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RESTRUCTURING THE MARITAL BEDROOM: THE ROLE OF THE PRIVACY DOCTRINE IN ADVOCATING THE LEGALIZATION OF SAME-SEX MARRIAGE

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I. INTRODUCTION

On February 12, 2004, the American debate regarding the legalization of same-sex marriage finally got personal. After years of deliberations among academics, politicians, religious leaders, and activists, the American public received its first glimpse of what a same-sex marriage looks like: two grandmotherly women in their early eighties, gently hugging and pressing their wrinkled faces together. Phyllis Lyon and Del Martin, founders of the Daughters of Bilitis, one of the first lesbian rights organization in the United States,[1] had been regarded by supporters and foes alike as radical lesbian-feminists throughout their many years of activism. By participating in society's most conventional tradition, these women celebrated over fifty years of love and commitment not only to one another, but also to the queer[2] rights movement.

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* J.D., University of Michigan Law School, expected 2006; A.B., Bryn Maur College, 2001.

1. WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 57 (1996).

2. I use the term "queer" throughout this paper as an umbrella term to refer to lesbian, gay, bisexual, and transgender individuals generally. The term also includes individuals who do not identify with any of those categories but who share romantic relationships with people of the same gender. Of course, each of these separate communities has its own unique concerns and brings its own challenges to the marriage issue. For my purposes here, however, "queer" represents the broadest and most inclusive term possible.

Like most weddings, Lyon and Martin's union was carefully planned and orchestrated, but the details did not lie in the flavoring of the cake or the seating arrangements of the guests. Rather, San Francisco Mayor Gavin Newsom coordinated with constitutional scholars, government officials, and queer rights advocates to ensure that this groundbreaking moment was cloaked in privacy. The wedding planners wanted to prevent opponents from thwarting the ceremony,[3] but after issuing the marriage licenses, Mayor Newsom submitted a statement and a photograph of the newlyweds to the press. The symbolic imagery contained in those materials greatly impacted the nation. The queer community immediately recognized Lyon and Martin as two of its own heroes continuing the fight for equality. More importantly, the broader public saw that same-sex marriage was no more threatening than two elderly women holding hands. The date, February 12, represented "Freedom to Marry Day," a day so named by queer rights activists several years ago as a means to educate and build support for legalizing same-sex marriages. Activists purposefully had chosen that date for its proximity to the romantic holiday of St. Valentine's Day.

The images of Lyon and Martin's wedding personalized the same-sex marriage debate in the eyes of the American public, but the American legal system had been dealing with this issue for years. Since the Stonewall Riot in 1969, commonly regarded as the birth of the gay rights movement,[4] numerous same-sex marriage cases have reached the courts. The first such case was *Baker v. Nelson*[5] in 1971, in which the Minnesota Supreme Court affirmed the district attorney's refusal of a marriage license to a male couple. Despite the plaintiffs' disappointing loss, same-sex couples in other jurisdictions filed civil actions against their municipal governments. All of these cases failed until *Baehr v. Lewin*,[6] in which the Hawaiian Supreme Court held that the state's denial of marriage licenses to same-sex couples was sex discrimination under the equal rights amendment to Hawaii's constitution. That groundbreaking decision set off a fury within the national political system and led to the federal government's "Defense of Marriage Act" ("DOMA"),[7] which effectively rendered the Constitution's full faith and credit clause moot with reference to same-sex marriages.

3. Rachel Gordon, *Bush's Stance Led Newsom to Take Action*, SAN FRANCISCO CHRONICLE, Feb. 15, 2004, at A-1.
4. *See generally* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004).
5. 191 N.W.2d 185 (1971).
6. 852 P.2d 44 (1993).
7. Defense of Marriage Act, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)).

Despite such a political backlash, queer rights advocates have pushed same-sex marriage forward via various lawsuits in different states, most notably in Vermont and Massachusetts.[8] The plaintiffs in these cases largely based their arguments on the notions of fundamental liberty and equality under the substantive due process and equal protection clauses of the Fourteenth Amendment. Explicit notions of privacy, upon which the Supreme Court supported its previous decisions concerning sexual, individual, and familial autonomy, were noticeably absent from their briefs. A close examination of those briefs reveals that same-sex marriage advocates disguised their privacy arguments as liberty claims. The affirmative decisions delivered by the state supreme courts in these cases, however, unambiguously incorporated elements of the privacy doctrine, thereby indicating that privacy does play a useful role in the pursuit of legalizing same-sex marriage.[9]

Feminist criticisms of the privacy doctrine and the holding in *Bowers v. Hardwick*[10] persuaded queer rights advocates to move away from the right to privacy as a supportive argument for same-sex marriage and to dress it as a liberty argument. This note argues that, since *Lawrence v. Texas*[11] has restored that right to queer individuals and their romantic relationships, the essential elements of the privacy right, specifically zonal, decisional, and relational rights to privacy,[12] must be inserted into the proponents' rationale. Doing so will strengthen the advocates' cases by situating the issue into the historical progression of the courts' precedents, bolstering the claim for legal equality, and increasing public support by desexualizing same-sex couples.

Part I of this paper examines the reasons underlying queer rights advocates' reluctance to insert privacy arguments into the case for legalizing same-sex marriage. Part II illustrates that, due to such disinclination, advocates transformed notions of privacy into concepts of liberty. Part III argues that, after the *Lawrence* decision, proponents

8. *See* Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State of Vermont, 744 A.2d 864 (Vt. 1999).

9. *See infra* Part II.

10. 478 U.S. 186 (1986).

11. 539 U.S. 558 (2003).

