The Defendant's Safe Word:
A Procedural Due Process Framework for the Consent Defense

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I. INTRODUCTION

Jennifer and her husband Jason had been married for eleven years and, as part of their sexual intimacy, had regularly engaged in acts that included slapping, choking, and biting.[1] On one of these occasions, slaps to the face left marks on Jennifer's face.[2] Jennifer and Jason planned to discuss the marks with their children after school the next day, but their children told school faculty who called child protective services before that opportunity came.[3] Child protective services then called the police, and Jason suddenly found himself a defendant in the criminal justice system, facing charges of felony assault.[4]

Throughout the three-year-long case, Jennifer maintained that the acts were consensual; in fact, she stated that she asked for Jason to engage in those acts with her.[5] The prosecution refused to accept that a person could freely and would willingly consent to such acts.[6] Luckily for Jason, the jury did, and he was found not guilty of assault.[7] But Jason could bring no formal legal defense for the consensual acts he was on trial for. His only hope was that the jury would see what the prosecution did not – that this was a private sexual matter between him and his wife, that both parties had wanted to participate – and acquit him.

If a jury is to make a proper determination as to guilt beyond a reasonable doubt, then a person charged with a crime for engaging in consensual kink with a consenting partner or partners must be able to put forth a legal defense stating that consent. Historically, consent has

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[1] Anchorage Press, June 6, 2020. "LETTER: Husband wrongly charged with assault over requested BDSM acts." *Jennifer Traver* https://www.anchoragepress.com/opinion/letter-husband-wrongly-charged-with-assault-over-requested-bdsm-acts/article_7d2076e2-a83d-11ea-bb2a-5fe6fca69bab.html
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Juneau Empire, April 25, 2023. "Man found not guilty of assault after wife says injuries were from consensual BDSM, not abuse." *Jonson Kuhn.*
[6] *Id.*
[7] *Id.*

served as a defense in some cases. Under English tort law, for example, the principle of *"volenti non fit injuria,"* which means "to a willing person, no injury is done," fully exonerated a defendant when the other party was fully aware of the risks involved and consented to waive all claims for damages.[8] That principle ought to be extended to cases like Jason's; it ought to serve as a full defense to criminal charges brought as a result of consensual kink.

Of course, there is still a legitimate state interest in prosecuting cases of domestic violence, which occurs in the absence of consent.[9] A consent defense would allow the jury to most effectively evaluate such cases while still preserving the state interest in criminalizing intimate partner violence. Thus, this paper seeks to lay a foundation for the necessity of a consent defense under procedural due process. In pursuit of this argument, this paper will begin by providing a definition of consensual kink, then turn to a discussion of the history of the state's involvement in the private sexual lives of its citizens. Then this paper will address the shortcomings of rooting a right to sexual privacy in this context in substantive due process, specifically addressing an alternative interpretation of *Lawrence v. Texas* that threatens the substantive due process argument. Finally, this paper will turn to the need for a consent defense under procedural due process.

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[8] Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 Cardozo L.J. & Gender 631, 636 (2015).

[9] While there is a state interest in criminalizing acts of violence that are not consented to, as will be discussed *infra* page 4, it is worth noting that the current scheme of intimate partner violence criminalization is not without its flaws. *See, e.g.,* Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, Violence Against Women 1, 9 (2020). This piece discusses the Violence Against Women Act's effectiveness and argues that while accountability is necessary in ending relationship violence, criminalization of this violence does not necessarily accomplish this goal because it strips victims of their ability to make decisions about whether and how the state will intervene in their relationships and this comes with significant costs, which are primarily borne by people of color, people with lower incomes, their children, and their communities. *See also* Katelyn Derr, Angela J. Hattery, and Earl Smith, *Help or Harm? Criminalizing Intimate Partner Violence and Feminist Abolitionist Frames*, Violence Against Women, 1 (2024), which posits that the carceral approach to domestic violence causes harm to both perpetrators and victims because the carceral state is rooted in white supremacist and heteropatriarchal systems of power, which is antithetical to the very feminist theory such criminalization is rooted in. The criminal system's "job" is not to care for victims, but rather to simply respond to the incident that is deemed criminal.

II. WHAT IS CONSENSUAL KINK?

Consensual kink refers to a variety of activities that fall outside the sexual "norm," including bondage, discipline, domination, submission, sadism, and masochism."[10] It is used as an umbrella term to denote a consensual exchange of power, use of physical restraints, and/or the enactment of violence.[11] Consensual kink can include impact play,[12] bondage,[13] psychological play,[14] service,[15] and power exchange.[16] It is worth noting that consensual kink does not require a sexual or romantic relationship; people can engage in consensual kink behaviors without being involved in a traditional or stereotypical relationship, as heteronormativity would generally dictate is required for intimacy.[17] Prevalence of consensual kink is difficult to capture, but studies estimate engagement may reach as high as 46.8% of the population.[18] Fantasies of kink occur in up to 70% of the population.[19]

In order to fully understand consensual kink, it is important to first understand the Western concept of "sexuality" generally, with specific attention to how it creates an "in" group of those

[10] Nathan Q. Brewer, Kristie A. Thomas, and Xavier Guadalupe-Diaz, *"It's Their Consent You Have to Wait For": Intimate Partner Violence and BDSM Among Gender and Sexual Minority Youth,* Journal of Interpersonal Violence, Vol. 39(1-2) 35-58, 35 (2024). Consensual kink is sometimes also referred to as BDSM, which stands for bondage and discipline, domination and submission, sadism, and masochism. The two terms have some nuance, but are more or less interchangeable. This paper will use consensual kink as an umbrella term to include all forms of kink, whether explicitly listed here or not.
[11] *Id.* at 37.
[12] Impact play involves such activities as spanking, caning, and whipping; essentially, situations in which one person is enacting violence either manually or with an object designed for such play. Brewer, et al. at 37.
[13] Bondage can include restraining a person with rope, handcuffs, or other devices. Brewer, et al. at 37.
[14] Psychological play includes humiliation, degradation, and threats. Brewer et al. at 37.
[15] Service involves one person requiring another to do certain acts, such as chores, cleaning, shopping, etc. Brewer et al. at 37-38.
[16] Power exchange means that one person gives up control over certain aspects of their life to another person. Brewer at al. at 38.
[17] Brewer et al. at 37.
[18] Holvoet et al., 2017.
[19] Brown, et al. 2020; Emma L. Turley, *Unperverting the perverse: Sacrificing transgression for normalised acceptance in the BDSM subculture,* Sexualities Vol. 27(4), 979-997, 980 (2024).

who follow heteronormative sexual ideals, and "out" groups of those who do not.[20] This concept of "sexuality," which includes consensual kink, is based in heteronormativity, or the idea that sex ought to be either traditional and heterosexual or mimic that which is traditional and heterosexual, and thus is inherently linked to queerness and the queer liberation movement.[21] To be clear, consensual kink is practiced by people of all sexual orientations, but is criminalized because it falls outside what is considered "traditional" and "heteronormative" sex.[22]

The study of sexualities emerged near the end of the 19th century contemporaneously with the rise of a new concept of sexual identities and sexual minorities in Western Europe.[23] The meaning of sexual acts slowly evolved to be seen as a person's coherent sexual identity rather than single, isolated acts or events.[24] And this thinking turned into the sexual binary we largely operate under today: there is the sexual majority, or heterosexuals, and the sexual minorities, or anyone whose identity and sexual behavior falls outside the heteronormative purview.[25] With the development of this binary, certain individuals became singled out or targeted, to include

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[20] Robin Bauer, "Queer BDSM Intimacies: Critical Consent and Pushing Boundaries," Palgrave MacMillan UK (2014), p1. It is worth noting that Bauer situates her research within a queer and trans theoretical context, using the critique of heteronormativity to guide her analysis. P1.

