PROTECTED CONDUCT AND VISUAL PLEASURE: A DISCURSIVE ANALYSIS OF LAWRENCE AND BARNES

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INTRODUCTION

Five years after the Supreme Court rejected a challenge to Georgia’s ban on homosexual sodomy in Bowers v. Hardwick,1 the Court, in Barnes v. Glen Theatre, Inc.,2 permitted the State of Indiana to prohibit nude dancing at the Kitty Kat Lounge in South Bend. At first glance these cases appear to have little in common. The plaintiffs in Bowers claimed a fundamental right under the Due Process Clause of the Fourteenth Amendment to engage in same-sex sodomy, while the plaintiffs in Barnes claimed a violation of their First Amendment rights in response to a statute prohibiting nude dancing in a night club. While both claims rested on independent and ultimately unsuccessful constitutional arguments, the regulations challenged in both instances were strikingly similar: state prohibitions of sexual conduct. This similarity becomes increasingly apparent in light of the Supreme Court’s recent holding in Lawrence v. Texas.3 Specifically, by articulating why Bowers was decided incorrectly, Lawrence impliedly demonstrates why Barnes was wrong as well.

The ink had barely dried on the Lawrence opinion before public outcry erupted over its potential reach. Politicians, scholars, community leaders, and pop-cultural commentators across the political spectrum all claimed that the opinion would have far reaching impli-
cations, for better or for worse, well beyond the holding of the 1986 case it sought to overturn. Forseeing such a response, the Justices who penned the opinion textually tripped over themselves in a muddied attempt to delineate the outer boundaries of Lawrence. The majority carefully, yet ambiguously, couched its discussion of the liberty interest in limiting terms; Justice O'Connor's concurrence was quick to distinguish her reasoning from the controversial issue of same-sex marriage; and Justice Scalia in his vigorous dissent claimed that the majority's opinion entailed a "massive disruption of the current social order," opening the doors to the legalization of prostitution, bestiality, incest, and masturbation.

Undoubtedly the scope of Lawrence will be the subject of continued debate and future litigation. However, the ultimate substantive thrust of the decision will be determined not by a whirlwind of socio-political rhetoric, but rather by the methodology the courts employ in their initial applications of the decision. Put another way, it is the methodology surrounding the initial interpretations of Lawrence—the courts' mode of analysis and their level of critical engagement—that will ultimately give effect to the liberty interest which the opinion

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5 See infra notes 33-38 and accompanying text (defining and offering detail on the limits outlined in Lawrence); see also Mary Anne Case, Of "This" and "That" in Lawrence v. Texas, 2003 SUP. CT. REv. 75 (drawing attention to the limiting effects of the seemingly deliberate ambiguity of many of the key passages in the majority opinion).

6 See Lawrence, 559 U.S. at 585 (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond the moral disapproval of an excluded group.").

7 Id. at 591 (Scalia, J., dissenting).

8 Lawrence has already been raised in several unsuccessful attempts to invalidate various state regulations. See, e.g., Williams v. Att'y Gen., 378 F.3d 1232, 1236–38 (11th Cir. 2004) (upholding Alabama's prohibition of sex toy sales and declaring that Lawrence contained no fundamental guarantee of sexual privacy); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815–17 (11th Cir. 2004) (upholding Florida's prohibition of adoption by same-sex partners and dismissing contentions that Lawrence bars such a prohibition); United States v. Peterson, 294 F. Supp. 2d 797, 803 (D.S.C. 2003) (finding that Lawrence does not invalidate prohibitions on child pornography); State v. Clark, 588 S.E.2d 66, 68–69 (N.C. Ct. App. 2003) (rejecting the use of Lawrence as a constitutional challenge to a rape statute). But see Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (relying, in part, on Lawrence to hold that moral approbation is not a sufficient justification for denying same-sex couples the benefits of state sanctioned marriage under the Massachusetts Constitution); Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 4, 2004) (using Lawrence as a justification for construing the Washington State Constitution to forbid exclusion of homosexuals from the institution of marriage).
purports to protect. In the less than two years since the Court announced its decision in Lawrence, considerable debate and confusion have arisen over what, if any, fundamental right the majority opinion announced, and what state action it prohibits beyond the criminalization of adult, consensual sodomy.\(^9\) Deciphering the equivocal limits of Lawrence and the permutations of conduct afforded protection is a challenge that all courts will face in a variety of contexts. However, while the substantive outcome of each future case unquestionably contributes to further defining the scope of the protected liberty interest, the very lens through which the courts examine the conduct at issue has profound implications for the future reach of the decision. As courts are currently working on an ostensibly blank canvas, it is the methodology employed in these first judicial grapplings with Lawrence that will set the tenor of the decision's legacy.\(^10\)

This Comment will argue that when interpreting Lawrence, courts should employ contemporary understandings of human sexuality in keeping with the decision's progressive and liberating spirit. Specifically, the courts should approach all questions of sexual conduct and sexual expression with a nuanced conception of the experience of sexuality implicit in modernity. When such an understanding of contemporary realities is employed, it becomes readily apparent why Barnes, like Bowers, was decided incorrectly.

This Comment begins by looking to the Lawrence decision itself, examining the limits of the opinion and the type of conduct it purports to protect. Next, the Comment will argue for a broad reading of protected "sexual conduct," one that reflects a nuanced understanding of the modern experience of sexuality. Employing such an understanding requires the courts to categorically reject the sexual status quo, insofar as sexual conduct is only understood as such in its more traditional, universally-accepted manifestations. Specifically, this Comment will argue that in recognizing forms of sexual conduct deserving protection under Lawrence, the courts need to inquire into the myriad of ways sexuality is manifest outside of the recognized paradigms.

This Comment will ultimately employ the controversial (and often criticized)\(^11\) case of Barnes v. Glen Theater, Inc. as just one example of

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\(^9\) See Lofton, 358 F.3d at 815-17 (finding that Lawrence cannot be construed to recognize a new fundamental right, as the Court did not inquire into whether private sexual conduct was a fundamental right and did not engage in strict scrutiny); see also Williams, 378 F.3d at 1236-38 (declining to find that Lawrence created a fundamental right to sexual privacy).

\(^10\) Lofton, 358 F.3d at 815-17, and Williams, 378 F.3d at 1236-38, are early examples of federal courts trying to decipher the scope of the broader liberty interest in Lawrence. For the purpose of this Comment, the Eleventh Circuit's determinations will be considered grossly restrictive and improper.