12. Each of these distinct and separate aspects of the right to privacy arises from the Supreme Court's opinions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). Specifically, zonal privacy refers to the spatial confines of privacy, whether within a physical space, such as a home, or within a relationship, such as a marriage. Decisional privacy encompasses one's right to make fundamental life decisions, such as if and whom to marry, where to live, and if and when to raise children. Relational privacy represents the right to choose with whom one associates, enters into romantic relationships, co-habits, and creates a family.

of same-sex marriage can and should use privacy-based arguments to fortify their claims.

II. Queer Rights Advocates' Resistance to Privacy-Based Arguments

Due to feminist criticisms of the privacy doctrine and the *Bowers* decision, queer rights advocates have resisted incorporating explicit privacy arguments into their claims for legalizing same-sex marriage. This resistance seems surprising at first because the rights that advocates seek to gain, including the freedom to choose one's romantic partner, engage in private, consensual sex, and make fundamental life decisions, are rights the Supreme Court has already granted in its seminal reproductive cases. The advocates' decision to minimize privacy-based arguments and instead emphasize liberty concepts begins to make sense, however, when regarded against the backdrop of the privacy doctrine's complicated history. That history commenced in the late 1970s, when Catherine MacKinnon led the feminist criticism against the modern privacy doctrine. Her work encouraged subsequent scholars to examine the history of the doctrine and deconstruct its problematic roots. The *Bowers* decision came down within this hostile environment and effectively denied privacy rights to queer individuals and their relationships, thereby severely limiting the judicial tools through which queer rights advocates could effect social change.

Historically, the queer rights movement has looked to the women's liberation movement as a model from which to guide its own struggle for equality. Patricia A. Cain notes this, writing that the "lesbian and gay civil rights movement has crafted legal arguments based on the successes of the arguments made in these earlier civil rights movements [for race and gender equality], thereby arguing for the extension to gay men and lesbians of rights that had been earlier won for racial minorities and women."[13] The lesbian rights movement in particular stemmed directly from the women's liberation campaign, as many "women came out [as lesbians] through feminism, and thought of their sexuality as something which they could change to line up with their women-centered political leanings."[14] As a result, many feminist leaders became staunch queer rights advocates, perhaps to the point of splintering the struggle for

13. Patricia A. Cain, Rainbow Rights 14–15 (2000).

14. Emily Griffen, *Sex and Sensibility: Stories of a Lesbian Generation by Arlene Stein*, 13 Berkeley Women's L.J. 315, 315 (1998) (emphasis omitted).

women's liberation.[15] Indeed, the intersections between queer rights activists and feminists trace back even further; many leaders of the first wave of U.S. feminism were women who shared romantic relationships with other women.[16] This history of overlapping methodologies and leadership illustrates that queer rights advocates look to the feminist movement as a potential blueprint for its own efforts. The privacy doctrine was no exception to this practice, as queer rights advocates witnessed feminists' severe dissatisfaction with the doctrine and changed their strategies accordingly.[17]

In order to understand the queer rights' movement's reluctance towards privacy-based arguments, one must first understand the doctrine's historical development. The modern privacy doctrine, which developed over a series of Supreme Court decisions in the latter half of the twentieth century, established rights of sexual privacy to married and nonmarried partners alike. Beginning with *Griswold v. Connecticut*[18] in 1965 through *Planned Parenthood v. Casey*[19] in 1992, the Court identified and delineated constitutional rights to zonal, decisional, and relational privacy within the Constitution. *Griswold*, which protected a married couple's right to use contraceptives, and *Roe v. Wade*,[20] which defined a woman's right to abortion as a fundamental right, presented the largest pillars upon which the Court built its modern privacy doctrine. Consequently, those cases also represented the largest targets for feminist scholars, who criticized the decisions for enforcing male supremacy.

The Supreme Court protected sexual privacy among married partners in *Griswold* by encasing the marital relationship within a zone of privacy and incorporating relational and decisional privacy rights. Striking down a Connecticut statute that banned the use of contraceptives by married couples, the Court held that "specific guarantees in the Bill of Rights have penumbras" that "create zones of privacy."[21] Marriage explicitly fell into that zone, as the justices regarded it as "a relationship lying within the zone of privacy created by several

15. *See generally* Barbara Epstein, *What Happened to the Women's Movement?*, 53 MONTHLY REVIEW 1 (May 2001), *at* http://www.monthlyreview.org/0501epstein.htm.
16. *See generally* LILLIAN FADERMAN, TO BELIEVE IN WOMEN: WHAT LESBIANS HAVE DONE FOR AMERICA—A HISTORY (1999) (describing that many feminist leaders in the nineteenth and twentieth centuries led lives that would be characterized as lesbian today).
17. *See* Ruth Harlow's comments *infra* notes 81–82 and accompanying text.
18. 381 U.S. 479 (1965).
19. 505 U.S. 833 (1992).
20. 410 U.S. 113 (1973).
21. *Griswold*, 381 U.S. at 484.

fundamental constitutional guarantees."[22] The Court characterized the zone as containing both concrete, spatial confines, namely the "sacred precincts of marital bedrooms,"[23] and intangible elements, as marriage represented "an association that promotes a way of life. . . ."[24] By linking marriage to the First Amendment's right of association, the Court defined privacy as a right to associate with a partner of one's choosing. Soon after delivering its decision, the Court extended these rights to unmarried partners in *Eisenstadt v. Baird*,[25] thereby providing sexual privacy to all adults engaged in heterosexual relationships.