[21] *Id.* Bauer defines "heteronormativity" as a concept and structure of power that permeates society by naturalizing "the notion of opposite-sex sexual object choice," celebrating and privileging certain forms of heterosexual relationships, identities, and practices, and placing the heterosexual couple as the "primary social unit of society." (p1).

[22] *Supra* note 18. It is worth noting that heteronormativity is not the same as heterosexuality; heteronormativity also negatively impacts people of heterosexual identity. Heteronormative sex would have traditional stereotypes remain true; for example, that the male or male-aligned-figure in the relationship is dominant and the female or female-aligned-figure submits, that sex is "vanilla" and does not include anything outside of vaginally-penetrative intercourse, and that it occurs with only one other partner in a bedroom setting. A clear illustration of heteronormativity is the expectation that in a lesbian couple, one woman is the "man" in the relationship despite both involved being women.

[23] *Id. See also* Michel Foucault, *The History of Sexuality*, Vol 1, 1976, translated by Robert Hurley. In the first volume, Foucault argues that during the 18th and 19th centuries, society did not repress sexuality, as was commonly theorized, but instead took interest in sexualities that did not fit within the traditional marital bond. Foucault argues that in the West, the majority views power as a product of law, but a different form of power governs sex and sexuality. Foucault continues his analysis in Vols. 2-4 (1984, 1984, and 2018, respectively). For a discussion on Foucault's theorization of genitalia, *see* Alison M. Downham Moore, *Foucault, Early Christian Ideas of Genitalia, and the History of Sexuality*, Journal of the History of Sexuality, Vol 29, Num 1, 2020 pp. 28-50.

[24] Bauer p2.

[25] *Id.*

homosexuals, transgender individuals, and sadomasochists, or those who engage in consensual kink.[26]

At this point, it is worth differentiating consensual kink from intimate partner violence (IPV). While both may involve similar behaviors, such as physical violence and psychological control, the central focus of consensual kink is the word "consent," and within the kink subculture, significant efforts have been made to build structures and spaces in which that consent is freely given *prior* to the acts that occur.[27] In contrast, IPV involves coercion and control in the absence of consent, or in the absence of freely-given consent.[28] Coercive control is defined as the "actions by an intimate partner that result in a 'condition of unfreedom,' including 'the use of force or threats' and 'structural forms of deprivation, exploitation, and command that compel obedience indirectly.'"[29] Thus, the distinguishing factor is the presence or absence of *freely given consent.*[30]

Again, it is important to emphasize that any discussion of consensual kink is rooted in Western conceptualizations of sex and sexuality.[31] The development of a binary of "normal" and "abnormal" sexual behavior, through a lens of heteronormativity, has influenced not only cultural

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[26] *Id.*
[27] National Coalition for Sexual Freedom, *Best Practices for Consent to Kink.* The NCSF provides a guidance document detailing how best to obtain consent for BDSM practices, to include that consent being explicitly provided, either verbally or in writing, prior to any BDSM activity occurring; that consent being informed, to include a discussion of risks and steps that will be taken to reduce those risks; full understanding of desires and boundaries from all parties involved; freely given consent to who will be involved; freedom to withdraw consent at any time; the provision of an agreed-upon word and/or signal (safe word) to clearly express a desire to stop; freely given consent without any coercion, force, or manipulation; understanding of all involved parties' limitations and barriers to their ability to consent, including age, diminished mental capacity, or use of drugs or alcohol; a prohibition on re-negotiating in the middle of the activity (commonly referred to as "scene") unless that re-negotiation serves to reject activities that were not previously agreed to; and an understanding that anything going beyond the scope of what was consented to or anything that causes serious bodily injury runs the risk of being considered criminal activity and is subject to prosecution.
[28] Brewer, et al. at 37.
[29] *Id.*
[30] This distinction will provide a framework for the boundaries of the state interest in prosecuting domestic violence.
[31] A strong Western European need to binarize and categorize human experiences led to the development of a sexual majority and minority. *Supra* page 2.

and social thinking about the ways in which we build physical intimacy with others, but also legal thinking.[32] A major piece of the social, cultural, and legal institution of heteronormativity arises from a desire to limit, if not abolish, all non-procreative sex, a category into which consensual kink frequently falls.[33] The upcoming section will go into further detail about the intersection of sex and state control, but here it is worth noting that consensual kink functions not only as an action, but often as an identity, one which has historically been in direct contrast with the law.[34] That identity positions its holders as distanced from the sexual norm, though more recently, representations and discussions of consensual kink have begun to embrace that non-normativity, resisting the social pressure to view illegality as inherently causing damage or harm.[35] In essence, illegality of this identity and action functions as a social attempt to preserve heteronormativity, rather than a true statement of the morality of the behavior it deems illegal. Thus, consensual kink becomes a manner through which a person may "resist the kinds of socially normalizing processes that attempt to re-assimilate transgressive individuals back into the social field," and provides a mechanism for resisting the domination of a heteronormative society. [36] Thus, while the differentiation of consensual kink from the sexual norm is a direct product of the Western need to categorize and, more specifically, binarize every human experience in order to craft laws attempting to regulate what kind of sex people can engage in, the community that arises from consensual kink's ostracization provides an avenue for

[32] Neal Carnes, Queer Community: Identities, Intimacies, and Ideology 15 (1st ed. 2019). Carnes argues that our contemporary conceptualization of sexuality and gender operate on the binary assumption that some expressions are "natural" while others are not, and this categorization is a derivative of the Industrial Revolution in an attempt to understand and describe unknown phenomena, including sex, gender, and sexuality.
[33] Lauren Zwicky, *Kink and Queer Becoming in Contemporary Intersex Narratives,* pp. 31-48, 33, appearing in Amber R. Clifford-Napoleone, "Binding and Unbinding Kink," (1st ed. 2022).
[34] *Id.* at 33-34.
[35] *Id.* at 34.
[36] *Id.*

challenging the heteronormative power structure that has allowed the state to supervise sexual intimacy historically and at present.

III. A HISTORY OF THE RIGHT TO HAVE SEX

Sex is intimately tied to marriage through history and law, especially criminal law. Originally, marriage was the route through which people could legally engage in sexual intercourse in a manner consistent with Christian religious beliefs and without state interference and punishment, and throughout the development of relationship law in America, sex and marriage have been intertwined; it is near impossible to find any case law that discusses sex or the right to sexual privacy without addressing marriage or relationships that mimic marriage.[37] This section will cover some of that history of marriage and sex, and their relationship to criminal law, in order to provide context for the shortcomings of substantive due process in the consensual kink space, particularly with respect to *Lawrence v. Texas.*

a. THE HISTORY OF MARRIAGE AND SEX

The present substantive due process framework around sex is a result of centuries of regulation of sexuality and its relationship to marriage, thus necessitating a brief discussion of its history in order to better explain the present day. Despite a strong connection with religion, marriage was not originally a Christian institution.[38] Until the 12th century, the Church simply deemed a marriage valid if it was entered into by mutual consent and sealed by sexual intercourse.[39] And it was not until the 13th century that the Church declared weddings had to

