference between protected relatively "private" sex and relatively "public" sex, which can be proscribed, must be that the former generates fewer negative externalities than the latter. Indeed, as understood by *Lawrence*, negative externalities that result from perceiving an offensive activity count, but those associated with merely knowing that an offensive activity is taking place somewhere do not count.[64] The legislature can only act with

62. The leading case that analyzes the limitations on the private property owners' right to exclude outsiders is *State v. Shack*, 277 A.2d 369 (N.J. 1971). There is also a necessity defense to trespass. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1465 (1996).

63. While giving my parents and sister a tour of my neighborhood during the summer of 1998, I saw a graphic sex act occur on a street crowded with pedestrians.

64. Feinberg explains:

> There is one kind of offended state that can probably never satisfy [the harm principle], namely the shock or disappointment occasioned by the bare knowledge that other persons are doing, or may be doing, immoral things in private with legal impunity. It is conceivable, I suppose, that there could be a person whose moral sensibilities are so tender that such knowledge would lead to a mental breakdown; but in such a case, it

the intent of curtailing harms that third parties perceive with their senses.

Unfortunately, upon reflection, matters turn out to be more complicated than this dichotomy suggests. Some forms of "bare knowledge" are more immediate than others, and, therefore, likely engender more substantial negative externalities. Suppose that Joe, a Baltimore resident, is offended by the idea of gay sex. Under ordinary circumstances, we can expect that Joe will experience great embarrassment, shame, or anger if he sees two men engaging in sex in a public park. Joe's reactions will be more muted if he knows that, statistically speaking, two gay men are likely engaged in sex somewhere in Manhattan right now.[65] The *Lawrence* Court, defensibly, views the first set of reactions, but not the second, as a predicate for state action. But what about intermediate levels of sensory perception? Suppose Joe sees his next-door neighbor and a stranger walk into the neighbor's home. Just before the door closes, Joe hears the neighbor ask the stranger "wanna have sex?" and the stranger's affirmative response. Joe then sees the stranger leave his neighbor's home the following morning. Whatever one thinks of the legitimacy of Joe's reactions to witnessing these scenes,[66] it seems safe to predict that he will experience greater disutility from this scenario than he will from his bare knowledge about sodomy between two strangers somewhere in Manhattan. If Joe's feelings are sufficiently intense, and the neighbor's encounter with the stranger was not particularly meaningful or enjoyable, it is conceivable that Joe's disutility will exceed the positive utility gained by the neighbor and the stranger.[67] Is Joe's intermediate disutility sufficient to form a predicate for state action?

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would be more plausible to attribute the breakdown to abnormal susceptibilities than to the precipitating cause.

FEINBERG, *supra* note 27, at 50. Feinberg provides a lengthy treatment of this subject and the "bare knowledge" problem. *See id.* at 58–71.

65. It may be inaccurate to say that Joe is not harmed by such conduct. *See* Smith, *supra* note 27, at 27–29 (arguing that people may suffer disutility upon acquiring abstract knowledge of such events, even if they do not know any of the details).

66. I am not sympathetic to Joe's sentiments, but I do not doubt the sincerity of people who hold views similar to Joe's.

67. This example raises the problem of interpersonal utility comparison, which presents a recurring problem for utilitarians. For a recent exploration of the subject, see Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 473 (1995). One might address this problem, albeit clumsily, by focusing on the parties' relative willingness to pay. Thus, if Joe, the neighbor, and the stranger all have roughly equal disposable incomes and wealth, then Joe's willingness to pay $1,000 to prevent the neighbor and the stranger from engaging in sexual relations, combined with the neighbor and stranger's unwillingness to spend more than $250 to spend the night together, might help convince us that restricting the conduct in question would increase society's utility (ignoring any additional externalities).

The Supreme Court would almost certainly say no. The inadequacy of bare knowledge is strongly suggested by the text of *Lawrence*, which states that the "fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[68] It seems uncontroversial to assert that when many people view a practice as immoral, they will sincerely say they suffer disutility from the continuation of that practice, and they may attempt to restrict the practice as a way of increasing their own utility.[69] The *Lawrence* majority probably would concede this point. But the quoted text suggests that these forms of disutility do not "count" as harms.[70]

But what about Joe's more substantial disutility from seeing the actions that preceded his neighbor's likely sex act? It is not obvious from the text that this "disutility" also fails to count as a "harm" that will authorize state intervention. Notably, however, the facts of *Lawrence* suggest that in the view of the majority, intermediate disutility, based on some level of immediate knowledge, will not satisfy the harm principle either. After all, we know that Lawrence's neighbor had a strong reason to suspect that Lawrence was engaged in homosexual sodomy, and called the police, falsely telling them that he suspected a "weapons disturbance."[71] Looking for a weapon, the police entered the home and found Lawrence and Garner engaging in sodomy.[72] When the Court says that there is no legitimate interest in preventing private sodomy,[73] it implicitly holds that to be true even in cases where nosy neighbors have a strong basis for believing that sodomy is occurring, and feel sufficiently angered by this conduct to call the police under false pretenses.