In *Roe*, the Court enlarged the scope of sexual privacy and the right to make fundamental life decisions without government interference. Written by Justice Blackmun, the majority pointed to previous cases that demonstrated that the privacy right "has some extension to activities relating to marriage,"[26] and that it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[27] Specifically, that right to privacy included zonal and relational components, because "zones of privacy . . . exist under the Constitution,"[28] and such zones extend to family relationships.[29] Justice Douglas, in his concurrence, added the decisional dimension by advocating for privacy "in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."[30]

By granting married and unmarried heterosexuals the privacy to conduct their sexual activities and make personal decisions regarding their romantic relationships without government involvement, *Griswold*, *Eisenstadt*, and *Roe* present logical platforms upon which to base equality claims for queers. Same-sex marriage proponents want the exact rights conferred to different-sex couples so that queer individuals may freely choose their partners, enjoy sexual privacy, and create a family on their own terms. Extending the holdings in the reproductive rights cases to protect same-sex couples does not constitute a radical departure from the Court's jurisprudence. Rather, granting the existing rights of heterosexuals to queer persons and unions represents the next step in the natural progression of the privacy doctrine. Doing so would situate

22. *Griswold*, 381 U.S. at 485.
23. *Griswold*, 381 U.S. at 484.
24. *Griswold*, 381 U.S. at 484.
25. 405 U.S. 438 (1972).
26. *Roe*, 410 U.S. at 152.
27. *Roe*, 410 U.S. at 153.
28. *Roe*, 410 U.S. at 152.
29. *Roe*, 410 U.S. at 153.
30. Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring in *Roe v. Wade*, 410 U.S. 113 (1973)) (emphasis omitted).

queer rights within the Court's doctrinal history and provide advocates with the tremendous strength of judicial precedent. Queer rights activists, however, have not advocated this progression, choosing instead to dress the privacy doctrine as a liberty argument.[31] Their reasons for this decision include the scathing criticisms of privacy-based arguments by the feminist movement and the Supreme Court's damaging decision in *Bowers*.

Catherine MacKinnon led the feminist movement's criticism of the modern privacy doctrine by deconstructing its principles as those that enforce men's domination and women's oppression. In her examination of abortion rights, she notes that, instead of guaranteeing bodily integrity and freedom of choice, the "law of privacy instead translates traditional liberal values into [the rhetoric of] individual rights as a means of subordinating those rights to specific social imperatives."[32] She believes that a woman's legal right to privacy translates into "a means of subordinating women's collective needs to the imperatives of male supremacy."[33] She also regards the privacy doctrine as a vehicle for freeing male sexual aggression and reinforcing the gender inequality that exists between heterosexual partners. Understanding privacy as "the ultimate value of the negative state,"[34] she contends that the doctrine purports that "no act of the state contributes to shaping its internal alignments or distributing its internal forces, so no act of the state should participate in changing it."[35] Such a perception by defenders of the doctrine "presupposes that the private is not already an arm of the state,"[36] that "intimacy is implicitly thought to guarantee symmetry of power."[37]

Due to these defenders' misperceptions of privacy, MacKinnon asserts that the doctrine only serves to reinforce the status quo. She states that the "existing distribution of power and resources within the private sphere are precisely what the law of privacy exists to protect;"[38] thus, "the measure of the intimacy has been the measure of the oppression"[39] for women. As a result, MacKinnon contends that "getting anything

31. *See infra* Part II.
32. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 187 (1989).
33. *Id.* at 187–88.
34. *Id.* at 190.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 193.
39. *Id.* at 191.

private to be perceived as coercive"[40] is nearly impossible because "[t]o complain in public of inequality within the private contradicts the liberal definition of the private."[41] She emphasizes that social change necessitates state involvement because "if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful;"[42] with this argument, she thereby calls upon feminists "to explode the private."[43]

MacKinnon's critique of the modern privacy doctrine encouraged other feminist scholars to examine and criticize its early roots; understanding this history is necessary to illustrate the queer rights' advocates' distrust of the doctrine. The American legal system developed the notion of privacy through family law, as privacy was employed as a means of protecting individuals from government interference by way of the family unit. The doctrine did not solidify until the latter half of the eighteenth-century because privacy, as we understand the concept today, did not exist at that time. Rather, as historian Nancy Cott describes, the "very circumstances of household life facilitated the intervention of neighbors, and even more readily, of lodgers, into a couple's affairs."[44] Everything from the spatial configurations of the home, where married persons shared their bed with boarders,[45] to religious and social values, which encouraged the "predisposition to be one's brother's and sister's keeper,"[46] comprised such circumstances. As a result, the community as a whole exercised guardianship over family affairs,[47] so the notions of decisional, relational, and zonal privacy did not exist.

By the latter half of the eighteenth-century, courts began to build the groundwork for a privacy doctrine based upon marital privilege, and modern feminists criticize that development for (in)advertently condoning violence against women. Scholar Elizabeth M. Schneider asserts that "[w]oman-abuse is an aspect of the basic gender inequality built into the very fabric of American family law,"[48] because "battering is perceived as a 'private' problem, neither serious nor criminal."[49] Historian Reva B. Siegel credits the emergence of privacy as a

40. *Id.* at 190.
41. *Id.*
42. *Id.* at 191–92.
43. *Id.* at 191.
44. Nancy F. Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. Soc. Hist. 20, 23 (1976).
45. *Id.*
46. *Id.*
47. *Id.* at 22.
48. Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973, 981 (1991).
49. *Id.* at 982.

supplementary rationale for justifying wife-beating "when rationales rooted in authority-based discourses of marriage had begun to lose their persuasive power."[50] She points towards such cases as *State v. Rhodes*,[51] in which the North Carolina Supreme Court held that, although a husband does not have the right to chastise his wife, the state will not interfere with the "family government."[52] By observing that the "violence complained of would without question have constituted a battery if the subject of it had not been the defendant's wife," the court defended its holding by declaring that "the evil of publicity would be greater than the evil involved in the trifles complained of . . . [which] ought to be left to family government."[53]