\(^11\) See infra note 66 (citing critical treatment of Barnes).
how modern understandings of sexuality can be utilized in future interpretations of Lawrence, as well as the implications of doing so for other areas of constitutional jurisprudence. In particular, the Comment will argue that extending Lawrence-type protection to the conduct at issue in Barnes requires that courts embrace an all-encompassing conception of sexual conduct—one that recognizes the sexuality inherent in certain non-physical, non-traditional, visual acts. The failure of courts to adopt such an understanding creates the risk that Lawrence will become a judicial pronouncement which simply reifies the pre-Lawrence status quo, rather than one which protects the liberty of those on the margins. 12

The Comment concludes by demonstrating that approaching future interpretations of Lawrence with an expansive conception of sexual conduct provides for a broader, more liberating, range of protected activity. As a logical extension of such an approach, the Comment will ultimately argue that regulations of sexual expression such as those present in Barnes may, after Lawrence, be more effectively understood as “conduct” regulations that serve to regulate “status,” and are therefore subject to due process challenge. 13 It is only when Lawrence is approached with such an expansive and contemporary understanding of sexuality that the ultimate promise of the decision may be fully realized. 14

I. THE LIMITING LANGUAGE OF LAWRENCE

It is crucial to establish at the outset, for the purpose of future application, that Lawrence is not simply a case involving the right of homosexual individuals to engage in a particular sexual act. 15 Lawrence stands for the much broader proposition that a state’s power to regulate sexual conduct, in the absence of a non-morality based state in-

12 While there is no explicit discussion of the Court’s intent to protect marginalized individuals, that sentiment is implicit in the Court’s declaration that all persons can invoke the Constitution in their search for greater freedom. Lawrence, 539 U.S. at 579.
13 See infra Part I.A.
14 In Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name, 117 HARV. L. REV. 1893 (2004), Lawrence Tribe declares Lawrence’s articulation of a Fourteenth Amendment liberty to be one of the most defining and empowering moments in constitutional jurisprudence since Brown v. Board of Education, 347 U.S. 483 (1954).
15 See supra note 4 (citing scholarly speculations on the far-reaching implications of Lawrence beyond the prohibition of regulations prohibiting same sex sodomy). But see Williams, 358 F.3d at 1236 (finding that Lawrence simply established the “unconstitutionality of criminal prohibitions on consensual adult sodomy”); cf. Recent Cases, Constitutional Law—Substantive Due Process—Eleventh Circuit Upholds Alabama Statute Banning Sale of Sex Toys, 118 HARV. L. REV. 802 (2004) (analyzing the claim in Williams and Lofton that Lawrence does not articulate a fundamental right to sexual privacy).
terest, is virtually non-existent. Thus, on its face, *Lawrence* is primarily a decision regarding a state's power to enact a particular conduct regulation. While this statement should appear obvious (and is, perhaps, an oversimplification), it is worth articulating for its implications on the reach of *Lawrence* in future decisions. If *Lawrence* can be read as a conduct-focused opinion, it is readily apparent that the holding becomes applicable to a broad range of cases, most notably those like *Barnes*, which implicate the First Amendment.

**A. Freeing Conduct**

Prior to *Lawrence*, the Supreme Court grappled with the distinction between "conduct" and "status" regulations in several instances involving homosexuality. *Lawrence* is particularly noteworthy because it serves as a clarification of the relationship between these two concepts. Were *Lawrence* to be read solely as a status-focused decision—concentrating on the power of the state to punish a class of people based on who they are ("status") as opposed to what they do ("conduct")—its future reach would be significantly truncated. Despite the apparent separability of these terms, *Lawrence* represents the first time that the Court was able to properly gauge the relationship between homosexual status and conduct.

The majority in *Bowers* held that it was permissible for Georgia to prohibit homosexual sodomy, which the Court treated ostensibly as a straight-forward conduct regulation. The problem with the *Bowers* analysis was that Georgia had not actually criminalized homosexual sodomy, but rather had enacted a general sodomy prohibition that

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16 *Lawrence*, 539 U.S. at 571 (holding that morality alone is not a sufficient state interest to justify the criminalization of private, adult, consensual sexual conduct).


18 It has been argued that sexual conduct may implicate both free speech rights under the First Amendment as well as fundamental rights/liberty interests under the Fourteenth and Fifth Amendments. See C. Edwin Baker, Op-Ed, *First Amendment Protection for Gays: Nude Dancing and Homosexuality Deserve the Same Rights*, N.Y. TIMES, July 27, 1991, at 23 (arguing that as legitimate forms of expression/conduct, nude dancing and homosexual sodomy deserve the same protection under the First Amendment). This Comment relies on Professor Baker's initial inquiry, specifically in its re-evaluation of *Barnes*.

19 Were *Lawrence* to apply only to status-based classifications, the holding would only extend to instances where the law singled out a class of individuals for special treatment. In contrast, a conduct-based ruling extends to all who engage in the protected activity, independent of "who they are."

applied to all citizens of the state.\(^\text{21}\) Georgia's statute was, on its face, simply a regulation of "conduct" independent of "status." The Court, however, took it upon itself to conflate the two concepts, treating homosexuals as a class defined by their willingness to engage in certain conduct—namely, sodomy.\(^\text{22}\) Thus, the question the Court eventually answered in the negative was whether there is a fundamental right to engage in homosexual sodomy. The question of homosexual sodomy, however, should never have been present in the case.\(^\text{23}\)

The Court had more success teasing out the status/conduct distinction in \textit{Romer v. Evans}\(^\text{24}\) precisely because the Court was faced with a challenge to a straightforward status regulation, independent of any conduct prohibitions. In holding an amendment to the Colorado Constitution to be in violation of the Equal Protection Clause of the Federal Constitution, the Court recognized that the amendment in question was "a status-based classification . . . [which is] something the Equal Protection Clause does not permit."\(^\text{25}\)

\textit{Lawrence} again presented the Court with a hybrid status/conduct distinction, yet one more obvious than that in \textit{Bowers}. The statute at issue in \textit{Lawrence} was an explicit prohibition of homosexual sodomy.\(^\text{26}\) Thus, the Court was faced with a conduct regulation, but one predicated on status. In this instance, however, the majority was able to properly articulate the two categories of regulation without conflating them. The Court acknowledged its error in \textit{Bowers} stating, "To say

\(^{21}\) See id. at 188 n.1 ("Georgia Code Ann. § 16-6-2 (1984) provides . . . (a) A person commits the offense of Sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .").

\(^{22}\) See id. at 186 (stating the case's holding in terms of homosexual sodomy); see also \textit{Romer v. Evans}, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (declaring that homosexual conduct "defines the class" as homosexuals); JANET HALLEY, \textit{DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY} 5-11 (1999) (arguing that the \textit{Bowers} majority inappropriately conflated homosexual status and conduct).