Returning to our hypothetical neighbor, Joe, legal doctrine might provide the Court with an easier way out. As a doctrinal matter, the Court probably would note the legality of walking to the threshold of a private home, the constitutionally protected nature of the query "wanna have sex?" said by one consenting adult to another, and the legality of spending the night somewhere within another person's private residence. An ordinary person would not be offended by the first or third step,[74] and while the law admits that people may be offended

68. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (footnotes and citations omitted)).

69. *See* Smith, *supra* note 27, at 24–31.

70. *Lawrence*, 539 U.S. at 577–78.

71. *Id.* at 562.

72. *Id.* at 563.

73. *Id.* at 578.

74. *See generally* FEINBERG, *supra* note 27.

by the conversation between the neighbor and the stranger, the First Amendment holds that the right to speak freely in public trumps these offenses to an audience.[75] Admittedly, however, this disaggregation will not be satisfying on welfarist grounds. But then, *Lawrence*'s harm principle is not genuinely welfarist.[76] Rather, it is a recognition of the difficulties that arise when translating an abstract harm principle into legal doctrine, given First Amendment and other nonwelfarist commitments.

The question of whether a third party has perceived, with his own senses, the offensive conduct that the state seeks to regulate, offers judges the prospect of a relatively bright line rule.[77] The line-drawing issues surrounding differing levels of immediacy that fall short of sensory perception seem much less conducive to legal resolution. Judicial administrability thus justifies treating "bare knowledge" and "intermediate knowledge" differently from "actual knowledge acquired via sensory perception."

Limiting ourselves to the universe of sensory perception, we can imagine three types of "valid" negative externalities that relatively public sex might engender. First, relatively public sex might be witnessed by an adult who would prefer not to see the act in question or a child who cannot consent effectively. Second, relatively public sex might engender greater "secondary effects" than relatively private

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75. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).

76. A genuinely welfarist approach would count all disutility incurred as a result of any action and compare that disutility to the positive utility resulting from the action. But Mill, Feinberg, and other harm principle proponents have argued that certain types of disutility suffered by individuals do not count as harms. *See* Smith, *supra* note 27, at 32–39. For this reason, to its critics, the harm principle is an empty vessel, whether it arises in legal doctrine or philosophical debate. *See id.* at 8. Appropriately enough, the same sorts of criticisms have been registered against the concept of privacy. *See, e.g.*, RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS (2001). Geuss argues:

> It is . . . a mistake to answer the question, "Why shouldn't we interfere with that?" with "*Because* it is private," and think that this is the obvious end of the discussion. In itself it merely and tautologically says that we should not interfere because that is the kind of thing we think we ought not to interfere with.

Id. at 107. Smith and Geuss are right that a normative choice underlies both the harm principle and the concept of privacy generally. Once society or the Court renders a normative judgment about what counts as a harm or why something ought not to be interfered with, however, legal scholarship can make contributions to an important discourse. To the extent that *Lawrence* represents such a normative judgment, this Article takes that judgment as a given and explores its ramifications.

77. I use the word "relatively" because some senses provide more certainty than others about whether the conduct in question is occurring. Seeing people having sex provides greater certainty to the observer than hearing people having sex through a thin hotel wall.

sex, such as rowdiness, traffic jams, or criminal behavior. Third, sexuality in public might engender pure aesthetic harms.[78]

The first of these justifications is plainly the strongest. When a child witnesses two (or more) people having sex, that is a problem. To the extent that "public sex" refers to those sexual acts performed in open access public spaces, children cannot be excluded from these spaces without depriving the public of the benefits associated with true public space.[79] Even limiting the discussion to adults, however, seeing a sex act imposes a discrete harm on the nonconsenting adult.[80] The common law has long distinguished between visible sexual conduct, which could be proscribed as a nuisance, and conduct that took place behind closed doors, which could not.[81] Society regards the woman walking down the street who is flashed by a man wearing only a trench coat as a "victim."[82] Society does not regard someone who merely knows

78. For further discussion of the benefits and costs of public nudity, see Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure*, 29 COLUM. J.L. & SOC. PROBS. 85, 108–14 (1995).