The use of privacy to perpetuate patriarchal structures by condoning violence against women also emerges in the history of marital rape, further alienating queer rights activists from the doctrine. Legal historians frequently cite Sir Matthew Hale, the Chief Justice of the Court of King's Bench in the seventeenth century, as the authoritative voice behind the marital rape exemption. He argued that a "husband cannot be guilty of a rape committed by himself upon his lawful wife"[54] because, by contracting and consenting to marriage, "the wife hath given up herself in this kind unto her husband, which she cannot retract."[55] Professor Jill Hasday notes that Hale's supposition characterizes the "mutual decision to marry as grounds for subjecting wives and husbands to very different obligations and rights."[56] Specifically, a woman's agreement to marriage "gave the husband a right of sexual access to his wife" and "bestowed an obligation on the wife to submit."[57] Common law adopted Hale's assertion that a man cannot be guilty of raping his wife, and the Model Penal Code codified it, reasoning that "[r]etaining the spousal exclusion avoids this unwarranted intrusion of the penal law into the life of the family."[58] Modern feminists attack the privacy doctrine for such a justification, as Hasday believes that "the use

50. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2151 (1996).
51. 61 N.C. (Phil. Law) 453 (1868).
52. *Id.*
53. *Rhodes*, 61 N.C. at 454.
54. MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 628 (Robert H. Small ed., 1st Am. Ed. 1847) (1736).
55. *Id.*
56. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1400 (2000).
57. *Id.*
58. MODEL PENAL CODE § 213.1 cmt. 8(c) (1980).

of the privacy rationales to justify nonintervention in cases of marital rape protects and exacerbates the current distribution of power within a marriage."[59] The privacy doctrine presents a double-edged sword, giving "husbands safety in committing highly injurious conduct that the law would otherwise consider felonious, while simultaneously disabling wives from summoning state resources for their own protection."[60]

Due to these feminist criticisms of the privacy doctrine as a means by which to effect and maintain patriarchy within the family unit and society at large, queer rights advocates minimized privacy-based arguments in favor of feminists' advice to rely upon concepts of liberty. Schneider represents one such feminist by interpreting the right to privacy as a passive right that obstructs state intervention, whereas a liberty interest would "imply that the state had an affirmative obligation to ensure that women can exercise their freedom."[61] She underscores this view by declaring that the "notion of women as agents of their own lives is an important and powerful concept that transcends the common experience of the concept of privacy."[62] Siegel advocates for a similar change because reproductive rights are "generally discussed as a negative liberty, a right of privacy, a right to be let alone,"[63] a perception that she finds "at odds with other important aspects of feminist thought."[64]

The queer rights advocates' reluctance to use privacy-based arguments was reinforced by the Supreme Court's divisive decision in *Bowers v. Hardwick*, which denied zonal, relational, and decisional privacy rights to queer individuals and relationships.[65] In a five to four vote led by Justice White, the Court upheld a Georgia statute that criminalized sodomy, defined as oral or anal sex, among consenting adults. The case arose when an Atlanta police officer, following up a citation for drinking an alcoholic beverage in public, entered Michael Hardwick's bedroom and witnessed Hardwick engaging in consensual sexual activity with another man.[66] Hardwick challenged the constitutionality of the statute, claiming that it violated his right to privacy.[67] The Eleventh Circuit agreed with Hardwick, holding that, under the privacy doctrine as

59. Hasday, *supra* note 56, at 1491.
60. *Id.*
61. Schneider, *supra* note 48, at 998.
62. *Id.*
63. Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory, in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995).
64. *Id.*
65. 478 U.S. 186 (1986).
66. LEE WALZER, GAY RIGHTS ON TRIAL 68 (2002).
67. *See Bowers*, 478 U.S. at 188; WALZER, *supra* note 66, at 69.

established by *Griswold* and *Roe*, "the Georgia Statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation. . . ."[68] The Supreme Court, however, overturned this ruling by restructuring the issue at stake: rather than understanding the case as a right to privacy, the majority regarded it as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[69]

By framing the case's central inquiry in such a limited manner, the Court separated this decision from its previous privacy cases, thereby avoiding a proper application of the modern privacy doctrine. The opinion purported that "none of the rights announced in those cases [*Griswold*, *Roe*, et. al.] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy"[70] because its authors failed to recognize a "connection between family, marriage, or procreation on one hand and homosexual activity on the other."[71] In other words, the majority held that queer people do not deserve relational or decisional privacy rights because such persons do not have the capability to choose a partner, raise children, or create a family. The Court also removed zonal privacy rights from queer people by refusing to respect the spatial confine of that right, the "sacred precinct"[72] of the bedroom. Instead, the majority believed that sodomy represented a criminal act and that "otherwise illegal conduct is not always immunized whenever it occurs in the home."[73]

The *Bowers* majority's veering away from the Court's privacy doctrine prompted severe criticism from queer rights advocates and the Court's own dissenting justices. Critics faulted the majority for improperly framing the issue at stake, declaring that "what animated the Supreme Court in this case was the issue of homosexuality rather than the right of privacy."[74] Activist Lee Walzer argues that the Court had not conditioned the right to privacy "explicitly on the nexus with (heterosexual) family relationships"[75] in *Griswold* and *Roe*, but that decisions pertaining to intimate matters fell "into the sphere of personal

68. Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (relating holding of lower court in Bowers v. Hardwick, 760 F.2d 1202 (1985)).
69. *Bowers*, 478 U.S. at 190.
70. *Bowers*, 478 U.S. at 190–91.
71. *Bowers*, 478 U.S. at 191.
72. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
73. *Bowers*, 478 U.S. at 195.
74. WALZER, *supra* note 66, at 70.
75. *Id.* at 75.