\(^{23}\) This is ultimately the problem that presents itself in the military's "Don't Ask Don't Tell" policy. Under Department of Defense ("DOD") regulations, service members who demonstrate a "propensity to engage in homosexual conduct" may be properly subject to discharge. However, in enforcing the statute, the mistake present in \textit{Bowers} is repeated such that conduct and status are again conflated. While the original DOD regulations were intended to be a straightforward conduct prohibition, they ostensibly became regulations of status. Homosexuals were understood to be \textit{who they were because of what they did}. See HALLEY, supra note 22, at 3-5 (describing the history of "Don't Ask, Don't Tell," and arguing that its application cannot distinguish between engaging in homosexual conduct and being a homosexual). Several circuit courts have upheld the "Don't Ask, Don't Tell" policy as constitutional. \textit{See}, e.g., \textit{Able v. United States}, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997).

\(^{24}\) 517 U.S. 620 (1996) (holding unconstitutional an amendment to the Colorado Constitution that precluded all state action designed to extend general protections to homosexual persons).

\(^{25}\) Id. at 621.

\(^{26}\) See \textit{TEX. PENAL CODE ANN.} § 21.06(a) (Vernon 2003).
that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. 27 The Court went further to say, "The laws involved in Bowers and here are . . . statutes that . . . do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct . . . ." 28 Sexual conduct, the Court concluded, does not define a class. It is rather "but one element in a personal bond" formed by members of that class. 29 Thus, the Court properly acknowledged a certain dialectic between status and conduct: while they are distinct categories, regulation of one may have profound implications for the other.

B. Limiting Dimensions

With the notion of "conduct" freed from its improper conflation in Bowers, Lawrence can be correctly read as a ruling on state regulation of sexual conduct. 30 As such, its reasoning has tremendous potential for application in all cases dealing with forms of sexual expression. Critics of Lawrence were quick to make doomsday predictions that the Court had opened its doors to a proverbial parade of horribles. 31 Had the Court drafted a far more ambiguous and sweeping opinion, there may have been merit to such ultimately baseless worries. 32 However, with a certain sense of judicial clairvoyance, the majority was quick to erect an outer wall around the liberty interest pre-

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28 Id.
30 This, of course, is not intended to suggest that status regulation plays no part in the majority's analysis. However, for the purpose of this section of the Comment, it is necessary to look at Lawrence's treatment of conduct regulation, without focusing on its status implications.
31 See supra note 4 and accompanying text (noting the views of those who foresee wide-ranging consequences in Lawrence's wake); see also Lawrence, 539 U.S. at 590 (Scalia, J., dissenting) (claiming that the Lawrence ruling calls into question laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity").
32 While Lawrence was handed down rather recently, the "massive disruption" that Justice Scalia predicted in his dissent, Lawrence, 539 U.S. at 591 (Scalia, J., dissenting), has not yet occurred. Rather, several laws regulating sexual conduct have since been upheld only when the state was unable to assert a non-morality based justification. See supra note 9 and accompanying text (describing the narrow interpretation of Lawrence in subsequent court decisions). The most monumental use of Lawrence to date was its citation in Goodridge v. Department of Health, 798 N.E.2d 941, 948 (Mass. 2003) (finding a Massachusetts ban on same-sex marriage in violation of the state constitution).
sent in Lawrence. Deciphering the precise limits of that nebulous boundary is a challenge all courts will undoubtedly face.

When applying the analysis performed in Lawrence to other cases concerning state regulation of sexual expression such as Barnes, the opinion’s judicially created boundaries come into focus. The majority opinion contains two main limiting dimensions that protect the asserted liberty interest from over-expansive interpretation. These two dimensions will hereinafter be referred to as the opinion’s “expressive limitations” and “spatial limitations.” These limitations are stated explicitly and impliedly throughout the opinion and are, in part, derived from Supreme Court precedent. Without the presence and enforcement of such limitations it would be difficult to imagine a post-Lawrence exercise of liberty that could be constitutionally subject to state sanction.

The spatial and expressive limitations were initially made explicit by the petitioners in their petition for certiorari, which the Supreme Court granted. The second of three questions put to the Court was “[w]hether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?”

The petitioners’ framing of the issue articulates the narrowest possible reading of Lawrence, and the most restrictive interpretation of the opinion’s expressive and spatial limitations. At the absolute very least, Lawrence speaks to the unconstitutionality of regulating “adult consensual sexual intimacy” occurring within the confines of the “home,” when the only asserted state interest is grounded in notions of morality. Under this reading, the private sphere of the “home”...

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53 The specific nomenclature is mine for the express purpose of this Comment. As of yet, I do not suggest repeating it in learned circles. There is, however, some textual support for my construction of these terms. “Spatial dimensions” are referenced throughout the opinion. See Lawrence, 539 U.S. at 562 (“The instant case involves liberty... in its spatial and more transcendent dimensions.”). Sexual conduct has also been characterized as a form of “expression.” See, e.g., Baker, supra note 18, at 23 (“[H]omosexual conduct between consenting adults should be protected expression.”).

54 See infra notes 45–50 and accompanying text (describing the history of the constitutional protection afforded to intimate, rather than purely sexual matters by the Supreme Court before Lawrence).

55 537 U.S. 1044 (2002) (granting the petitioners, John Lawrence and Tyrone Garner, certiorari, on the three questions they submitted to the Court).

56 Id. (emphasis added).

57 Articulating a discreet and narrow issue for the Court was, quite obviously, sound judicial strategy on behalf of the petitioners. Citation of the petition for certiorari is not intended to suggest that the petitioners would advocate for such a restrictive reading of the Court’s ultimate holding.

58 Cf. supra note 9 and accompanying text (describing the confusion over what, if any, fundamental right was announced in Lawrence).
serves as a spatial limitation, and "adult consensual sexual intimacy" as a limitation on the type of conduct warranting protection.

Fortunately for those who argue that Lawrence should have a more expansive interpretation, the Court did not cast their ultimate decision in the explicit terms advanced by the petition for certiorari. While acknowledging the presence of spatial and expressive limitations, the opinion remained equivocal as to the precise scope of these limits. The challenge that courts will face in subsequent applications of Lawrence is giving meaning to these judicially implied limitations.