79. On the benefits of public space, see Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 27–28 (2004).

80. *See* JOEL FEINBERG, OFFENSE TO OTHERS 17–18 (1985). Feinberg argues:

> The disquietude caused in casual observers by public nudity and sexual behavior is a complicated psychological phenomenon . . . . To begin with, nude bodies and copulating couples, like all forms of nuisance, have the power of preempting the attention and absorbing the reluctant viewer, whatever his preferences in the matter. . . . There is a temptation to see and savour all, and to permit oneself to become sexually stimulated, as by a pornographic film, but instantly the temptations of voyeurism trigger the familiar mechanism of inhibition and punishment in the form of feelings of shame. . . . When the precipitating experience is not mere nudity, but actual sexual activity, even of a "normal" kind, it will create a kind of inner agitation at best, and at worst that experience of exposure to oneself of one's "peculiarly sensitive, intimate, vulnerable aspects," which is called *shame*.

Id.; *see also* HUMPHREYS, *supra* note 59, at 159 ("The 'public' nature of the offense may become crucial because it violates a norm that western societies, at least, demand in the case of all sexual (and many other interpersonal) acts: The principle of free consent.").

81. John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 277–79, 297 (2001). *See also* PHILIP A. CURRY & STEEVE MONGRAIN, WHAT YOU DON'T SEE CAN'T HURT YOU: AN ECONOMIC ANALYSIS OF MORALITY LAWS (Am. Law & Econ. Ass'n Annual Meetings, Working Paper No. 48, 2004), http://law.bepress.com/cgi/viewcontent.cgi?article=1062&context=alea (suggesting that morality laws seek to proscribe behavior with which the associated negative externality is reduced if the behavior's visibility is decreased); Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 5–9 (1999) (arguing that Florida law barred the prosecution of an individual who fondled another person in a gay bar because no one, other than the arresting officer, witnessed or was offended by the fondling, as the club was not open to the general public).

82. Society's response to the man who is flashed by the woman differs. Indeed, given prevalent social norms, many men would regard such flashing as a benefit, not a harm. On the consent-based understanding of privacy that I offer here, the female flasher would run the risk that someone would see her flashing and be offended by it, but, *ceteris paribus*, this risk might be lower than that faced by her male flasher counterpart.

that another stranger has been flashed as a victim in the same way. So, consistent with the harm principle, if people in a city conclude that public displays of affection are "gross," then the people can prohibit such displays in open access areas, even if the notions of "gross" and "immoral" are inextricably intertwined. The Constitution might only prevent such regulation if a community treats comparable homosexual and heterosexual displays differently[83] or if the conduct in question is sufficiently expressive to qualify for First Amendment protection.[84]

The second of these justifications—secondary effects—is also straightforward, not to mention consistent with the Supreme Court's nude dancing cases.[85] The idea here is that a municipality cannot target nude dancing as such, but it can act to prevent the harmful secondary effects of nude dancing. On the whole, this is a somewhat unsatisfying line of argumentation, since it seems plain that in the wake of these decisions, municipalities disguise morality-based opposition to nude dancing itself as opposition to its secondary effects. In any event, there is a legitimate empirical argument that sex in limited commons contributes to substantial negative externalities whose effects are felt outside the limited commons.[86] That said, if secondary effects are used to justify restrictions on large gatherings for the purposes of sexual contact, the contours of legal doctrine will be decisive. Can criminal defendants avoid liability by showing that their particular activities created no more secondary effects than permitted nonsexual gatherings? Or need a state only show a rational basis for concluding that sex-related gatherings in general contribute to more negative externalities than other unrestricted gatherings involving equal numbers of people? Given *Lawrence*'s Delphic pronouncements regarding the appropriate level of scrutiny,[87] the answer to this question remains unclear.

The third justification—aesthetics—is a broader version of the first justification, and recourse to property law will again prove helpful.

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83. Such divergent treatment might be prohibited under either the dignity rationale articulated in the *Lawrence* majority opinion or the equal protection rationale invoked by Justice O'Connor's concurrence. *See* Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 55 SUP. CT. REV. 75, 136 (2003).

84. For a discussion of conduct that qualifies as expressive conduct protected by the First Amendment, see *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

85. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438–42 (2002); City of Erie v. Pap's A.M., 529 U.S. 277, 296–301 (2000).

86. *See Pap's A.M.*, 529 U.S. at 300; *see also* State *ex rel.* Montgomery v. Pakrats Motorcycle Club, Inc., 693 N.E.2d 310 (Ohio Ct. App. 1997) (discussing anecdotal evidence of such spillover effects).