autonomy that cannot be touched by the heavy hand of the state or its agents."[76] Justice Blackmun expressed similar sentiments in his dissenting opinion, indicating that the majority betrayed the Court's privacy doctrine by denying queers the "ability to make constitutionally protected 'decisions concerning sexual relations.'"[77] He stressed that "in a Nation as diverse as ours . . . there may be many 'right' ways of conducting"[78] intimate relationships, and he berated his colleagues for failing "to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[79]

The devastating decision in *Bowers*, coupled with the feminists' severe critiques of the modern and early privacy doctrines, persuaded queer rights advocates to move away from explicit privacy-based arguments. As scholar Martin Dupuis writes, after *Bowers*, "it seem[ed] that a claim for gay and lesbian rights based on a substantive due process argument, such as privacy, [would] not succeed in the United States."[80] Indeed, queer rights advocates turned away from such arguments because *Bowers* prevented them from referring to the federal Constitution and the privacy rights guaranteed under that document.[81] Following the feminists' advice, they turned towards liberty-based arguments instead, but such a decision came at a cost to the queer rights movement.

III. Same-Sex Marriage Proponents Transform Privacy into Liberty Arguments

Due to the simultaneous attack on the privacy doctrine by feminist critics and the *Bowers* decision, same-sex marriage advocates minimized explicit notions of privacy in their arguments and presented them as concepts of liberty. Ruth Harlow, former legal director of Lambda Legal Education and Defense Fund, expresses the advocates' intent, stating that "privacy has been criticized so much as coming from thin air and [being] associated with *Roe v. Wade* that we [advocates] emphasized liberty."[82] Dupuis underscores this assertion, writing that the "legal

76. *Id.*

77. *Bowers*, 478 U.S. at 203 n.2 (Blackmun, J., dissenting) (*quoting* Carey v. Population Services International, 431 U.S. 678, 711 (1977) (Powel, J., concurring in part and concurring in judgment).

78. *Bowers*, 478 U.S. at 205.

79. *Bowers*, 478 U.S. at 206.

80. Martin Dupuis, Same-Sex Marriage, Legal Mobilization, & the Politics of Rights 26 (2002).

81. Ruth Harlow, Address at the University of Michigan Law School (March 25, 2004).

82. *Id.*

framework for discussing the rights of gays and lesbians was redefined"[83] in the years following *Bowers*. Such a shift in the queer rights movement is best illustrated in the plaintiffs' briefs filed in the major same-sex relationship cases, namely *Baker v. State of Vermont* and *Goodridge v. Department of Public Health*. The judges who delivered decisions favorable to same-sex marriages, however, partially relied upon the privacy doctrine in order to do so. An examination of the courts' decisions in comparison to the plaintiffs' briefs reveals that the privacy doctrine does indeed play a positive role in the debate, despite the obstacles presented by feminist critics and the majority in *Bowers*.

Before delving into *Baker* and *Goodridge*, both of which ordered legal recognition of same-sex relationships, one must first examine *Baehr v. Lewin*, a Hawaiian State Supreme Court case that fell short of such a mandate.[84] The majority held that the denial of marriage licenses to same-sex couples establishes a sex-based classification, which is presumed to violate the equal protection clause of the state constitution.[85] Decided in 1993, the court remanded the case to the lower court for retrial, instructing that the state must prove that issuing such licenses jeopardized compelling state interests.[86] In 1996, the trial court re-heard *Baehr* and declared that Hawaii's refusal to grant marriage licenses to same-sex couples violated that state's constitution.[87] The Hawaiian legislature and voters responded by amending the state's constitution to define marriage as a legally recognized relationship between one man and one woman,[88] thereby rendering the judicial process on this case moot. At the same time, the federal government enacted the so-called "Defense of Marriage Act," which denied federal benefits to married people of the same sex and authorized states to ignore such marriages if other states legally permitted them.[89]

The Hawaiian Supreme Court's failure to mandate legal recognition to same-sex couples stemmed from its failure to address the relevant issue. The plaintiffs in the case, three same-sex couples, claimed that the state's refusal to grant them marriage licenses violated their rights to privacy under the Hawaiian constitution. The court reviewed the Supreme

83. DUPUIS, *supra* note 80, at 26.
84. 852 P.2d 44 (Haw. 1993).
85. *Id.* at 59–68.
86. *Baehr*, 852 P.2d at 68.
87. WALZER, *supra* note 66, at 136.
88. *Id.*
89. 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000); *see also Introduction*, SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 9–10 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

Court's privacy doctrine and determined that it protected decisions relating to marriage and family relationships.[90] The privacy provision in Article 1, Section 5 of the Hawaiian constitution directly reflected those holdings because it was purposefully added to the document after *Griswold* and *Roe*.[91] Nevertheless, instead of applying these principles to the case at hand, the Hawaiian court narrowly defined the issue, much like the U.S. Supreme Court did in *Bowers*. The majority phrased the question as whether the right of privacy extends to same-sex marriage, neglecting the larger issues at stake, namely an individual's rights to zonal, decisional, and relational privacy.