1. Expressive Limitations

In considering treatment of the expressive limitations in the opinion, "sexual intimacy" stands out as the only equivocal term. The additional requirements of "adult" and "consensual" are explicit and relatively unambiguous.\(^9\) Moreover, the state can assert numerous interests, independent of morality, in requiring that sexual conduct remain between consenting adults.\(^4\) Intimacy, on the other hand, is a far more subjective concept, which the state will have more difficulty limiting in the absence of a non-morality based justification. While the term "intimate" is absent from law dictionaries,\(^4\) it is given broad meaning in standard dictionaries.\(^4\) Intimate conduct may be understood broadly as conduct, "personal or private," characterizing "one's deepest nature" or more narrowly as conduct "marked by a warm friendship developing through long association."\(^4\) When examining the specific facts of Lawrence, it is clear that the intimacy at issue is of the more traditional variety. Specifically, the intimate conduct involved two individuals, the mutual touching and meeting of

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\(^{9}\) See Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other engaged in sexual practices . . ."); cf. Paris Adult Theatre v. Slaton, 413 U.S. 49, 57 (1973) ("Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, this Court has never declared these to be the only legitimate state interests permitting regulation . . . ." (citations omitted)).

\(^{40}\) One such state interest is that of protecting minors. But see Paris Adult Theatre, 413 U.S. at 106 (Brennan, J., dissenting) (noting that there is an "emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests").

\(^{41}\) See, e.g., BLACK'S LAW DICTIONARY 827 (7th ed. 1999).

\(^{42}\) See, e.g., THE MERRIAM-WEBSTER DICTIONARY (5th ed. 1994) [hereinafter MERRIAM-WEBSTER] (defining "intimate" as: "of a very personal or private nature;" "belonging to or characterizing one's deepest nature;" "marked by very close association, contact, or familiarity"; "marked by a warm friendship developing through long association"), available at http://www.m-w.com/cgi-bin/dictionary.

\(^{43}\) Id.
bodies, and the act of penetration. One of the questions this Comment posits is whether this sole form of intimacy—the physical union of two bodies—constitutes Lawrence's expressive limitation.

While it is unclear what specifically constitutes sexual intimacy for the Lawrence majority, their use of the term is not accidental. "Sexual conduct," as a stand-alone concept, is never present in the opinion; rather, it is always qualified with the term "intimate." The Court's treatment of protected intimate conduct is informed by precedent—a series of decisions which have, over time, granted increasing constitutional protection to intimate sexual matters. Griswold v. Connecticut, heavily relied on by the Lawrence Court, placed significant emphasis on the marital relationship and the conduct occurring therein. This limitation in Griswold, which was both spatial and expressive, was eroded by subsequent rulings in Eisenstadt v. Baird and Carey v. Population Services International, which extended protection to sexual expression and conduct occurring outside the marital framework. Both decisions placed strong emphasis on the privacy rights of the individual, as opposed to that of the collective marital unit. The infamous "mystery-of-life" passage contained in Planned Parenthood v. Casey appears, on its face, to introduce a more expansive understanding of intimate sexual conduct, by empowering the individual to determine what constitutes intimate conduct for herself. However, while Lawrence relied heavily on Casey, its understanding of intimate conduct does not appear as liberating. The Lawrence Court does caution against having the judiciary set rigid boundaries concerning the meaning of relationships. However, by claiming that "[w]hen sexu-

44 See Lawrence, 539 U.S. at 562-63 (describing what Houston Police officers witnessed upon entering Lawrence's home). There may have been other expressions of intimacy which were not observed, such as intimate conversation or other forms of activity not necessarily involving physical contact.

45 See, e.g., id. at 576 (referring to the "right of homosexual adults to engage in intimate, consensual conduct"); id. at 567 (considering "[w]hen sexuality finds overt expression in intimate conduct with another person").

46 381 U.S. 479, 485 (1965) (holding unconstitutional a state prohibition on the dispensing or use of birth control devices to or by married couples).

47 405 U.S. 438, 454 (1972) (holding, in part, that there was no rational reason for the different treatment of married and unmarried people for the purposes of criminalizing distribution of contraceptives).

48 431 U.S. 678 (1977) (invalidating a New York statute which regulated the sales, advertisements, and displays of contraceptives).

49 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). But see Lawrence, 539 U.S. at 588 (Scalia, J., dissenting) (arguing that the "mystery-of-life" passage in Casey does nothing to expand post-Roe jurisprudence).

50 See Lawrence, 539 U.S. at 573 (justifying the overruling of Bowers in part because Casey "cast [the Bowers] holding into . . . doubt").

51 Id. at 567 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries . . . .").
ality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," the majority impliedly suggested not only that such conduct involves two individuals engaged in an "overt" expression, but that there is a relationship which exists beyond the sex act itself. Such a narrow understanding of intimate sexual conduct not only ignores the experience of sexuality implicit in contemporary western culture, but also may unduly restrict the opinion’s holding beyond the intention of its authors.

2. Spatial Limitations

The spatial limitation present in Lawrence is less equivocal than the expressive limitation. In light of the underlying facts, as well as the petition for certiorari, the opinion can be narrowly interpreted as extending protection only to activities which occur within the four walls of one’s home. However, such a restrictive understanding of the spatial bounds to which sexual privacy extends was not ultimately adopted by the Court. Throughout the opinion, the Court repeatedly referred to the sanctity of the home and its accompanying expectation of privacy. Notwithstanding such continued reference to this “most private of places,” the Court acknowledged that privacy outside of residential confines deserves protection as well. As one of the Court’s earliest “privacy” cases, Griswold placed special emphasis on the sanctity of the marital bedroom as a space that should remain...

52 Id. The term "overt" assumes an obviousness and intentionality in the sexual act, as opposed to understanding sexuality as a subtext that may exist in non-physical acts. See infra notes 79–83 and accompanying text (discussing Michel Foucault’s views of sexuality as existing outside of the sexual act, as a construct that permeates non-physical, everyday activities).

53 See generally MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1978) [hereinafter FOUCAULT, INTRODUCTION] (suggesting that sexuality, as a product of modern civilization, is experienced in a wide range of activities both physical and non-physical, intentional and unintentional); see also infra notes 79–83 and accompanying text (surveying briefly Foucault’s theories on sexuality and modernity).

54 Lawrence, 539 U.S. at 571 (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting Planned Parenthood, 505 U.S. at 850)); see id. at 579 (expressing an intent to “define the liberty of all” and invoke the principles of the Constitution in a “search for greater freedom”).

55 See supra note 17 and accompanying text (noting that the petition for certiorari focused narrowly on “conduct”).

56 See supra notes 36–37 and accompanying text (observing that the petitioners astutely presented the Court with the narrow issue concerning “adult consensual sexual intimacy” in “the home”).

57 See Lawrence, 539 U.S. at 567 (“The laws involved in Bowers . . . . touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home . . . . [A]dults may choose to enter upon this relationship in the confines of their homes . . . .”)