87. *See generally* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

American law in recent decades increasingly has recognized that the state's police power extends to regulating aesthetics of its publicly visible spaces.[88] This authority extends not only to public and commercial buildings but also to the exteriors of single family homes as well.[89] Notably, most courts no longer require the state to justify its regulation on the basis of economic considerations (e.g., an ugly building lowers property values on the block) or some other tangible harm (e.g., causing glare for nearby motorists, harming the health of nearby residents, or the like).[90] Rather, promoting beautiful, harmonious, or historic exteriors is itself enough of an interest to warrant state restrictions on building exteriors.[91] Indeed, it appears that the government can restrict residents of an area to building houses in particular architectural styles.[92]

If the state can regulate the appearance of building exteriors on the basis of purely aesthetic judgments, it seems appropriate to let the state regulate sexual conduct that is visible to members of the public. To be sure, a family's claim to build a modern home in a colonial neighborhood deserves some weight, just as an exhibitionist couple's desire to express themselves in public deserves some weight. But those individuals' liberty interests ought to be balanced against the collective's weighty interests in regulating the appearance of their immediate environment. This appearance helps the community define itself and send signals to outsiders whom the community would like to attract. Given this communitarian interest, the state might use aesthetic justifications to prohibit conduct in open access areas that is less offensive than public intercourse or full frontal nudity.[93] Indeed, the state might clamp down on public kissing or conduct that is merely suggestive of erotic themes.[94] While such efforts could well run afoul

88. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1019 (5th ed. 2002).

89. *See* John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 301 (1996) (criticizing this line of authority on freedom of architectural expression grounds).

90. James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation*, 15 COLUM. J. ENVTL. L. 307, 313–14 (1990).

91. Berman v. Parker, 348 U.S. 20, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy.").

92. State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

93. Using Joel Feinberg's framework, we might conclude that lack of consent could be a predicate for state action against only "profound offenses," but aesthetics might lend authority to the government to regulate offenses of lower intensity. FEINBERG, *supra* note 80, at 50–96.

94. Surely many of us would oppose decisions by our local governments to prosecute people for kissing in a public park or on a public bus, but this may well be an appropriate decision for the body politic to make, and certain religious communities may see fit to ban all displays of affection from the town square. Indeed, governments in Indonesia and Moscow have recently considered such measures. *See* Stephen Goode, *Interior Decorating for Divorces; Subway Sex*

of First Amendment protections for speech and conduct, they do seem to satisfy *Lawrence*'s harm principle.

Notice what is happening. The *Lawrence* Court's simultaneous embrace of both the harm principle and the public-private dichotomy solidifies a distinction between regulation on the basis of morality (prohibited) and regulation on the basis of aesthetics (permitted). Aesthetics, of course, has a substantial moral component, and is equally subjective. The only real difference is that aesthetics deals with behaviors that third parties can perceive with their own senses, and morality also encompasses behaviors that third parties may believe to be occurring but cannot perceive. Although the line that the Court is drawing here has its flaws and conceptual difficulties, it is a defensible rule of thumb.

V. THE CASE FOR PUBLIC SEX

What interests does public sex further and why might we be concerned about treating it more harshly than private sex? There is extensive literature on public sex.[95] Notably, the defenders of public sex generally refer to sex in limited commons areas, as opposed to open access areas. Some authors argue that confining sex to residential bedrooms renders sex itself shameful, prevents sexual awareness and growth, and actually harms children more than it helps them.[96] Others note that sexual abuse typically occurs in the most private spaces, and so a society interested in protecting children and privileging consent ought not to focus on public spaces.[97]

Police, INSIGHT, Jan. 5, 2004, at 8, 2004 WL 55098512; *Indonesia May Kiss Public Affection Goodbye*, AUSTRALIAN BROAD. CORP. NEWS, Mar. 8, 2004, 2004 WL 70188656; *cf.* Chris Sheedy, *Love Is in the Chair*, SYDNEY MORNING HERALD, May 5, 2004, 2004 WL 74954449 (reporting that thirty-nine percent of human resources managers surveyed at U.S. firms supported rules prohibiting public displays of affection in the workplace).

95. *See, e.g.*, GILBERT D. BARTELL, GROUP SEX: A SCIENTIST'S EYEWITNESS REPORT ON THE AMERICAN WAY OF SWINGING (1971); CALIFIA, *supra* note 58; HUMPHREYS, *supra* note 59; Leap, *supra* note 58.

96. *See* CALIFIA, *supra* note 58, at 78–81; Kendall Thomas, *Going Public: A Conversation with Lidell Jackson and Jocelyn Taylor*, *in* POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM 53, 56–57 (Ephen Glenn Colter et al. eds., 1996). Robert Post recently observed that if one takes seriously *Lawrence*'s dignity-based notion of privacy, the case for restricting public conduct by homosexuals disappears. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 103–04 (2003).