[37] *See, e.g.,* Cassidy Percoco, "Yes, They Did: Premarital Sex in (English) History," Medium.com, Apr. 26 2020. Percoco discusses that while sex was most commonly engaged in only after marriage, though this depended on social class. Particularly, unmarried women of higher social standing were subject to stricter surveillance and would be under suspicion if they were known to be sexually active before marriage.
[38] Lloyd T. Kelso, History of Marriage, NC-FAMPRACT § 4:2 (Feb. 2024). For the first thousand years that marriage was in existence, the Catholic Church did not consider it a sacrament, and weddings were not celebrated in churches.
[39] *Id.*

take place in a church.[40] Until the 18th century, marriage was meant to serve one or more of three goals: to consolidate wealth, to create political alliances, and to consummate peace treaties.[41] It also ensured domestic roles, giving men power over their wives and children.[42] Ultimately, before the late 18th century, marriage was meant to secure the parentage and welfare of children, to create a domestic economic enterprise system, and to provide access to legal rights and benefits granted on the basis of marital status.[43] American law has never overtly recognized marriage as a religious element, but instead has viewed it as a civil contract.[44] From the start, the American colonies did not bring with them Lord Hardwicke's Marriage Act of 1753, which required that marriages be conducted by a leader within the Church of England.[45] During the colonial era, religious leaders simply served as witnesses to the marital commitment and ensured the requirements for a civil marriage license were met.[46] However, the lack of an explicit religious element has not stopped the American legal system from inserting religious tradition into the law of marriage.

Before discussing the modern American case law on relationships, it is worth noting the historical importance of sexual intercourse to the marriage. Sex was how a marriage was "sealed;" it was what made the marriage legitimate.[47] But sex has also been the focal point of a substantial amount of criminal law.[48] While civil law regulated who may enter into marriage, restricting entry at times on the basis of sex, race, monogamy, and exogamy, criminal law

[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Kelso, History of Marriage, supra note 35.
[45] *Id.*
[46] *Id.*
[47] *Supra* note 35.
[48] Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 Col. L. Rev. 573 (2016). Sexual regulation was not limited to just the criminal law; amatory torts, sexual harassment laws, and professional codes of conduct have also helped in the institutional regulation of sex and sexuality. FN 15.

followed suit, criminalizing fornication, incest, and adultery.[49] Almost universally, any sex that occurred outside of marriage was subject to criminal regulation, causing such non-normative sex to be both punishable by the state as well as deeply stigmatized by society.[50] Though that state regulation has decreased substantially, as the next section will discuss, there is still a significant amount of state interference and emphasis on marriage or marriage-like relationships that cause sexual practices that are considered "deviant" to still fall under suffocating state regulation and lead to state punishment for completely consensual sexual acts.[51]

b. THE STATE AND SEX TODAY

While the legality of sex has expanded beyond the confines of marriage, there is still substantial state control over when, where, and with whom we may engage in sexual activity and how that sexual activity must relate to relationships. This is especially evident in the gaps left by *Lawrence*, as well as other caselaw regulating relationships, which can be read to provide for an implicit requirement that relationships be marital or marriage-like to be afforded state protection rather than prosecution.[52]

Control over sex, even within the confines of marriage, is especially evident in the laws that preceded *Griswold v. Connecticut*.[53] In an effort to regulate sex within any relationship, even marriage, Connecticut passed a law criminalizing advising one to use or the use of any form of contraception.[54] After employees of Planned Parenthood provided information, instruction, and medical advice to married individuals regarding contraception, they were found guilty as

[49] *Id.* Murray describes a marriage-crime binary, which separates sex into two categories: marital or criminal. Marital sex is considered lawful and legitimate, while criminal sex is just the opposite. State regulation led to a designation of sex being either "good" or "bad," "legitimate" or "illegitimate," and ultimately pushed sex to become entangled with marriage.
[50] *Id.*
[51] *Infra* pages 9-15.
[52] *Infra* page 12.
[53] *Griswold v. Connecticut,* 381 U.S. 479, 480 (1965).
[54] *Id.*

accessories to the crime of using contraception and fined $100 each.[55] They then brought suit, challenging the statute as violating the constitutional rights of married people with whom they had a professional relationship.[56] The Court found that the rights of married people fell within a "zone of privacy" created by several fundamental Constitutional guarantees, and held that a law prohibiting contraception rather than regulating manufacture or sale has a "maximum destructive impact upon [the marital relationship]," which, in light of the principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms," is "repulsive to the notions of privacy surrounding the marriage relationship."[57]

It is absolutely worth mention that the Court was very intentional in discussing the marital relationship in this case. The right to privacy in *marriage* was protected, but outside of that state-regulated, legally recognized relationship, there seemed to be no privacy protections. This notion was addressed in *Eisenstadt v. Baird,* in which a professor was convicted of violating a Massachusetts law that prohibited the provision of contraception to any unmarried person when he gave an unmarried woman a package of vaginal foam at the end of his lecture about contraception.[58] The Court, questioning what purpose the statute was even meant to serve, held that it violated the Equal Protection Clause of the Fourteenth Amendment because it targeted single persons as compared to married ones.[59] This case, however, does not address the underlying fornication statute in Massachusetts; it merely holds unconstitutional a law prohibiting contraception for those who have extramarital sex.[60]

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[55] *Id.*
[56] *Id.* at 481.
[57] *Id.* at 485.
[58] *Eisenstadt v. Baird,* 405 U.S. 438, 440 (1972).
[59] *Id.* at 443.
[60] *Id.* at 448.

Though eventually overturned, *Bowers v. Hardwick* provides evidence of the Court's reluctance to substantially change how the criminal law addressed extra-marital sex, especially in the queer context.[61] In *Bowers,* Mr. Hardwick was charged with violating a Georgia criminal statute prohibiting sodomy.[62] Mr. Hardwick was charged with violation of this statute for committing an act of sodomy with another adult male in the bedroom of his home.[63] Mr. Hardwick challenged the constitutionality of the statute, which criminalized even consensual sodomy, arguing that it violated his fundamental rights as a "practicing homosexual" because it placed him in imminent danger of arrest.[64] The Court determined that this case did not require a decision on whether sodomy laws between consenting adults generally or between "homosexuals" in particular were "wise or desirable," as it raised no questions about the right of state legislatures to pass such laws.[65] The Court simply found that there was no Constitutional right for "homosexuals to engage in acts of sodomy."[66] Furthermore, the Court refused to announce a fundamental right to engage in "homosexual sodomy," as that conduct presented no

[61] *Bowers v. Hardwick,* 478 U.S. 186 (1986). I use the word "queer" to discuss what is commonly referred to as "same-sex" because definitions based on sex rather than gender are still exclusionary. Queer is more all-encompassing of individuals whose experiences are not strictly heterosexual, whereas same-sex would exclude transgender and gender non-conforming individuals. For example, "same-sex" is typically used to refer to conduct between two people designated male or female at birth based on their physical biology, but would exclude two people who identify as male where one was identified male at birth, and one was identified female at birth but transitioned to male based on gender identity. While that situation would be heterosexual under the law's very basic understanding (or, arguably a better phrasing would be the law's desire *not* to understand) of gender and sex and its often conflation of the two, it would be considered same "sex" or, more accurately, same gender conduct. It is unclear whether the law that prohibited "same-sex" intercourse would also have applied to heterosexual same-gender intercourse, but given that the purpose of these laws was to prohibit queerness and queer sex generally, I have to imagine it would have been used in that way. Rather than providing a caveat explaining the difference between sex and gender each time this is brought up, I opt to use the word "queer" to describe non-heterosexual sexual conduct. However, when quoting or addressing language specifically from statutes or case law, I will use the verbiage offered in that text, which is often "same-sex," for the sake of accurate reflection of those texts.
[62] *Id.* at 188. The statute proscribed the performance of or submission to "any sexual act involving the sex organs of one person and the mouth or anus of another…". FN 1.
[63] *Id.* After a preliminary hearing, the District Attorney elected not to present the matter to a grand jury unless he received further evidence.
[64] *Id.*
[65] *Id.* at 190.
[66] *Id.* at 190-191.

fundamental liberty that, if sacrificed, would have significant impacts on the existence of liberty and justice, nor was such conduct "deeply rooted in this Nation's history and tradition."[67] In essence, states were free to criminalize sex, especially queer or "deviant" sex.