The plaintiffs' original complaint in *Baker v. State of Vermont* took a different approach by transforming the privacy doctrine into an argument based upon the concept of liberty. The suit, also filed by three same-sex couples, stated that Vermont's refusal to issue marriage licenses to them violated the state constitution's Common Benefits Clause. Declaring that the state "government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . and not for the particular emolument or advantage of any single person, family or set of persons, who are a part only of that community,"[92] the clause supported plaintiffs' claim that restricting marriage licenses to heterosexual couples denied same-sex couples the "common benefits" that marriage provided. They underscored this principle by referring to Supreme Court and Vermont state cases that held marriage as "one of the most fundamental of all our human and civil rights. . . ."[93]

The plaintiffs built their case upon the concept of liberty as protected under the Common Benefits clause, but notions of privacy permeated the brief. By opening with a statement of facts that carried the reader into the private homes and lives of the plaintiffs, the brief invited the court to infiltrate their zonal privacy. Doing so was meant to lead to the conclusion that such privacy was only possible via marriage. The plaintiffs revealed their names, their children's names, their places of residency, and their occupations.[94] They even divulged the number of years that each couple had spent together, as well as such personal details as the tragic loss of one couple's child due to heart failure.[95]

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90. *Baehr*, 852 P.2d at 56.
91. *Baehr*, 852 P.2d at 55.
92. VT. CONST. ch. I, art. 7.
93. Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 5 MICH. J. GENDER & L. 409, 415 (1999).
94. *Id.* at 413–14.
95. *Id.*

The plaintiffs continued to address ideas of privacy under the rubric of liberty within the body of the brief. The fundamental right to marriage that the plaintiffs desired actually represented a right to decisional and relational privacy. They asked for the "the right to marry the person we love, the person with whom we want to share our lives."[96] In other words, the plaintiffs requested the right to make their own decisions concerning their intimate relationships without state interference. Such a right represented the decisional and relational privacy rights that the U.S. Supreme Court established via its development of the modern privacy doctrine. The plaintiffs highlighted decisional privacy rights in their brief by citing *Perez v. Lippold*[97] (holding unconstitutional a state anti-miscegenation law) in order to express that the "'essence of the right to marry is freedom to join in marriage with the person of one's choice.'"[98] The plaintiffs again emphasized decisional and relational privacy rights in their conclusion by asserting that "[w]hen two adults make the very intimate and personal decision to commit themselves to one another by marrying, that decision should not be subject to 'legislative hearings and debate.'"[99]

Queer rights advocates further dressed the privacy doctrine as a liberty concept in the plaintiffs' reply brief, filed in response to the state's answer to their original complaint. The plaintiffs opened their reply with an appeal to relational privacy rights, quoting the U.S. Supreme Court's assertion that "'certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation. . . .'"[100] By giving individuals the privacy to choose how and with whom to live their lives, the court could protect such relationships from unwarranted state interference, which "safeguards the ability independently to define one's identity that is central to any concept of liberty.'"[101] Thus, the plaintiffs directly connected the notions of relational and decisional privacy to the concept of liberty. They expanded this link by citing the Supreme Court's observation that family relationships involve "'distinctively personal aspects of one's life,'"[102] which highlighted relational privacy, and that the government could not force "'all to live

96. *Id.* at 415.
97. 198 P.2d 17 (1948).
98. Bonauto, *supra* note 93, at 471 (*citing Perez*, 198 P.2d at 21) (emphasis omitted).
99. *Id.* at 474 (*quoting* State of Vermont's Motion to Dismiss in *Baker et al.* at 3).
100. Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 6 MICH. J. GENDER & L. 1, 5 (1999) (*quoting* Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)).
101. *Id.* at 6 (*quoting* Roberts, 468 U.S. at 619).
102. *Id.* (*quoting* Roberts, 468 U.S. at 620).

in certain narrowly defined family patterns,'"[103] which illustrated decisional privacy. The plaintiffs again transformed their privacy claims into liberty arguments by invoking the Supreme Court's privacy doctrine, which also implicitly criticized the *Baehr* court: "If courts defined historical 'fundamental rights' at the level of specificity urged by the State, privacy would not include rights to contraception, abortion, or interracial marriage."[104]

Despite the plaintiffs' explicit emphasis on liberty and the noticeable dearth of privacy-based arguments, the majority in *Baker* relied upon relational and decisional privacy rights to hold that the state was constitutionally required to extend the benefits and protections of marriage to same-sex couples. Citing recent studies and statistics regarding lesbian and gay parenting, the court determined that the legal protections that stemmed from marriage protect children by way of shielding the family unit.[105] It noted the state's suggestion that the government carried an interest in "promoting a permanent commitment between couples who have children [in order] to ensure that their children are considered legitimate and receive ongoing parental support."[106] The court also held that the state's argument that "Vermont public policy favors opposite-sex over same-sex parents"[107] was without merit because of a recent law that removed all prior legal barriers to the adoption of children by same-sex couples. Depriving same-sex couples of this relational privacy, the court reasoned, "exposes their children to the precise risks that the State argues the marriage laws are designed to secure against."[108]

Although the court held that same-sex couples deserved to receive the same privileges as those in heterosexual relationships, it fell short of ordering the issuance of marriage licenses to such couples. Its reasoning for doing so was purely etymological, as the court merely pointed to the definition in Webster's dictionary and the historical meaning of the term under Vermont statutes and common law[109] to support its stance. Nevertheless, at the time that it delivered its opinion, the Vermont Supreme Court granted the broadest range of legal rights and protections, including the various rights to privacy, that had ever been made available to same-sex couples in the United States.

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103. *Id.* (*quoting* Moore v. East Cleveland, 431 U.S. 494, 506 (1977)).
104. *Id.* at 4.
105. Baker v. Vermont, 744 A.2d 864, 881 (1999).
106. *Baker*, 744 A.2d at 881.
107. *Baker*, 744 A.2d at 885.
108. *Baker*, 744 A.2d at 882 (emphasis omitted).
109. *Baker*, 744 A.2d at 868–69.