97. HUMPHREYS, *supra* note 59, at 162.

> In the absence of social visibility and vice squad activity, strong cultural norms protect the sanctity of consent to copresence in bedrooms and parlors. Here, however, most rapes and acts of incest are committed, most child molestation is found, most seduction of teenagers occurs. This continuum suggests a final hypothesis: As both social visibility and sanctions decrease, due to apparent protection of the right of consent to copresence, the danger to society of sexual activity in these settings increases. It is the

Even among the most radical proponents of public sex, it is difficult to find people who favor sex in open access locations.[98] Although some exhibitionists derive sexual gratification from having their sex acts watched by an audience, this is usually couched in terms of an audience of willing observers, not passersby or, worse yet, a hostile audience.[99] Indeed, qualms about open access sex are reflected in behaviors as well. In general, people who want to have sex in open access spaces try to limit the number of non-consenting passersby who might witness the act—choosing relatively isolated or less visible locations.[100] They thus try to find open access spaces that nevertheless offer a strong probability of social privacy.[101] To the extent that individuals deviate from these norms, they may have a preference for engaging in proscribed sex acts *because of* their illegality. The law, quite rightly, ignores such preferences for illegality.

The same trends hold true when one shifts from spatial privacy to social privacy. There are Americans whose participation in poly-amorous relationships seems central to their identity.[102] But even among them, sex acts tend to involve dyads. Gilbert Bartell's sociological study of swinging suburban couples suggests that dyads are more common and more preferred than other arrangements.[103] When couples switch spouses, they thus tend to go into separate bedrooms during the sex acts.[104] In short, sex remains primarily a small-numbers activity, even among those who openly reject monogamy.[105]

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safeguarded, walled-in, socially invisible variety of sex we have to fear, not that which takes place in public.

Id.

98. For example, Scott O'Hara's radical defense of sex in public parks is predicated on the fact that his conduct occurs in the bushes, not the thoroughfares. Scott O'Hara, *Talking with My Mouth Full*, *in* POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM, *supra* note 96, at 81, 84 ("[H]e and I both get pleasure from the act; the rest of the world, without extreme measures of surveillance, would never even know about it. I don't know how anyone can claim that we're harming society.").

99. *See* Stephen O. Murray, *Self Size and Observable Sex*, *in* PUBLIC SEX: GAY SPACE, *supra* note 58, at 157.

100. *See id.*; HUMPHREYS, *supra* note 59, at 7, 161; Michael C. Clatts, *Ethnographic Observations of Men Who Have Sex with Men in Public: Toward an Ecology of Sexual Action*, *in* PUBLIC SEX: GAY SPACE, *supra* note 58, at 141, 145–46.

101. SCHNEIDER, *supra* note 41, at 57–58. Admittedly, these practices might reflect concerns about criminal prosecution for public indecency.

102. Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 310–16 (2004).

103. BARTELL, *supra* note 95, at 142–43.

104. *Id.*

105. Some forms of group sex evidently appeal to a rather large segment of the U.S. population, particularly men. *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 159, 162–65 tbl. 4.3 (1994). For example, nearly half of all men aged eighteen to forty-four found group sex "very appealing" or "some-

A survey of the literature on "public sex" therefore reveals that the type of sex that could satisfy the harm principle is not particularly prevalent, let alone vociferously advocated.[106] When people engage in sex in public parks or restrooms, they generally try to seclude themselves from the view of passersby. Semi-public sex does take place in bath houses, bars, sex clubs, and private residences, but there are rarely involuntary witnesses, and access to these locations is tightly controlled. The state undoubtedly retains the right to prohibit sex in open access spaces or limited commons spaces that have failed to warn unwitting passersby.[107] But these forms of conduct are rare, and even when they do occur, the participants ordinarily will take enough precautions to prevent the naïve passerby from noticing.[108]

To be sure, sex in open access spaces may have some marginal expressive benefits, and may offer genuine utility to a small group of people for whom exposing one's self to unwitting strangers is sexually gratifying.[109] But open access sex does not present a hard case under either the First Amendment or a welfare maximization theory. The potential for shame, improper exposure to minors, violence, and disorder are too substantial.

Given the previous discussion, we can now answer Justice Scalia's question of, when does sex become public enough to allow the state to restrict it under the harm principal?[110] One person engaged in solitary sexual conduct at home has long been given substantial constitutional protection.[111] *Lawrence* unambiguously extends the scope of constitutional protection to two people within a home, even if procreation decisions are not implicated, and even if a nosy neighbor might have a strong reason to believe that sodomy is occurring outside of public view.[112] In so doing, *Lawrence* implicitly accepts the information privacy idea that information or conduct can remain private even

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what appealing." By contrast, only four to six percent of men aged eighteen to forty-four described same-gender sex as very appealing or somewhat appealing. *Id.* Unfortunately, the Laumann data does not break down group sex into sub-categories (i.e., sex involving three people, four people, more than four people).