In a case overturning *Bowers,* the Court in *Lawrence v. Texas* provided what seemed like a turning point for the legal protection of non-normative, queer sex. Petitioner John Lawrence was arrested, charged, and ultimately convicted of violating a Texas law that criminalized "deviant sexual intercourse" as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[68] "Deviant sexual intercourse" was defined specifically as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object."[69] The *Lawrence* Court was to decide on the basis of both Equal Protection, as the law only criminalized such acts between same-sex couples, as well as on the basis of liberty and privacy under the Due Process Clause of the Fourteenth Amendment.[70] The Court elected to decide this case solely on Due Process grounds, adhering to the broad statements of the substantive reach of liberty provided by a string of previous substantive due process cases.[71] The Court largely based its reasoning in *Griswold v. Connecticut,* where it found that there was an established right to make certain decisions regarding sexual conduct that extended beyond just the marital relationship.[72] This right was defined as the right to privacy, though in *Griswold,* that privacy was discussed in the marital context, emphasizing the marital relation and protected

[67] *Id.* at 191-192. The Court cited to *Griswold, Meyer, Pierce, Prince, and Carey,* but still found no need to protect queer sex under the Constitution or Supreme Court jurisprudence.
[68] *Lawrence v. Texas,* 539 U.S. 558, 562 (2003).
[69] *Id.* at 563.
[70] *Id.* at 564.
[71] *Id.,* citing *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Griswold v. Connecticut,* 381 U.S. 479 (1965).
[72] *Id.* It is interesting to note that the *Bowers* Court also cited *Griswold,* but chose not to follow its reasoning in deciding not to protect queer sexual privacy.

space of the marital bedroom.[73] The Court also relied on the decisions in *Eisenstadt v. Baird*, which invalidated a prohibition on the distribution of contraceptives to unmarried persons, and *Carey v. Population Services, Int'l*, which invalidated a law prohibiting the distribution of contraceptives to persons under sixteen years old.[74] The sum of these cases, the Court concluded, established a right to privacy that extended to this kind of sex, and thus, *Bowers v. Hardwick* was overruled.[75]

While the state has slowly come to permit or decriminalize certain sexual acts, such as in *Lawrence,* inherent to the implicit requirement of marriage or marriage-adjacent relationships that underlies that newfound permission is that those relationships be monogamous, at least from the legal perspective.[76] While *Lawrence* was largely hailed as a victory for both queer couples and for sexual privacy generally, critics have pointed out that *Lawrence* might serve only to protect sexual conduct when that conduct promotes emotional intimacy.[77] Drawing upon the Court's statement that sexual acts, including anal sex between two men, "can be but one element in a personal bond that is more enduring," some have concluded that the Court did not actually declare that consenting adults have the freedom to engage in all forms of sex, but rather, that the

[73] *Id.,* citing *Griswold,* 381 U.S. at 485.
[74] *Id.,* citing *Eisenstadt v. Baird,* 405 U.S. 438 (1972) and *Carey v. Population Services, Int'l,* 431 U.S. 678 (1977).
[75] *Id.* at 578.
[76] *See, e.g., Reynolds v. United States,* 98 U.S. 145 (1878), in which the Court decided that the First Amendment's Freedom of Religion provision did not extend so far as to allow Mormons to engage in polygamy, or the marrying of more than one person. While the legality of non-monogamy generally falls outside the scope of this project, given that BDSM and kink communities often tend toward more non-monogamous practices than their vanilla counterparts, it is worth noting the complete state prohibition on multiple legally recognized relationships, with the exception of Cambridge and Somerville, Massachusetts. For further reading on Massachusetts' polyamorous partnership ordinances, see "Three's Company, Too: The Emergence of Polyamorous Partnership Ordinances," 135 Harv. L. Rev. 1441 (2022). I also address non-monogamy and polyamory in my piece, "Sex and the City: How to Overcome Antiquated Single-Family Zoning Provisions and Grant Protection for Non-Monogamous Families," (unpublished, 2024).
[77] Laura A. Rosenbury and Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 Emory L.J. 809 (2010).

Court suggested that sex is only deserving of constitutional protection when it furthers the development of emotional intimacy.[78]

Prior to *Lawrence,* criminal law and family law intertwined to determine which sexual activities were protected and which were viewed as vices.[79] Historically, criminal law punished a variety of consensual sexual activities, such as extramarital sex, adultery, and prostitution, while family law encouraged people to choose marriage as the framework in which to engage in sex.[80] This tendency to be sex-negative largely remains in the legal landscape today, with *Lawrence* furthering the tendency to favor marriage: "the majority in *Lawrence* stated that it did not intend to interfere with the traditional prerogatives of states to set their own requirements for which relationships are eligible for state recognition and support and which are not."[81] Courts and legislatures have also not moved quickly to decriminalize long-stigmatized consensual sexual activities, as, though contrary to common belief, *Lawrence* did not declare unconstitutional all prohibitions on consensual sex.[82]

In essence, *Lawrence* enshrined protection for "certain intimate conduct," including "intimate sexual conduct" and "sexual intimacy."[83] The majority opinion provided little if any justification for protecting sex that is not part of an ongoing relationship and seems to limit gay sex that is deemed "acceptable" to that which conforms to a heteronormative marriage-like model.[84] It implies that "the Court and the Constitution will respect our sex lives, but on [the]

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[78] *Id.* at 810.
[79] *Id.* at 816.
[80] *Id.*
[81] *Id.*, citing *Lawrence v. Texas,* 539 U.S. 558 (2003).
[82] *Id.* at 816-817.
[83] *Id.* at 825.
[84] *Id.* at 828, citing Libby Adler, *The Dignity of Sex,* 17 UCLA Women's L.J. 1, 16-19 (2008), Libby Adler, *The Future of Sodomy,* 32 Fordham Urb. L.J. 197, 218 (2005), Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas,* 104 Colum. L. Rev. 1399, 1400-01 (2004), Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After Lawrence v. Texas?* 23 Soc. Text. 235, 238-45 (2005), and Marc Spindelman, *Homosexuality's Horizon,* 54 Emory L.J. 1385-86 (2005).

condition that our sex lives be respectable," and "respectable" means conforming as closely as possible to heteronormative ideas about sex and relationships.[85]

When it comes to deciding whether the state will protect or prosecute, majoritarian sexual morals have historically ruled.[86] And while the Court has stated that such majoritarian views ought not to be the determinative factor in choosing what sexual acts are legal versus criminalized, the above line of cases seems to suggest that a bias toward traditional and heteronormative sex still plays a role in the background. *Lawrence* only overturned *Bowers* after queerness became slightly more accepted and mainstream. Marital contraception had to be protected before nonmarital folks had access to the same. Even though *Lawrence* seems to offer protection for sexual conduct that exists in the "interstitial space" between marriage and crime,[87] there are still limitations, the primary example here being consensual kink, which, as exemplified in Jason's case, is often criminalized.[88] The protections of privacy under the Substantive Due Process doctrine are insufficient at present, as will be addressed in the following section. Thus, there is a need instead for a consent defense to prosecutions for illegal sexual conduct, especially for consensual kink.