58 See id. at 562 (“Freedom extends beyond spatial bounds.”).
free from unwarranted state intrusion. As with understandings of protected conduct, Eisenstadt and Carey extended this conception of the private sphere beyond the walls of a particular room. The privacy afforded to intimate sexual conduct no longer remained attached to the marital bedroom, or even the bedroom for that matter. The Lawrence Court embraced this more expansive view of protected space at the outset of the opinion by stating that “there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.” The challenge for the courts lies in teasing out the distinctions between those spaces outside the “home” where intimate sexual conduct is protected, and the spatial limitation is posed by spheres that are sufficiently public to warrant state intrusion.

Both spatial and expressive limitations are apparent in Lawrence. Yet, the precise boundaries of those limits are uncertain. Strict reliance on the underlying facts of Lawrence would result in an overly narrow application of the opinion, protecting only a certain type of sexual conduct (“intimate”) occurring within a particular private sphere (the “home”). Yet, given the Court’s language, and the general spirit of the opinion, it seems unlikely that such an interpretation was intended. Undoubtedly, the limiting dimensions within the opinion must be upheld, protecting the implicated liberty interest from the type of over-interpretation critics predicted. However, these limitations must be infused with a contemporary understanding of certain sexual and spatial realities. This will give the opinion proper applicability in a wide range of future cases, as well as demonstrate why prior cases such as Barnes were incorrectly decided.

II. THE CASE FOR (RE)DEFINING SEXUAL EXPRESSION

Barnes v. Glen Theatre, Inc. is a prime example of a case that could be subject to a Lawrence-type analysis had it come before the Court today, despite that fact that it originally arose under an entirely dif-

59 See Griswold v. Connecticut, 381 U.S. 479, 485-86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

60 See supra notes 47-48 and accompanying text (observing that Eisenstadt and Carey expanded the Court's privacy jurisprudence by not relying upon Griswold’s limited vision of marital privacy).

61 Lawrence, 539 U.S. at 562.

62 See supra note 37 (noting that the petitioners' narrowing of the issue was strategic, and not necessarily representative of the Court's view); see also supra notes 14, 54 and accompanying text (suggesting that an overly narrow reading of the petition for certiorari belies the Lawrence Court's broader language and tenor concerning liberty).

63 See supra note 31 (discussing the "doomsday predictions" of Lawrence's critics).

ferent constitutional doctrine. When the State of Indiana attempted
to enforce a prohibition against completely nude dancing at the Kitty
Kat Lounge, the petitioners sought an injunction, claiming a viola-
tion of their rights guaranteed by the First Amendment. The Court,
in a holding that has since been much criticized, found that nude
dancing was afforded protection within the "outer perimeters" of the
First Amendment, though "only marginally so." After placing such
expressive conduct in the outer realm of protection afforded by the
First Amendment, the Court readily accepted the state's two main in-
terests as sufficient justification for the regulation: protecting order
and protecting morality. That nude dancing receives some protec-
tion under the First Amendment, however marginal, seems to be the
legacy of Barnes rather than its ultimate outcome.

It is worthwhile to note that the Court in Barnes referred to Bowers
v. Hardwick in order to validate the State's asserted interest in morality, which makes analysis under Lawrence all-the-more compelling.

This section of the Comment will use the facts present in Barnes to
demonstrate how a proper application of Lawrence, one adopting a
nuanced conception of the modern experience of sexuality and an
expansive understanding of "intimate sexual conduct," can affect
various cases outside of Lawrence's original framework. Specifically,
use of Barnes can demonstrate how certain cases dealing with regula-
tions of sexual expression, previously argued on First Amendment

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65 Id. at 563–64. The petitioners included the owners of the Kitty Kat Lounge as well as se-
veral dancers. The petitioners had been prosecuted for violating the state's public indecency
statute.

66 As a matter of First Amendment jurisprudence, Barnes has been given significant critical
 treatment. See, e.g., Pap's A.M. v. City of Erie, 812 A.2d 591, 595 (Pa. 2002) (citing the Pennsyl-
vania Supreme Court's prior unanimous adoption of the standard set forth in Justice White's
dissent in Barnes, and holding that Erie's prohibition was unconstitutionally overbroad). This
Comment is not intended to suggest that Barnes should be explicitly overruled on First
Amendment grounds, but rather that the facts present in the case, after Lawrence, would lend
themselves to a successful claim under the Fourteenth Amendment.


68 See id. at 569 ("[T]he public indecency statute furthers a substantial government interest
in protecting order and morality.").

69 See Baker, supra note 18, at 23 ("[P]erhaps the Court's one solid finding—that nonverbal
expressive conduct falls within the First Amendment's reach—will be the lasting legacy in the
case . . . ").

70 See Barnes, 501 U.S. at 569 ("The law, however, is constantly based on notions of moral-

71 Reliance on Bowers calls future application of Barnes into question, insofar as Lawrence
overturned Bowers, claiming that "[o]ur obligation is to define the liberty of all, not to mandate
v. Casey, 505 U.S. 833, 850 (1992)).
grounds, may be more effectively argued when understood as sexual conduct regulations for Fourteenth Amendment purposes.\textsuperscript{72}

In a fitting twist of irony, Justice Scalia, concurring in Barnes, lent support to the above assertion, as he vigorously claimed that the nude dancing at the Kitty Kat Lounge was not expression, but rather conduct, and therefore not subject to First Amendment protection or analysis.\textsuperscript{73} If definable as sexual conduct, it appears that the activity at issue in Barnes would properly be subject to a due process challenge after Lawrence. In order for such a challenge to succeed, however, it must first be determined how live nude performances at the Kitty Kat Lounge can be understood as adult, consensual, intimate sexual conduct.\textsuperscript{74} Put another way, what are the problems posed by Lawrence's expressive and spatial limitations? Asking this question requires an understanding of contemporary sexuality in its myriad forms. Specifically, in determining what type of activity constitutes "intimate sexual conduct" one needs to ask further questions: How is sexuality currently experienced in contemporary western society? How has sexuality—not only as a practice but also as a discourse—been produced or constructed? In what ways do we as sexual subjects and objects ultimately produce and/or derive pleasure? And, what is at stake in engaging in non-traditional or deviant sex acts? Looking to postmodern, psychoanalytic, feminist, and even economic theory helps to answer some of these difficult inquiries.

Broadly defining sexual conduct via postmodern and feminist theory is a cumbersome project that would undoubtedly span volumes. However the task becomes considerably more manageable when examining Barnes as just one example of how such theory can be employed in a due process analysis.\textsuperscript{75} Insofar as Barnes involved nude dancers, as well as the spectators engaged in watching them, the act of looking/being looked at needs to be understood as a form of

\textsuperscript{72} See Baker, supra note 18, at 23 (arguing that the Court should consider prohibitions on sodomy as regulation of expression under First Amendment doctrines). This Comment diverges from Professor Baker's analysis by suggesting that, after Lawrence, regulations of expression may be considered on due process grounds).