106. *See generally* sources cited *supra* notes 95–104.

107. *See, e.g.*, State v. Rocker, 475 P.2d 684 (Haw. 1970) (upholding indecent exposure convictions for nude sunbathers because their "nude beach" was a popular location for fisherman and members of the general public).

108. *See, e.g.*, Recreational Developments of Phoenix, Inc. v. City of Phoenix, 83 F. Supp. 2d 1072, 1078–80 (D. Ariz. 1999) (describing access restrictions at a series of sex clubs in Phoenix).

109. *See* Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1474 n.130 (1994).

110. *See supra* note 5 and accompanying text.

111. *See generally* Stanley v. Georgia, 394 U.S. 557 (1969).

112. *See supra* notes 41–55 and accompanying text.

though it is shared with another person, so long as consent exists. What about the threesome? Setting aside the traditionalist concerns that the *Lawrence* Court deems illegitimate, there does not seem to be a good reason to treat threesomes any differently from twosomes.[113] Indeed, as I have suggested, the important leap in privacy law is not from "two to three," but from "one to two."[114] In short, any sexual conduct that takes place on private property, with the consent of all witnesses and participants, seems "private" under *Lawrence*'s harm principal. Because the number of participants and witnesses rarely will generate the level of secondary effects that form a predicate for state action, consensual conduct within homes is almost always protected.

What about the limited commons? Here again, consent is the touchstone of privacy. The actions of a solitary sex performer at a sex club are private if all people within the limited commons consent to witnessing such an act. Exceptions arise only if the boundaries of the limited commons are inadequately policed (in which case the law should treat it like an open access space) or if the audience generates sufficiently substantial negative externalities to fall within the Supreme Court's "secondary effects" line of reasoning.[115] Under this case law, the state may legislate, but only to target the secondary effects, not to target the performance itself.[116] The same is true for two or more performers within the limited commons. Indeed, within the limited commons, the number of witnesses typically dwarfs the num-

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113. One might argue, alternatively, that monogamy is welfare maximizing, and that group sex should be restricted on paternalist grounds. For a critique of compelled monogamy, see Emens, *supra* note 102.

114. *See supra* text accompanying notes 50–52.

115. In *Recreational Developments of Phoenix v. City of Phoenix*, 83 F. Supp. 2d 1072 (D. Ariz. 1999), the court took a different approach. It decided that a group of sex clubs in Phoenix were not private, even though club employees policed the entrances of said clubs to keep out people not interested in witnessing sex acts. *Id.* at 1082–84. The court found the clubs non-private on the basis of their non-selective admissions criteria. *Id.* This focus on associational privacy interests seems misguided in light of the *Lawrence* Court's subsequent failure to discuss the specifics of Lawrence and Garner's relationship, and in light of the possibility that lasting intimate associations might develop among strangers who meet at sex clubs. *Cf. Lawrence*, 539 U.S. at 567 ("When sexuality finds overt expression in intimate contact with another person, the conduct can be but one element in a personal bond that is more enduring."). After *Lawrence* it would seem that sexual privacy hinges on spatial privacy considerations more than associational privacy considerations. From an information privacy perspective, the fact that most participants in the club were strangers, as opposed to old friends, seems orthogonal to the issue of whether the conduct was "private," and certainly bore little or no relationship to the harm principle. After all, obscure sex acts performed for strangers seem less likely to have lasting repercussions than sex acts performed for friends, relatives, or neighbors.

116. City of Erie v. Pap's A.M., 529 U.S. 277, 293–301 (2000).

ber of participants, so the number of participants may be a negligible consideration.

In open access environments, things change dramatically. In such environments there is a real likelihood that a naïve passerby will be exposed to the act in question. The harm principle is invariably satisfied because unwanted exposure to someone else's sex act is a harm and also because efforts to exclude passersby from open access areas also represents a harm (an improper assertion of dominion, in this case). After *Lawrence*, these spaces are the zones in which the state retains untrammeled authority to regulate sex acts.

The following figure introduces the different categories of relatively public and private sex. On private property, whose borders are normally protected, the increasing number of participants in the room renders the conduct in question decreasingly private. But these differences are ordinarily incremental and, barring huge gatherings in mansions, will not generate the kinds of secondary effects that might justify state regulation under the harm principle.[117] In the limited commons, there may be a large enough potential audience to dwarf the effects of the increase in the number of participants. Thus, *ceteris paribus*, a sex performance with one performer and one hundred audience members is as private as one with three performers and ninety-eight audience members. One's status as a participant or audience member does not seem to matter, so long as consent is established. As the number of participants and audience members increases, however, the magnitude of any secondary effects increases, and so does the predicate for state involvement. Finally, in open access spaces, there is generally a very substantial risk of non-consensual exposure to embarrassing images or of improper efforts to exclude someone from a space that is legally open to all. In such spheres, the state's authority to regulate is virtually untrammeled.