IV. KINK AND SUBSTANTIVE DUE PROCESS: WHY PRIVACY IS INSUFFICIENT

The above limitations in *Lawrence* may serve to undermine a substantive due process right to sexual privacy in the consensual kink context in two ways. First, if *Lawrence* requires intimacy to extend constitutional protection, then any consensual kink activity that occurs outside an established romantic or sexual relationship is subject to scrutiny and unlikely to be

[85] *Rosenbury and Rothman* at 829, citing Ruskola, 23 Soc. Text. At 239.
[86] *Supra* note 45, citing *Lawrence* at 571.
[87] *Id.* Murray discusses the "interstitial space" between marriage and crime, defining it as the range of nonmarital sexual acts that are also no longer criminalized. She argues that we have moved beyond the "marriage-crime binary," *supra* note 46,
[88] *Supra* page 1.

protected. Second, if *Lawrence* protects only that sex which is "respectable," or, in other words, sex that conforms as closely as possible to heteronormative assumptions about sex, consensual kink strays far from the procreative assumptions that surround sex, leaving it again unprotected under a Substantive Due Process theory.

a. INTIMACY AND SEX

The American jurisprudence on sexual intimacy has almost exclusively tied intimacy and sex closely together, failing to account for the fact that each can exist independent of the other. The prevailing argument in favor of constitutional protection for consensual kink conduct is that *Lawrence* protects a liberty right to engage in sexual activity "in the pursuit of enduring intimate relationships," and therefore prosecution of consensual kink cases as assaults places an unconstitutional burden on the ability of practitioners of consensual kink to form enduring intimate relationships.[89] This may be true; to the extent that people engaging in consensual kink are in an enduring intimate relationship, perhaps *Lawrence* might offer some level of privacy protection under substantive due process. But what about those who do not have that "enduring intimate relationship," who engaged in a consensual encounter outside the bounds of the traditional cisheteronormative monogamous relationship?

The language in the *Lawrence* decision demonstrates how the failure to separate intimacy and sex leads to a requirement that intimacy is what provides the right to privacy.[90] Similarly, *Griswold* and its progeny protect not only an individual's choice to procreate, but the autonomy of the couple's association in making that decision.[91] This extends to married and unmarried

[89] Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 Cardozo J.L. & Gender 631, 641 (2015). Haley argues that sex involving BDSM is not dissimilar to homosexual sex in a legal sense; if the courts protect certain ways to engage in sex with another person, then that ought to extend to sex involving BDSM as well.
[90] *Supra* page 11-12.
[91] Kenneth L. Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 640 (1980). Karst argues that there is a Constitutionally protected right to intimate association, gleaned from a variety of caselaw discussing the rights of the

couples: *Griswold* explicitly protects the private intimacy of the marriage, while *Eisenstadt* extends that protection implicitly to the unmarried couple.[92] In both of these circumstances, however, the privacy protection is granted to couples in an emotionally intimate and committed relationship. This privacy protection is discussed only in the context of a relationship, whether marital or marriage-like, that adheres to societal norms about how relationships look. This means that the privacy protections extend only so far as a relationship looks, on the outside, as though it were marital or en route to marriage. It would not be surprising to see a court elect not to extend that same privacy protection to, for example, a one night stand or friends with benefits situation, both of which are perfectly valid ways to engage in physical intimacy with another person, because of the lack of emotional intimacy that is typically characteristic of the kinds of relationships that have been granted privacy protection under substantive due process. This means that if people not engaged in what the state would consider an emotionally intimate (and monogamous) relationship also engage in an act of consensual kink, and the state finds out, there is no argument to be made that those people had a right to the privacy derived from intimate association, because they would not be found to have been in an emotionally intimate relationship.

This state requirement of emotional intimacy can be found in the statutes of several states that punish domestic violence differently than standard assault. In Colorado, for example, the domestic violence statute requires an "intimate relationship,"[93] and a relationship of purely

intimate couple and the family unit. While the article cites to cases that have been abrogated or overturned, such as *Roe v. Wade,* the general idea is still one worth noting. *Griswold* and *Eisenstadt* do certainly provide a context for ascribing a constitutional right to intimate association couched in the privacy doctrine of substantive due process, although, again, that intimacy is so deeply intertwined with the monogamous marital or marriage-like relationship that it seems privacy protects only those intimate relationships that mimic or adhere to the traditional relationship norms that are derived from patriarchy, religion, and "tradition."

[92] *Id.*

[93] C.R.S. § 18-6-800.3

sexual nature does not fit that definition.[94] An "intimate relationship" under Colorado state law is one "between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time."[95] This is a clear limitation to couples whose relationships are marital or marriage-like, thus imposing an emotional requirement into the definition of "intimacy."

Consensual kink can occur in a variety of relational contexts, often between people who have no emotionally intimate relationship whatsoever. Of course, there can be an argument that there is a level of emotional intimacy necessary to have the lengthy conversations about boundaries, consent, and safe words that distinguish consensual kink from intimate partner violence. But would the state accept that as emotionally intimate? I would bet not, as that level of intimacy does not look like the intimacy involved in the kinds of relationships defined above.

So if the argument is that consensual kink ought to be protected because the lack of intimacy prevents the formation of emotionally intimate relationships, then this protection would only serve to protect a fraction of the people who engage in consensual kink, which would present an equal protection issue far outside the scope of this paper. And further, ascribing to the state's idea of an emotionally intimate relationship should not be a requirement to access that protection. One should not have to formulate their intimate relationships in a way prescribed by the state in order to avoid being punished by the state for engaging in a private and consensual practice. To illustrate, if two individuals engage in the consensual kink act of, for example, one party hitting the other with a flogger, so long as there was clear consent to that act, the state ought not to be involved, regardless of the level of intimacy between both parties. But at present,

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[94] *Id.*

[95] *Id.* In a future draft of this paper, I intend to include more state definitions, but for the sake of space and time, for now, I'm including just the Colorado statute as a placeholder for a lengthier discussion.

the state considers certain types of sex and relationships, such as those that include consensual kink, to be "deviant" or "abnormal," and protects only that sex which it views as respectable, which almost universally means sex within the established cisheteronormative monogamous bounds of traditional relationships.

b. RESPECTABILITY AND SEX

Just as the state has created an implicit requirement of emotional intimacy for privacy protections, so too has it delineated what sexual activities can be viewed as respectable and worthy of protection and privacy. Sex that is heterosexual or mimics heterosexuality, monogamous, and in pursuit of growing emotional intimacy is considered respectable.[96] Thus, any consensual kink conduct that is not furthering a growing emotional intimacy, one that pursues a marriage or marriage-like relationship, would not fall under the "respectability" umbrella to earn protection. Put simply, *Lawrence* does not protect sex that is not part of an ongoing relationship.[97] So even if the substantive due process privacy protections under *Lawrence* were to extend to consensual kink conduct, it would only do so to the extent that that conduct is part of an ongoing, emotionally intimate relationship.