\textsuperscript{73} Barnes, 501 U.S. at 572 (Scalia, J., concurring) ("[T]he challenged regulation must be upheld . . . because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."). However, Justice White argued, perhaps most aptly, that nude dancing contains both conduct and expressive elements. See id. at 592 (White, J., dissenting).

\textsuperscript{74} The definitions of "adult" and "consensual" are not at issue in Barnes, as minors were banned from the premises of the Kitty Kat Lounge and it can be readily assumed that dancers and patrons were present under their own will. See Barnes, 501 U.S. at 566 ("In such places . . . minors are excluded and there are no nonconsenting viewers.").

\textsuperscript{75} Different cases with different fact patterns would pose significantly different questions. This Comment uses Barnes as an example of just one way in which conceptions of sexual conduct can be understood and employed in a due process analysis.
sexual conduct. In other words, "voyeurism"\textsuperscript{76} and "exhibitionism"\textsuperscript{77} need to be (re)defined as sex acts in and of themselves, such that they could be subject to protection under \textit{Lawrence}.\textsuperscript{78} Assuming that voyeurism and exhibitionism are ostensibly non-physical activities (at least when compared with more traditional forms of sexual conduct, such as intercourse), a justification must be found for "reading" sexuality into such passive acts. The great observer of contemporary sexuality, Michel Foucault, opened the door for exploring the sexuality inherent in non-physical actions such as "looking" or being "looked at."\textsuperscript{79} Sexuality, as observed by Foucault, exists outside of the sexual act, and should be understood as an experience, a construct, and a discourse that permeates non-physical, everyday activities.\textsuperscript{80} Historical repression of the sex act in western culture, Foucault argues, led to its inevitable expression in other "non-act" based formulations.\textsuperscript{81} As such, sex "spreads over the surface of things and bodies," creating a great "surface network" of sexualities.\textsuperscript{82} In what has been cited as Foucault's "most visionary" moment, he noted that this historical repression of the sex act has led to an era of "multiplication" and "dispersion" of sexualities; and, most important for our analysis, a culture ripe with "sexual heterogeneities" and a proliferation of multiple "categories of pleasure" independent of the physical sex act.\textsuperscript{83}

\textsuperscript{76} See \textit{MERRIAM-WEBSTER}, \textit{supra} note 42, at 818 (defining voyeur as "[o]ne who habitually seeks sexual stimulation by visual means"); see also \textit{LINDA WILLIAMS}, \textit{HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE,"} at X (1989) (referring to the act of watching pornography as "literal voyeurism").

\textsuperscript{77} See \textit{MERRIAM-WEBSTER}, \textit{supra} note 42, at 264 (defining exhibitionism as "the act or practice of behaving [sexually] so as to attract attention to oneself").

\textsuperscript{78} It is assumed throughout this analysis that acts of voyeurism and exhibitionism involve mutually consenting adults. Additionally, it will be assumed that any asserted state interest is purely morality-based.


\textsuperscript{80} According to Foucault, there is nothing "natural" about the sexual "act" itself. Rather, the act is a construct, a product of societal power relations. See generally \textit{FOUCAULT, INTRODUCTION, supra} note 53.

\textsuperscript{81} Sexuality was placed into discourse via historical repression and stigmatization of the act. When historically discouraged from engaging in sex acts, sexuality often became manifest in non-physical phenomenon. See id. at 17–23.

\textsuperscript{82} Id. at 72; see also \textit{WILLIAM N. ESKRIDGE, JR. \& NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW} 587–88 (2d ed. 2004) (providing a general summary of Foucault's theories on sexuality).

\textsuperscript{83} \textit{ESKRIDGE \& HUNTER, supra} note 82, at 587–89 (citing \textit{FOUCAULT, INTRODUCTION, supra} note 53, at 90–106).
When deciphering the meaning of sexual conduct as present in Lawrence, it is essential to look at Foucault and other postmodern theorists who challenge paradigmatic assumptions concerning sexuality and gender. By exposing sexuality as a construct which permeates all things, rather than as a natural phenomenon, Foucault expands on the solely act-based conception of sexuality implicit in Lawrence. Most importantly, Foucault challenges the assumption that sexuality is always reducible to intercourse. This insight has led contemporary theorists to expand on the foundations established by Foucault. Specifically, feminist film theorists, such as Laura Mulvey and Linda Williams, have begun to understand the act of viewing itself as a sexualized act. This paves the way for a conceptualization of sexuality present in non-physical acts deserving of constitutional protection.

A. The Act of Looking

Having made a case for reading sexuality into non-physical actions, it must be determined whether the actions involved in Barnes are sex acts in and of themselves. Specifically, can the interaction between voyeurism (“looking”) and exhibitionism (“being looked at”) be considered a form of sexual conduct? Having moved beyond the need to establish the existence of a physical sexual act, it is now “no longer a question of saying what was done... and how it was done; but of reconstructing, in and around the act, ... the obsessions that accompanied it, the images, desires, modulations, and quality of the pleasure that animated it.” Psychoanalysis is a powerful tool for uncovering the mechanics behind the act of “looking” and for describing “patterns of fascination... at work within the individual subject.” Such analysis unlocks the modes in which subjects internalize the elements viewed and how pleasure is derived from looking or being looked at.

84 See id. at 584 (analyzing Foucault’s social constructionist philosophy). See generally SARA SALIH, JUDITH BUTLER (2002) (discussing the performative and constructed nature of sex distinctions).
85 See ESKRIDGE & HUNTER, supra note 82, at 587 (discussing the roots of sexuality notions, such as religion and educational systems). Foucault also observed that the traditional ties of the family were being taken over by “ties of pleasure and corporality.” Id. at 589.
86 See id. at 559 (discussing Foucault’s belief that all sexuality is “constructed, the conventional no less than the deviant”).
87 WILLIAMS, supra note 76, at 55 (citing FOUCAULT, INTRODUCTION, supra note 53, at 63).
88 LAURA MULVEY, VISUAL AND OTHER PLEASURES 14 (1989) [hereinafter MULVEY, VISUAL].
89 Much of the following analysis relies heavily on feminist film theory; however, the filmic components of the cited works are not within the subject matter of this Comment. While Mulvey and Williams go further to discuss how the apparatus of cinema produces visual pleasure and a gendered subjectivity, this Comment is primarily interested in how the very act of “look-
It is contended that "[t]here are circumstances in which looking itself is a source of pleasure, just as... there is pleasure in being looked at." Sigmund Freud referred to this phenomenon as scopophilia, the "basic human sexual drive to look at other human beings in such a way that the process of looking arouses sexual stimulation and objectifies the person looked at." Freud argues that pleasure derived from the act of looking stems from this "fetishization" of the human body. Applying this theory to Barnes, the audience at the Kitty Kat Lounge derived pleasure from the act of watching the dancers on stage by "fetishizing" their bodies. While subconscious and non-physical, such "semiotics of fetishism," according to some theorists, conceptualize a true "sexual reality." It is ultimately through the sexually charged "gaze" of the spectator that the process of "looking" is consummated as sexualized conduct. The dominating gaze (in Barnes the dominating gaze is presumably that of the male audience member) carries with it a tremendous amount of sexual power. This gaze, as the manifestation of the viewer's scopophilic instinct, may be understood as sexual, insofar as "pleasure in his own sexual organ" transfers to the "pleasure in watching other people" engaged in erotic activity. Thus, the
sexuality implicit in traditional physical sexual acts is not lost when one engages in voyeuristic or exhibitionistic activity, it is rather transferred; the stimulation experienced is a "visceral appeal to the body" that comes from the very act of viewing itself.98 While there is no actual physical contact of bodies, this transfer of pleasure occurs specifically because the distance between the subject and the "object" allows the viewer to assume a voyeuristic or fetishistic sexualized position.99