117. Sex clubs are another matter. *See Recreational Developments of Phoenix*, 83 F. Supp. 2d at 1079 (noting that at some sex clubs, "several hundred people" could show up on a given night).

FIGURE 1: RELATIVE PRIVACY IN VARIOUS SPACES

	Private Property	Limited Commons	Open Access
1 participant	Most Private *Stanley*[118]	Relatively Private with border control	Relatively Public
2 participants	Relatively Private *Lawrence*[119]	Relatively Private with border control	Relatively Public
3 or more participants	Relatively Private *Lovisi*[120]	Relatively Private with border control	Least Private

This figure and analysis suggest that once one accepts the idea of social privacy, spatial privacy quickly trumps social privacy as a decisive consideration. Social privacy might make an important difference of degree in situations where there is no audience (i.e., on private property), but once a sizable audience exists, it hardly matters how many people fill the various roles of audience member and participant.

VI. THINKING ABOUT THE CASE LAW—*LOVISI V. SLAYTON*

Let us now return to our paradigmatic case—the Fourth Circuit's 1976 opinion in *Lovisi v. Slayton*.[121] At the outset, I applauded the court's effort to bring information privacy principles into decisional privacy case law.[122] That being said, *Lovisi*'s vision of information privacy is highly distorted. In the court's view, Mr. Dunn's participation in the sex act deprived the Lovisis of whatever social privacy they otherwise would have had.[123] But, as we have seen, information privacy law ordinarily is just as receptive to the idea of privacy among three as it is to the notion of privacy between two.[124] Spatial privacy also counsels against the result in *Lovisi* because the conduct in question took place in a private residence.[125] The idea that the Lovisis had no reasonable expectation of privacy once they invited Earl Dunn into their bedroom is silly. If that was all that happened in the case, it would have been wrongly decided, particularly after *Lawrence*.[126]

118. Stanley v. Georgia, 394 U.S. 557 (1969).

119. Lawrence v. Texas, 539 U.S. 558 (2003).

120. Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976).

121. *See supra* text accompanying notes 8–20.

122. *See supra* text accompanying note 24.

123. *See supra* text accompanying note 20.

124. *See supra* notes 50–56 and accompanying text.

125. *See supra* text accompanying note 18.

126. In this respect, my understanding of *Lawrence* diverges from that of Katherine Franke, who concludes that the Supreme Court would probably not strike down a consensual sodomy law applied to group sex in a private residence. Franke, *supra* note 52, at 1410–11.

> The lesson of the [European Court of Human Rights'] recent sexual privacy jurisprudence is that rather raunchy forms of sex can be insulated from government regulation

In this case, however, there was further dissemination, via the Lovisis' daughter. Although the court did not devote any attention to this dissemination, it is that subsequent distribution that potentially implicated the harm principle. The Lovisi children found photographs depicting their parents engaged in sexually explicit acts.[127] This is a harm because the child cannot consent effectively to witnessing these acts and allowing the parent to consent on the child's behalf is problematic on these facts. One of the Lovisis' daughters then brought a sexually explicit photograph from home to school and showed it to other children.[128] Here we have another harm. Eventually, a teacher found the photograph and contacted the authorities.[129] By creating the photographs and taking insufficient precautions to prevent their dissemination, the Lovisis exposed multiple minors to sexually explicit images.[130] It is as though the photographed activities took place in a highly visible open access site. The harm principle is satisfied, and the state should be free to punish the conduct in question. Only if the Lovisis had taken sufficient steps to render the photographs' dissemination highly unlikely or unforeseeable would the couple be able to escape liability.[131]

> if they take place within a marriage or, absent a marriage or other sanctioned relationship, if they in no way threaten to seep into public view. If cases like these were to come before the United States Supreme Court now . . . a case [involving multiple participants in a sex act] would likely come out differently. The sex at issue [in such a case] was not an expression of an enduring bond, and it did not take place in the context of a relationship. Indeed, there was nothing about it that evokes the warm, fuzzy, domesticated backdrop of *Lawrence*. It was just sex. *Lawrence*, most likely, would provide those men little comfort.

Id. As long as the private owner took ordinary precautions to shield the activity from non-consenting outsiders, there is simply no harm, and thus no predicate for state action. I believe that *Lawrence* makes this abundantly clear, and that the Court's failure to take interest in the details of Lawrence and Garner's relationship is telling. *Lawrence*'s distinction between public and private acts is an application of the harm principle, but *Lawrence*'s privileging of dyads over triads would be an abrogation of it.