Further, if *Lawrence* protects only that sex which is "respectable," or, in other words, sex that conforms as closely as possible to heteronormative assumptions about sex, consensual kink strays far from the procreative assumptions that surround sex, leaving it again unprotected under a substantive due process theory. *Griswold* and *Eisenstadt,* while extending a privacy protection, do so in the context of the decision of when to procreate. Consensual kink often does not include

[96] Laura A. Rosenbury and Jennifer E. Rothman, *Sex In and Out of Intimacy,* 59 Emory L.J. 809, 820 (2010).
[97] *Id.* at 828-829.

procreative sexual acts, and sometimes does not actually include sex at all; people can and often do engage in consensual kink without any sexual contact whatsoever.[98]

There has been an argument made to reconstruct the right to privacy with regard to sex such that it would become independent of intimacy requirements.[99] This, it has been argued, would make unconstitutional any prohibition on sexual activity that is motivated by a state desire to channel sex into "acceptable forms of coupled intimacy."[100] If this were to become true, it would be an ideal solution: to completely strip sex of its legal intertwinement with state regulation of emotional intimacy, and, even better, to end the regulation of emotional intimacy altogether. But at present, reconstructing an entire societal view of sex and relationships is impractical, or, at the very least, a long-term project, and people engaged in consensual kink conduct face serious prosecutorial consequences right now. So while this is certainly something to work toward, there needs to be a more immediate solution. While some have offered a First Amendment avenue to protection, which will be discussed in the forthcoming section, ultimately this paper will rest on a theory of procedural due process as the best current means of protection until such a time as society can overcome its desire to inextricably link sex and emotional intimacy in the law.

c. A deeper dive into intimate association and consensual kink

Griswold also contemplates a freedom of intimate association that might be applied to the Substantive Due Process framework. In *Griswold,* the Court found a general "zone of privacy,"

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[98] *Supra* page XXX
[99] Rosenbury and Rothman at 860.
[100] *Id., citing* Karst, *The Freedom of Intimate Association, infra* note XX. The argument here is that intimate association promotes engagement between individuals, which builds community and therefore betters society. Karst also argues that sex, with or without emotional intimacy, can further the goal of promoting society by providing the opportunity for a diverse set of interactions and experiences among different people to foster a greater sense of interconnectedness and self-understanding.

to which the First Amendment contributed by means of protecting the freedom of association.[101] *Griswold* began a larger movement to use substantive due process to guarantee individual freedoms, with the freedom of association in the sexual context, otherwise known as the freedom of intimate association, at the forefront.[102]

In essence, the freedom of intimate association protects close personal relationships; a person may enter an intimate association with whomever they choose, subject to a handful of exceptions.[103] However, this has been described as protecting only those relationships that are comparable to a marriage or family relationship.[104] This freedom of *intimate* association also draws us back to our discussion of the scope of *Lawrence* as being limited only to intimate relationships.[105] Intimacy can have two meanings. The first is synonymous with privacy: something that is intimate is something that is private, or a fact that a person would not normally share with more than a few people.[106] The second refers to a type of close association between people.[107] The *Griswold* opinion appears to combine the two definitions when it discusses intimacy.[108]

However, as discussed above, a significant limitation to this protection is the requirement of *intimacy*, which, we've established, is emotional, not sexual, in nature. So, if this avenue provides protection again only to relationships involving emotional intimacy, then we are back

[101] Kenneth L. Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 624-25 (1980).
[102] *Id.* at 626-27.
[103] *Id.* at 628.
[104] *Id.* at 629.
[105] *Supra* pages 11-12.
[106] *Karst* at 634.
[107] *Id.*
[108] *Id.* at 635.

where we started under the substantive due process analysis: protection for only some people engaged in some forms of consensual kink conduct.[109]

Within the freedom of association, another salient issue arises with respect to consensual kink: the freedom to contract. Almost universally, the law has disfavored contracts between those in a relationship.[110] Such contracts, specifying expectations on personal goals, household tasks, religious commitments, or rules for arguments, have been argued to limit how interactions might change over time and prevents the parties from seeing each other as whole people rather than a sum of contractual duties.[111]

Most relevant to our discussion, contracts for sexual relationships are never upheld in the courts, and likewise, no contract as to the boundaries of a consensual kink interaction has been upheld.[112] Nevertheless, contracts are widely used in consensual kink relationships to denote the agreed-upon acts, boundaries, and process for revoking consent.[113]

The contractual approach would help prevent the blurred area between consensual kink and intimate partner violence by presenting, in writing, the exact limits of the freely given consent as well as a mutually-agreed upon process for revoking that consent. However, the unwillingness to

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[109] Another proposed avenue for protection is tort law. Devin Meepos, *50 Shades of Consent: Re-Defining the Law's Treatment of Sadomasochism,* 43 Sw. L. Rev. 97, 107-108 (2013). Meepos discusses the similarities between criminal and tort law, but notes the distinguishing factor: in tort law, consent can negate the wrongfulness of the alleged tort, whereas in criminal law, consent can currently do no such thing. While this presents an interesting and potentially beneficial means of dealing with cases of questionable consent or conduct that goes too far while removing the state from the equation, it is currently impractical. Such a shift would require all states to cease prosecuting any crime that involves people that are potentially in a consenting BDSM relationship, which means any and all defendants would raise consent in order to stop prosecution and move the case to the civil realm. This leaves too large a gap, as the state could no longer prosecute any domestic violence whatsoever. It would be entirely on the victim to bring the case, and victims of domestic violence and sexual assault are often hard pressed to be involved in criminal prosecution brought by the state. Putting the entire matter in their hands would likely lead to an increase in intimate partner violence, as there would be fewer restraints and consequences for engaging in those non-consensual behaviors.

[110] *Id.* at 639.

[111] *Id.* at 640.

[112] *Nonbinding Bondage: Exploring the (extra)legal complexity of BDSM contracts,* 128 Harv. L. Rev. 713, 714 (2014).

[113] *Id.* at 716-17.

uphold contracts that include sex as well as majoritarian views of morality likely prevent these contracts from being used to their full potential. In the absence of clear law allowing and protecting the use of such contracts, parties who find themselves in litigation would be subject to the whims of the court, with the contract's validity resting not on settled law, but rather on a judge's or jury's own views. And with consensual kink still overwhelmingly viewed as a sort of deviant or even criminal sexual behavior, with no legal protection, the likelihood is that these contracts would almost universally be considered invalid.[114] Further, taking such a contract to court might result in criminal proceedings against one or both party because of the combined lack of protection and criminalization of consensual kink.

The freedom of intimate association has an additional major shortcoming: it in no way prevents the state from promoting majoritarian views of morality.[115] This is certainly evident in the above discussion on contracts, but the state's power to legislate on morality extends much further. The state continues to regulate incest, bigamy, age of consent, and more, and has in the past regulated homosexuality, for example, in its quest to legally define which sexual activities are moral and which are not.[116] It would be outside the scope of this paper to examine the morality of each of those examples, but the fact remains that the state has the power to legislate what is popularly considered moral at the time, and has in the past been wrong.[117]

d. PROCEDURAL DUE PROCESS AND THE CONSENT DEFENSE

[114] *Supra* page 3.
[115] *Karst* at 627.
[116] *Karst* at 670-671.
[117] *See, e.g., Lawrence, supra* note XX, discussing how regulation of morality in the form of same-sex sexual relations was incorrectly upheld in *Bowers v. Hardwick, supra* note XX. *See also Obergefell v. Hodges,* 576 U.S. 644 (2015).