According to these theories of the "gaze," patrons and performers at the Kitty Kat Lounge were engaged in a two-step process through which they experienced the transfer of sexual pleasure described above: they derived sexual pleasure from the exercise of their scopophilic instincts, while simultaneously deriving pleasure from their identification with the dancers on stage.100 The former pleasure is one of objectification, inasmuch as those watching the nude dancers derived sexual satisfaction by objectifying them—taking them as "objects [and] subjecting them to a controlling and curious gaze."101 This act of "viewing"/"being viewed" mimics the dynamics present in more traditional, physical forms of sexual conduct, and may be seen as a non-physical analog to traditional intercourse. The active process of looking (objectifying),102 coupled with the passive process of being looked at (being objectified) mirrors natural oppositions such as dominant/submissive and penetrator/penetrated.103 As participants in a voyeuristic exchange, this was precisely the sexual dynamic which occurred every night among those at the Kitty Kat Lounge; a type of non-physical, visual intercourse.104

98 WILLIAMS, supra note 76, at 5.
99 See BROOKS, supra note 91, at 171 (surveying various theories on why "distance" is sexually satisfying); see also WILLIAMS, supra note 76, at 245 ("[V]oyeurism and fantasy safely distance the characters from actual physical contact.").
100 See MULVEY, VISUAL, supra note 88, at 18 (setting out two aspects of pleasurable structures of looking, the first "scopophilic . . . [t]he second . . . comes from identification with the image seen").
101 Id. at 16. The difference between heterosexuals and homosexuals, for the purpose of objectification, is that the homosexual "'outlet' is characterized by the choice of an object of the same sex as oneself." GUY HOCQUENGHEM, HOMOSEXUAL DESIRE 100 (Daniella Dangoor trans., 1978).
102 See MULVEY, VISUAL, supra note 88, at 18–19 (discussing "active scopophilia").
103 See FOUCAULT, PLEASURE, supra note 79, at 46–47 ("[T]he great caesura between male and female sexuality . . . were thought of as an activity involving two actors, each having its role and function—the one who performs the activity and the one on whom it is performed."). Some theorists have expanded on Freudian and Foucauldian theory by arguing that the process of artistic expression itself is sexualized, insofar as it mirrors more traditional forms of sexual expression. See STEVEN C. DUBIN, ARRESTING IMAGES 125 (1992) (quoting Lucy Lippard as saying, "[I]t is often taken for granted that art-making is directly related to sexuality . . .").
104 At the extreme, voyeurism can become "fixated into a perversion, producing obsessive voyeurs and Peeping Toms, whose only sexual satisfaction can come from watching, in an active controlling sense, an objectified other." MULVEY, VISUAL, supra note 88, at 17; see also, Stephen
The latter mode of deriving sexual pleasure stems from the audience's identification with the dancers on stage. The dancers at the Kitty Kat Lounge cast the spectator as a "hypothetical partner." By positioning himself as an imaginary partner, the audience member identifies with the visual on stage, achieving sexual satisfaction purely through the act of viewing. The dancer is a willing and active participant in this exchange, engaging the subject in a non-physical form of sexual conduct, (re)defined by a historically unprecedented "heightened urge to look."

While not involving the physical union of two bodies, or the existence of a "bond that is more enduring," the nonphysical acts of looking and being looked at in the Kitty Kat Lounge, may be conceptualized as legitimate sexual conduct. Assuming a state cannot assert a non-morality based counter-interest, such conduct, when engaged in by consenting adults, should be afforded the full constitutional protection given to the petitioners in Lawrence.

B. Implications

It is essential to consider what is at stake in expanding notions of sexual conduct to include such visual, non-physical activity. As Lawrence cautioned, the Court should be wary of attempting to define the meaning of relationships. Taking this a step further, the courts should be especially wary of privileging one type of relationship, or form of expressive conduct, over another, as such unequal treatment has profound effects on how sexuality is ultimately understood and

Heath, Difference, in THE SEXUAL SUBJECT: A SCREEN READER IN SEXUALITY 77 (1992) (restating Freud's analysis of the "Peeping Tom"). When such obsessive voyeurism is between nonconsenting parties, it should obviously not be afforded constitutional protection. See supra MULVEY, VISUAL, note 88, at 18 (describing this late stage of human development, when pleasure from "looking" results from personal identification with the viewed object).

Williams, supra note 76, at 77.

Id.

See DAVID HOLBROOK, THE PSEUDO-REVOLUTION: A CRITICAL STUDY OF EXTREMIST "LIBERATION" IN SEX 5 (1972) ("Never before in the history of man have so many people watched... the sexual activity of others... [T]he new development is almost exclusively concerned... with a 'heightened urge to look.'").


More consideration to Lawrence's spatial limits will be given below.

See Lawrence, 539 U.S. at 567 (stating, as a general rule, that attempts by the state to define the meaning of relationships, or to set their boundaries, may have far-reaching consequences upon the most private human conduct).
experienced. According to Foucault, one of three axes that constitute “sexuality” as a discourse is “the systems of power that regulate its practice” via “punitive power and disciplinary practices.”

“Sexuality” has emerged as a concept, in part, because of the establishment of a set of rules and norms that found support in judicial institutions. Therefore, the judiciary should never underestimate the influence of such decisions as Lawrence and Barnes on discourses of sexuality.