127. Lovisi v. Slayton, 363 F. Supp. 620, 623 (E.D. Va. 1973).

128. Lovisi v. Slayton, 539 F.2d 349, 350–51 (4th Cir. 1976).

129. *Id.* at 351.

130. The Lovisi children do not appear to have brought any photographs of the Lovisis and Dunn into school, but it appears that the children had access to those photographs. *Lovisi*, 363 F. Supp. at 623.

131. Jurisdictions' bans on public sex acts typically require not only that a non-consenting person see the act in question, but also that such exposure would have been foreseeable to the participants. *See* Michael E. Malamut, *Proposal for Revision of Archaic Statutes Implicating Private Consensual Noncommercial Adult Sexual Conduct*, 3 LAW & SEXUALITY 45, 83–84 (1993).

Let me add one complication. Assume that the Lovisis actually took insufficient steps to prevent the photographs' dissemination. Say they carelessly left the photographs lying around on the kitchen table for a week, but their daughter never found them. Can the state punish their conduct? In order to answer this question, one needs to decide whether satisfying the harm

VII. CONCLUSION

Lawrence gives us a world where everyone who is exposed or potentially exposed to a sex act is capable of consenting, and does in fact consent to participating in or witnessing the act. If everyone consents, then, under an information privacy understanding of *Lawrence*, the act is "private" and its participants are protected under the Constitution.[132] When the *Lawrence* Court refers to Lawrence and Garner's conduct as being "private and consensual,"[133] the Court was being redundant. Garner's consent to have sex with Lawrence, in the presence of no one else, rendered their activity private. This explains why the Court sensibly drew a distinction between sex in public places and sex in private places. In a relatively public place, participants have no right to exclude outsiders, and therefore encounter the risk that an outsider, who does not consent to seeing the act, will in fact be subjected to it.

More provocatively, *Lawrence* appears to suggest that the police power authorizes the state to regulate rather minor, aesthetic offenses relating to human sexuality, so long as those offenses occur in open access sites or inadequately controlled limited commons. We might read *Lawrence* as part of a trend in property law generally that autho-

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principle requires an actual harm or whether a risk of a harm is sufficient. As a general matter, Millian philosophers have concluded that a risk of a harm is a harm for the purposes of the harm principle. Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 969, 984 n.108 (2000). Thus, the state could punish the Lovisis even if they were lucky enough to avoid the further dissemination of the photographs. *Cf.* Malamut, *supra* note 131, at 84 n.193. Malamut quotes *Commonwealth v. Ferguson*, 422 N.E.2d 1365 (Mass. 1981), for the proposition that "conduct is not established as public merely because another person actually observes the conduct, and, conversely, in order to be illegal, the conduct does not have to be actually observed by members of the public." *Id.* (internal quotation marks omitted).

Of course, it can be difficult for the state to learn about such risks in the absence of an actual harm. One historical instance of criminal punishment for consensual acts that could not be seen by the public was the Walter Jenkins affair. Jenkins was Lyndon Johnson's Chief of Staff and was caught engaging in consensual sodomy with another man in the stall of a basement restroom of a Y.M.C.A. Lee Edelman, *Tearooms and Sympathy, or, The Epistemology of the Water Closet*, *in* NATIONALISMS & SEXUALITIES 263, 263–66 (Andrew Parker et al. eds., 1992). The closed stall door would have prevented a restroom user from seeing their act, but the Washington D.C. vice police were able to look down into the stalls from an elevated peephole. *Id.* at 266. For a more recent case involving somewhat similar police tactics, see People v. Lynch, 445 N.W.2d 803 (Mich. Ct. App. 1989), *abrogated by* People v. Brashier, 496 N.W.2d 385 (Mich. Ct. App. 1992), *whose abrogation in turn was recognized by* People v. Bono, 641 N.W.2d 278 (Mich. Ct. App. 2002).

132. To clarify, according to my analysis of privacy, a rape that occurs in the bedroom of a single family home is not "private." It is not private because of the victim's lack of consent to the assailant's acts; she does not consent to make her body parts visible and accessible to the assailant, nor does she consent to being exposed to his body. This is not the most important reason why rape is wrong, but it is the most important reason why rape can never be private.

133. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

rizes majoritarian regulation of individual public conduct that is insufficiently harmful to constitute a common law "nuisance" but sufficiently offensive to galvanize citizens to seek restrictive legislation. This suggests that *Lawrence*'s embrace of both the harm principle and a sharp public-private distinction will raise the stakes of First Amendment law in the coming years, and perhaps draw renewed attention from those combatants in the cultural wars who were disappointed by the result of *Lawrence*.