As previously stated, the doctrine of *"volenti non fit injuria"* ought to be applied to the criminalization of consensual kink.[118] While certainly, there is a legitimate government interest in the prevention of crimes causing physical harm, especially domestic violence and sexual assault, what is to be done when that "crime" is done with the consent of the "victim"? When the state interest in preventing physical harm overlaps with what one accused of such a crime might consider to be an act of consensual BDSM, how is the accused to protect themselves in the absence of a substantive due process protection for absolute sexual privacy? This issue has been raised in a number of cases. One such example is State v. Van, which explicitly raised the question of whether the right to pursue private intimate relationships outlined in *Lawrence* extended to BDSM-related activities.[119] Mr. Van was charged with sexual assault, assault, false imprisonment, and terroristic threats because he was engaged in a consensual homosexual BDSM relationship in which he was the "master" exerting control over his "slave."[120] Mr. Van and his partner mainly focused on this domination dynamic, but occasionally also engaged in bondage and discipline activities, such as flogging and the use of restraints and gags.[121] They had a safe word that could be invoked at any point if the conduct became too intense, but that was never invoked at any point in the relationship.[122] The case came to be known by the state after the victim staged his own abduction, in which a third individual, Mr. Marshall, who was also a submissive of Mr. Van's, was involved.[123] Several days after the staged abduction, Mr. Marshall

[118] Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 Cardozo L.J. & Gender 631, 636 (2015). *Supra* page 1.
[119] *State v. Van,* 268 Neb. 814 (2004).
[120] *Id.* This kind of master/slave dynamic is common in BDSM relationships; the "D" in BDSM stands for domination, as a common dynamic involves one person holding power and the other lacking it. *Supra* notes 19-21.
[121] *Supra* note 112.
[122] *Id.* The factual pattern in this case is interesting and worth reading in full, although it is far too long to fully detail here, as it describes a set of incredibly common practices within the BDSM community. The court attempts to paint them in a negative light, but it's worth noting that the "victim" in the case described several of their acts as a "huge catharsis" and specifically requested that these acts be done to him.
[123] *Id.*

had a conversation with the victim, who stated that he wished to leave, and Mr. Marshall helped him devise an escape plan.[124] The victim then reported Mr. Van's and Mr. Marshall's conduct to the police at the urging of his father.[125]

On appeal after his conviction, Mr. Van argued that the statutes were unconstitutional as applied because the legislature did not intend them to apply to private, consenting BDSM relationships, and that the reasoning in *Lawrence* supported his argument. The court, however, distinguished the clear consent in the case in *Lawrence* from what it considered questionable consent here for the period during which the victim wished to leave the dynamic and return to his home.[126] The court stated, "[w]e find nothing in Lawrence to even remotely suggest that nonconsensual sexual conduct is constitutionally protected under any circumstances or that consent, once given, can never be withdrawn."[127]

Though on first glance, *People v. Van* appears to be a total loss for the legalization and protection of BDSM, it may provide some use in future BDSM cases where consent is more clear cut. The court did not unequivocally say that BDSM was not worthy of protection, just that consent must be clearly present, which, in Van's case, it was not.

Another example of the lack of protection is *People v. Samuels,* in which the defendant, Mr. Samuels, made multiple sadomasochistic films of people being whipped.[128] When he sent one such film to be processed, it was instead turned over to the police, and Mr. Samuels was charged with assault by means of force likely to cause bodily injury, and was ultimately found guilty by a jury.[129]

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *People v. Samuels,* 58 Cal. Rptr. 439 (1967).
[129] *Id.*

Samuels is noteworthy for two reasons. First, Mr. Samuels attempted to raise a consent defense, but the court held that this defense was immaterial to his guilt or innocence and refused to allow it. Second, because this case was prosecuted without any victim pressing charges.

Mr. Samuels attempted to contend that consent of the victim is an absolute defense to the charge of aggravated assault, but on appeal, the trial court's decision not to instruct the jury on a consent defense was sustained.[130] Specifically, the court stated that it was "a matter of common knowledge that a normal person in full possession of his mental faculties does not feely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim in the…film did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant's conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another."[131] The language the court uses in discussing individuals who engage in BDSM is indicative of the same mentality that subjects certain forms of sexual activity to criminalization while permitting other conduct to be legal.[132] The court is certain that no "normal" person would consent to such acts, and describes anyone who does consent as having a "mental aberration."[133] Yet nearly half the population is estimated to engage in some form of BDSM conduct, and nearly 70% of people are estimated to fantasize about it.[134] Based on those numbers, it seems the 30-50% of people who do not engage in or fantasize about BDSM are the outliers, not the other way around, as the court would have it. And, as previously stated, the BDSM community is focused on consent; in the

[130] *Id.*
[131] *Id.*
[132] *Supra* page 8.
[133] *Supra* note 121.
[134] *Supra* page 4.

absence of consent, BDSM crosses into intimate partner violence.[135] While there is an arguably legitimate state interest in preventing intimate partner violence, without a consent defense, how is the state to know when that violence is actually occurring?[136]

The second issue with *Samuels* was the lack of a victim involved in bringing a charge. It would fall within the purview of the state's interest in preventing violence if a victim had filed a report or pressed charges. However, here, a third party entirely unfamiliar with the relationship between Mr. Samuels and the individuals being whipped made the report.[137] This also hurts the state's ability to determine when something is consensual versus truly intimately violent. The state is forced to presume that any reported violence falls into the second category rather than the consensual category, and absent a formal avenue for the accused to assert that the act was consensual, the only path to exoneration is through either acquittal or case dismissal, both of which depend on the feelings and life experience of another individual rather than the fact of consent in the charged offense.

Both of these cases, as well as several other examples,[138] demonstrate where a consent defense can be helpful in state decisions to prosecute sexual conduct that substantive due process currently fails to protect as falling under the right to sexual privacy. Instead of couching this

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[135] *Supra* page 3.

[136] I say "arguably" because there is an argument to be made, which reaches far outside the scope of this piece, that there is no legitimate state interest in the prevention of intimate partner violence under the aforementioned caselaw, *supra* pages 8 -13, which establishes a right to privacy within certainly the marriage, and extending to at least some intimate relationships generally. It could be considered a monumental overreach of the state to intrude into the intimate relationship, even if that relationship includes intimate partner violence, as the courts have long established a right to privacy within certain relational realms. My future work intends to consider the harm caused by prosecuting intimate partner violence, as this retraumatizes victims and likely subjects them to further harm from the violent partner, as that violent partner is likely to assume that the victim aided in their prosecution or to be angry that the victim testified against them, even when that victim was unwilling and was compelled by the prosecution to do so.

[137] *Supra* note 121.

[138] *Commonwealth v. Appleby* (holding that a victim's consent to assault and battery is not grounds for innocence of the crime); *State v. Collier* (holding holding that BDSM activities constitute assault, not "social activity"); *People v. Jovanovic,* (dealing heavily with the consent defense but overturning the conviction for mishandling of evidence); and *State v. Gaspar,* (discussing the line between consensual sexual activity and sexual assault with excessive force).

issue under substantive due process, as the overwhelming majority of scholarship on consensual kink and the law suggests, I will argue that it instead needs to be analyzed under procedural due process, and that the lack of a consent defense is in violation of the procedure due in the criminal justice system.