Under the Bowers regime there was a clear hierarchy of sexual practices, with varying levels of regulation dependent on the moral and societal approbation attached to each act. Generally, sexual conduct within the marital framework for the purpose of procreation was deemed most worthy of protection from overzealous state regulation, followed by sexual conduct engaged in by unmarried monogamous heterosexuals. Other heterosexual acts involving a deviation from the heterosexual, two partner paradigm—including homosexual conduct, promiscuous conduct, pornographic acts, and fetishes—were placed far lower on the totem pole of sexualities. While this virtual caste system of sexual practices has been weakened under Lawrence, a similar hierarchy will likely emerge if the courts engage in the practice of discriminating among types of sexual conduct that should be deemed worthy of protection from morality-based state regulation under Lawrence. Quite simply, exercising a judicial preference for one particular form of sexual conduct—one that is traditionally understood as such—simply reifies pre-Lawrence stereotypes. Whether or not sex acts are “gay or straight, coupled or in groups, naked or in underwear, commercial or free, with or without video, should not be ethical concerns” and should not play a role in judicial determination. Unless the courts adopt a similar view, the conduct at issue in Barnes will likely return to the bottom of the sexual hierarchy, thus permitting state regulation of a legitimate and ultimately rational form of sexual conduct. Such regulation would maintain a hegem-
ony of normative sexualities which the *Lawrence* decision, at least in spirit, purports to shun.

III. *(RE)DEFINING THE HOME*[^118]

Under *Lawrence*, classifying the act in question as intimate sexual conduct only completes half of the analysis. While the above sections have argued that the conduct in *Barnes* is not outside the expressive limitation of *Lawrence*, the opinion's spatial limitations must be considered as well. Specifically, does the conduct in question occur within a sufficiently private sphere to render government regulation impermissible? The facts of *Lawrence* appear to suggest that only sexual conduct within the home receives constitutional protection.[^119] However, as noted previously, the Court in *Lawrence* supported the notion that freedom may exist beyond these "spatial bounds."[^120]

As with notions of sexual conduct, the courts need to employ a reality-based conception of the distinctions between public and private spheres when dealing with questions posed by *Lawrence*’s spatial limitations. The key difference between this distinction and various understandings of sexual conduct is that the private/public opposition is a judicial construction, created by the courts to justify varying levels of protection.[^121] Foucault observed that notions of public and private are historical and social constructions which, although considered inviolable oppositions, are subject to continued contention.[^122] As such, the privacy of the "home" may be created in a variety of spaces outside of the traditional residential unit for numerous reasons. Certain sexual practices traditionally considered deviant have never found a

[^118]: Detailed analysis of private/public distinctions drawn by the Court would warrant several articles in itself, and is outside the scope of this Comment. This section of the Comment is simply intended to highlight the problems posed by *Lawrence*’s spatial limitation. As this Comment is primarily concerned with advocating for an expansive judicial conception of sexual conduct, this section is simply intended to highlight the similar problems posed by *Lawrence*’s spatial limitations. Considerably more space and time would be needed to appropriately address the fact-specific intricacies of this concern.


[^120]: See supra note 61 and accompanying text (discussing "the more expansive view of protected space" embraced in *Lawrence*).


[^122]: See, e.g., Michel Foucault, *Of Other Spaces*, DIACRITICS, Spring 1986, at 22–27 (discussing notions of the interconnectedness of "space" as the "great obsession" of the modern era).
place in the home, and instead have sought expression in more public spheres. Moreover, the home has often been recognized as a space dominated by ideologies of patriarchy, where non-majoritarian sexual practices are unable to find expression and flourish.

Putting these admittedly more theoretical qualms aside, the courts cannot deny that the home is no longer easily classifiable as a purely private space. The privacy of the home can be easily replicated in a variety of contexts, from hotel rooms for the constantly traveling business person, to the viewing booths inside the Kitty Kat Lounge. While the majority in Barnes considered the Kitty Kat Lounge to be a place of "public accommodation," it is not clear how that conclusion was reached. As the respondents in the case pointed out, minors were barred from entry, as were non-adults. While not a purely private space, it may be a gross oversimplification to refer to the Kitty Kat Lounge as a place of public accommodation.

Whether the courts will be willing to extend Fourteenth Amendment protection to sexual conduct occurring outside the home will likely be determined on a case-by-case basis. The private/public distinction is fact specific and ostensibly constructed by the courts. Therefore, how literally any adjudicative body adheres to the spatial limitations set forth in Lawrence will depend on the particulars of each case. While the sexual conduct present in Lawrence is of the variety traditionally experienced in the confines of one's own bedroom, the same is not so for the conduct at issue in Barnes, which may justify a more liberal interpretation of Lawrence's spatial limitations. The courts should take this, as well as the foregoing analysis, into account should they encounter a case like Barnes in the future.

CONCLUSION

If limited to its underlying facts, the Lawrence opinion would have a narrower application than its authors had originally intended. If read as protecting only a certain form of intimate sexual conduct within the confines of the home, rather than securing rights for those...
on the margins, the decision could be understood as simply preserving the pre-Lawrence sexual status quo. However, if the court employs a contemporary understanding of sexual and social realities when construing the future reach of Lawrence, the ultimate thrust of the decision will be far more liberating.

If such an expansive view of Lawrence's expressive and spatial limitations is adopted by the courts, as this Comment argues it should be, the implications could be quite significant for other areas of constitutional jurisprudence. Specifically, if courts look to the experience of sexuality in all its manifold forms, sexual expression cases which traditionally originated under First Amendment doctrine may now be more effectively argued as conduct cases under the Fourteenth and Fifth Amendments. This Comment used just one example, that of Barnes v. Glen Theater, Inc., to demonstrate how such an analysis could play itself out. Ultimately, the Court in Barnes accepted flimsy state interests to justify the regulation of nude dancing.128 However, after Lawrence, when applying an expansive and contemporary understanding of sexual conduct, the asserted interest in morality would no longer pass muster. Thus, the only remaining question would be as to the sufficiency of the state interest in "protecting order."129 Unless the state could assert a legitimate concern that nude dancing would disturb public order, such sexual conduct should not be prohibited.

Rather, courts should protect sexual conduct in its manifold forms, and should not privilege (for the purposes of constitutional protection) sexual conduct traditionally considered more acceptable and well understood—most notably that which is "intimate" and occurring in the home. Specifically, the courts need to approach future interpretation of Lawrence with a broad conception of sexual conduct and employ a methodology, in future decisions, which accounts for contemporary sexual realities. If, in their early interpretations of Lawrence, the courts adopt understandings of sexuality that are truly encompassing and reflect the modern experience of sexuality, the opinion will more fully live up to its ultimate promise of ensuring that "persons in every generation can invoke [the Constitution's] principles in their own search for greater freedom."130

128 Id. at 569 (accepting state interests in protecting order and morality).
129 Id.