Four years after the *Baker* decision, the Massachusetts Supreme Court became the first American court to order the issuance of marriage licenses to same-sex couples. The court, which heard the case on March 4, 2003, was expected to announce its decision in July. It postponed doing so because of the Supreme Court's decision in *Lawrence*, which was issued at the end of June 2003.[110] Finally delivered in November, *Goodridge v. Department of Public Health*[111] held that denials of plaintiffs' attempts to marry violated the individual liberty and equality provisions of the Massachusetts Constitution, and it remanded the case for entry of judgment. The court granted 180 days stay for such entry in order to permit the state legislature to take appropriate action. The state senate responded one month later, asking the court if the creation of domestic partnerships, like those in Vermont, would satisfy the court's ruling. The court responded with a strong affirmation of its holding in *Goodridge*:

> [b]ecause the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.[112]

The plaintiffs' brief in *Goodridge* followed the example set in *Baker*, incorporating the notions of zonal, decisional, and relational privacy rights but presenting such ideas as liberty concepts. Just as in *Baker*, the brief opened with an appeal to zonal privacy by exposing the private lives of the plaintiffs, who comprised seven same-sex couples. The authors of this brief gave even more details than those who wrote *Baker* by revealing not only the individuals' names, professions, locations, and children's names, but also their particular harms from the inaccessibility of marriage. Hillary Goodridge, for instance, had difficulty gaining access to her partner after "Julie had a difficult caesarian and was in recovery for several hours."[113] She could not even visit her newborn daughter, who had "breathed in fluid [during birth] and was sent to

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

111. 798 N.E.2d 941 (Mass. 2003).

112. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

113. Brief for Appellants at 3, *Goodridge*, 798 N.E.2d 941.

neonatal intensive care."[114] David Wilson and Robert Compton, who together took care of David's ill parents until their deaths, also confronted problems of accessibility within the medical care community.[115] Edward Balmelli, on the other hand, faced no pressing medical issues but wanted to provide financially for his partner, Michael Horgan, by naming "Mike as the beneficiary of his pension plan,"[116] an option made available to married couples only.

Plaintiffs transformed privacy rights into liberty concepts by consistently connecting the two throughout their brief. They opened their argument with a statement that liberty incorporated the rights to decisional and relational privacy: "the right to marry the person of one's choice is protected under the liberty and due process protections of the Massachusetts Constitution."[117] They pointed towards "this Court's precedents of respect for private personal decisions and expressive and intimate associations"[118] as further support for that liberty claim. Plaintiffs then delved into their full argument with a statement equating privacy rights to liberty concepts: "The right to marry the person you love and with whom you wish to share your life is one of the most fundamental of all our human and civil rights."[119] Citing certain provisions of the Massachusetts Constitution and previous case law, the plaintiffs also asserted a right to zonal privacy, as the government may not exercise control over "spheres of individual choice and behavior."[120] They underscored this particular privacy right by averring that marriage "is embraced within the sphere of privacy and self-determination protected by the liberty and due process clauses of the Massachusetts Constitution."[121]

The plaintiffs further developed their liberty-based arguments by examining the privacy-based precedents set by other courts. They referred to *Planned Parenthood v. Casey*[122] (affirming the core of *Roe* but permitting certain restrictions to the abortion right) to illustrate that the United States Constitution protects against unwarranted state interference with personal decisions relating to marriage and family. Quoting that case directly, the brief explained that state intrusion into these core decisions imposed an intolerable burden on an individual, as

114. *Id.*
115. *Id.* at 3–4.
116. *Id.* at 4.
117. *Id.* at 8.
118. *Id.*
119. *Id.* at 10–11.
120. *Id.* at 19.
121. *Id.* at 21–22.
122. 505 U.S. 833 (1992).

such matters "involve the most intimate choices a person may make in a lifetime."[123] They connected this notion to liberty by asserting that decisional privacy is "central to the liberty protected by the Fourteenth Amendment."[124] Plaintiffs again linked decisional privacy to liberty by citing the California Supreme Court's decision in *Perez*, which held that the "right to marry without the freedom to marry the person of one's choice is no right at all."[125] Lastly, the plaintiffs pointed to several child welfare cases and debunked the state's argument that heterosexual-led households provided better environments for childrearing. Delineating those cases' overall theme, that a "parent can raise his or her child as the parent wishes, absent some strong concern about the child's welfare,"[126] the plaintiffs asserted that "the state cannot demonstrate an interest in any particular type of parental role modeling in any family."[127]

Despite the plaintiffs' diminishing of privacy-based arguments, privacy rights played a substantial role in the *Goodridge* decision, the only American case thus far to grant full marriage rights to same-sex couples. Recognizing that marriage "bestows enormous private and social advantages on those who choose to marry,"[128] the court looked towards *Griswold* for its demarcation of zonal, decisional, and relational privacy. Doing so led the court to characterize the institution of marriage as one that celebrated "the ideals of mutuality, companionship, intimacy, fidelity, and family."[129] Relying upon the precedent set by *Griswold*, the court placed its decision within the natural progression of the modern privacy doctrine. This enabled the court to portray its application of the doctrine's principles as a logical extension of those rights. Whereas the *Baehr* court refused to apply the doctrine, the Massachusetts Supreme Court rightly recognized that the "rights implicated in this case are at the core of individual privacy."[130] Stated more explicitly, the judges held that "the decision whether and whom to marry is among life's momentous acts of self-definition"[131] and that "[w]ithout the right to marry—or more properly, the right to choose to marry—one is excluded from the

123. Brief for Appellants at 25, *Goodridge*, 798 N.E.2d 941, citing *Casey*, 505 U.S. at 851.
124. *Id.*
125. *Id.*
126. *Id.* at 44.
127. *Id.* at 43.
128. *Goodridge*, 798 N.E.2d at 954.
129. *Goodridge*, 798 N.E.2d at 954.
130. *Goodridge*, 798 N.E.2d at 957 n.15.
131. *Goodridge*, 798 N.E.2d at 955.

full range of human experience and denied full protection of the laws. . . ."[132]

The *Goodridge* majority bolstered privacy as a basis for its holding by invoking the significance of the *Lawrence* decision. Citing the recently delivered case in its introductory paragraphs, the opinion stated that *Lawrence* restored decisional and relational privacy rights to queer individuals and their relationships:

> There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United State Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity.[133]

Thus, by relying upon both the privacy doctrine and the *Lawrence* decision, in spite of the plaintiffs' efforts to minimize those arguments, the Massachusetts Supreme Court illustrated that privacy does play a vital role in extending civil marriage to same-sex couples.