I offer the consent defense under procedural rather than substantive due process because the substantive due process lens requires that there be a protected liberty interest in the fundamental right to engage in consensual kink, which, as discussed above, would require the case law to extend protection under the idea of the right to sexual privacy.[139] But that right to privacy has repeatedly been shown to extend only to sexual conduct that is viewed as moral or normative, not "deviant." Existing scholarship would place the consent defense within the bounds of substantive due process, holding it as a liberty and associational right.[140] Haley argues, for example, that the criminalization of consensual kink may be unconstitutional because, under *Lawrence,* substantive due process protects the right to pursue private intimate relationships free from government intrusion.[141] Thus, he reasons, the law should permit individuals to consent to a reasonable level of harm and to activities that could cause an unreasonable level of harm, because of the liberty right that protects private intimate relationships.[142]

However, per the previous discussion that *Lawrence* appears to have significant limitations, as well as the discussion about the shortcomings of couching consensual kink protections under substantive due process, I believe it is worth exploring the procedural route. There is a well-recognized interest in the deprivation of liberty that comes with a criminal conviction and

[139] *Supra* pages 14-19.
[140] *Supra* note 111 at 640.
[141] *Id.* I would caveat this argument with the fact that *Lawrence* does not offer universal protection from any government intrusion into relationships. *See supra* note XXX: the government may still get involved when it suspects intimate partner violence, and at present, the government does not distinguish BDSM from IPV.
[142] *Id.* at 640.

sentence. Procedures must be in place to ensure that deprivation is fair, and one such requirement is the right of the defendant to present a complete defense.[143] Presenting a consent defense and evidence of that consent falls under the right to present a complete defense: it is part of the defendant's story, their theory of the case, and excluding such a defense and evidence thereof means depriving that defendant of due process prior to the deprivation of their liberty that results from a criminal conviction.

So, in essence, this argument strikes a balance between the government interest in preventing intimate partner violence and the defendant's right to tell their story. This provides the state the opportunity to continue to pursue charges against behavior that, on its face, appears to cause physical harm to others, but does not erroneously punish the accused for engaging in behavior that was consented to. Such a defense would seem to comport with one of the main tenets of our criminal justice system: trial by jury. When the prosecution is permitted to present evidence that an assault or other illegal act occurred, but the defense is barred from presenting evidence as to why that act occurred, the system skews in favor of wrongful conviction for consensual acts. But if both sides may present their full theories of the case, the issue is placed back into the hands of its rightful decisionmaker- the jury. Such a defense and presentation of evidence also gives a voice back to the alleged "victim," as they may testify as to what truly occurred and to what, if anything, they consented to.

In order for this to work, however, consent must be an established defense, much like self-defense or defense of others. Otherwise, courts may elect to exclude the defense or evidence

[143] *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Citing Crane v. Kentucky,* 476 U.S. 683. *Holmes* provided that this right can be limited, however; state and federal rulemakers have "broad latitude" to establish rules excluding evidence from criminal trials.

brought in support of it, as occurred in *Samuels.*[144] Providing this as an established defense also puts all parties on notice as to what precisely the law would allow and how it would define such a defense. Some have also suggested that such a consent defense ought to be the default, placing the burden on lawmakers to carve out the specific instances in which they wish to bar consent as a defense.[145] While this approach could have its benefits, including to maintain strict criminalization of domestic violence and sexual assault and only permit consent as a defense to perhaps the less aggravated crimes, such as those associated with flogging, bondage, the use of restraints, etc., I would argue this concession would result in two major shortcomings. First, it would create confusion in permitting this defense for some BDSM-associated crimes but not others, and second, it would do nothing to stop the legislature from simply barring consent as a defense individually to each crime, ultimately bringing us right back to the current position, in which consent is not a valid defense.

I will concede that the consent defense may serve as something of a violation of privacy. It would require testimony and evidence about the private sexual lives of the people involved. But that is no less true of prosecutions for assaults based on BDSM, and at least if this evidence is proffered in support of a legitimate defense rather than to erroneously convict someone of engaging in a consensual act, then it is offered to tell the truth rather than to serve a government agenda against "deviant" sexual conduct. If privacy is going to be invaded one way or another, it is best to invade that privacy with an eye toward justice, rather than the regulation of sex based on a bias toward traditional and heteronormative sex.

e. CONCLUSION

[144] *Supra* page 24.
[145] Morgan Schumann, *Pain Please: Consent to Sadomasochistic Conduct*, 2018 U.Ill.L.Rev. 1177 (2018).

Though much of the scholarship discussing protection of consensual kink would couch it firmly within the substantive due process sphere, *Lawrence* makes it clear that sexual privacy is protected only to the extent that the people needing that protection are in an emotionally intimate relationship and engaging in sex that is considered "respectable." And an attempt to couch protection in the First Amendment's freedom of association leads us to a very similar outcome, protecting only a fraction of those who consensually engage in consensual kink.[146]

Thus, we are forced to turn to procedural due process. There is a clear liberty interest at stake, as prosecution for a consensual act risks imprisonment. Yet there is no current right to a consent defense, nor is one delineated in the law, despite a constitutional right to bring a complete defense to a charged act. While some have argued for the idyllic solution of a complete overhaul of our societal views of sex and relationships, there needs to be a more concrete, present-day solution while that long-term change takes place. We can find that concrete solution in the addition of a consent defense to permit those accused of criminally engaging in consensual acts to bring their complete defense to court.

We can return to Jason's story, with which we began our discussion, to illustrate the shortcomings of the substantive due process theory and the need for a consent defense under a procedural lens.[147] Jason was in an emotionally intimate relationship – he was married to Jennifer.[148] Yet substantive due process offered no protection despite the stated right to marital

[146] It is also worth noting that the vast majority of articles on this topic are from the early 2010s at the latest; several are from the late 1900s. There has not been a substantial amount of work done on this topic in recent years, despite BDSM becoming more and more popularly known and engaged in.
[147] *Supra* page 1.
[148] I'll note this here for now with the intent of moving it up when I revisit the piece to revise further. There is something to be said about the distinction between assault in emotionally intimate relationships, such as marriage or "serious" relationships, as defined in the Colorado statutory example given above, which is defined as domestic violence and punished more seriously, and regular assault between two people who are not in an intimate relationship, even if they are sexually involved, which is prosecuted and punished less severely. This may serve to encourage the opposite of what the state desires, which is the pairing off of all or almost all adults into monogamous marriages or marriage-like relationships in order to decrease the welfare burden on the state. If people involved in the BDSM community know about these distinctions and criminal consequences, they may be encouraged to engage

privacy given in the long line of cases that address that realm. Jason was still subjected to a jury trial, three years after the incident was reported by a third party and despite Jennifer pleading for the charges to be dropped because the acts were consensual.

What could have helped Jason, however, was a consent defense. Jason was at risk of being deprived of his liberty, as he was facing felony charges and could have been imprisoned if found guilty. Yet he had no right to bring consent as a defense despite the clear presence of consent.[149] If Jason had been able to bring that defense, he would not have had to rely on the jury to find him innocent despite the prosecution technically meeting the elements of the statute. And at the same time, the consent defense would allow the state to still bring the prosecution if it felt it was necessary, while permitting Jason a protected ability to present his full side of the story.

in more casual encounters or not to get into relationships which the state would define as "emotionally intimate" in order to avoid the highest-risk prosecutions.

[149] *State v. Van* may apply here, as the consent at issue was far more clear-cut than in the fact pattern in that case.