The queer rights movement's shift from privacy-based arguments to notions of liberty came at a cost to the movement's broader goals. By turning away from the privacy doctrine, advocates removed the power of precedent from the struggle for equality. The movement lost the opportunity to situate itself within the natural progression of the doctrine, a position that would have elevated the legitimacy of the activists' claims in the public eye. Instead, without such a substantial force to fortify its arguments, advocates worked outside the established doctrines and pursued their actions on the basis of liberty. Although the movement did achieve some victories this way, the power of *stare decisis* and the courts' desire to rely upon such precedents remained, as evidenced by the *Baker* and *Goodridge* decisions.

Another cost incurred by the queer rights movement for abandoning the privacy doctrine is the perception of accepted inferiority. By choosing not to attack the view that certain rights applied to heterosexual individuals and couples only, and that queer people did not enjoy such rights, advocates appeared implicitly to accept the legal inferiority of queers to their heterosexual counterparts. Such a perception damaged the movement's fight for civil rights because legal and social equality will not be granted to queers until they achieve the same respect as heterosexuals.

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132. *Goodridge*, 798 N.E.2d at 957.
133. *Goodridge*, 798 N.E.2d at 948.

Avoiding this issue altogether and relying upon liberty arguments only, advocates did little to raise the perceived legal status of queer individuals to the broader society. In order to achieve full equality, including marriage rights that are recognized in every state, advocates must place the movement within legal doctrinal history and outwardly demonstrate its refusal of legal inferiority to heterosexuals.

IV. Inserting the Privacy Doctrine into the Case for Same-Sex Marriage

Lawrence v. Texas,[134] which overruled *Bowers* and restored zonal, relational, and decisional privacy rights to queer individuals and their relationships, enables queer rights advocates to make privacy-based arguments and compensate for its losses incurred since abandoning the doctrine. The case arose in Harris County, Texas when the sheriff's officers, responding to a false report of a weapons disturbance, entered John Lawrence's home and discovered Lawrence and Tyron Garner having sex.[135] The officers charged the men with violating the Homosexual Conduct Law,[136] which criminalized consensual, adult sexual relations between same-sex partners. Although the charges were later dropped, Lawrence and Garner chose to challenge the statute's constitutionality, and their case reached the Supreme Court in March 2003.

A five-justice majority, led by Justice Kennedy, held the Texas law unconstitutional because it violated the due process clause of the Fourteenth Amendment by depriving same-sex couples the right to privacy.[137] In its opening sentence, the majority underscored the right to zonal privacy by writing that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places."[138] The opinion quickly revealed, however, that such privacy rights extended beyond merely zonal rights, as "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."[139]

The Court relied upon and expanded the modern privacy doctrine in order to determine its holding. The opinion first conjured *Griswold* to illustrate that the right to privacy guarded sexual choices and that the

134. 539 U.S. 558 (2003).
135. Brief for Appellants at 2, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102).
136. Tex. Penal Code Ann. § 21.06 (2004).
137. *Lawrence*, 539 U.S. 558.
138. *Lawrence*, 539 U.S. at 562.
139. *Lawrence*, 539 U.S. at 562.

marital bedroom was a protected space.[140] The Court then turned to *Eisenstadt* to indicate that an individual harbors the right "'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.'"[141] Finally, *Roe*, which recognized a woman's right "to make certain fundamental decisions affecting her destiny,"[142] confirmed once again that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[143] Thus, with its reliance upon the Court's established modern privacy doctrine, the majority situated *Lawrence* within that doctrine and guaranteed rights to zonal, decisional, and relational privacy to queer individuals and their relationships.

By asserting that *Lawrence* belonged within the modern privacy doctrine, the Court simultaneously recognized *Bowers* as an aberration of that doctrine. The Court rebuked that case's majority for failing "to appreciate the extent of the liberty at stake,"[144] which was not a fundamental right to homosexual sodomy, but a right to the protection of "the most private human conduct, sexual behavior, and in the most private of places, the home."[145] Overruling *Bowers* enabled the Court to restore the various elements of privacy to queer individuals, noting that such a "personal relationship . . . is within the liberty of persons to choose without being punished as criminals."[146] Stated more explicitly, "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."[147] By focusing on the greater rights at stake, instead of a sexual act, the Supreme Court restored queer individuals' claims to the zonal, decisional, and relational privacy rights that *Bowers* had stripped away.

In the post-*Lawrence* era, which protects and provides privacy rights to queer individuals and their romantic relationships, the traditional, historical privacy doctrine should play an important role in advocating the legalization of same-sex marriage. As previously discussed, marriage rights advocates have incorporated the essential elements of the privacy doctrine within their arguments, but they have done so under the rubric of liberty. By being open and honest about its modes of argumentation, queer rights advocates would advance their goals for an accepting world in which individuals can freely come "out"

140. *Lawrence*, 539 U.S. at 565.
141. *Lawrence* at 565 (*citing* Eisenstadt v. Bard, 405 U.S. 438, 453 (1972)).
142. *Lawrence*, 539 U.S. at 565.
143. *Lawrence*, 539 U.S. at 565.
144. *Lawrence*, 539 U.S. at 567.
145. *Lawrence*, 539 U.S. at 567.
146. *Lawrence*, 539 U.S. at 567.
147. *Lawrence*, 539 U.S. at 567.

about their true identities and be treated as equally as their heterosexual counterparts. Just as many queer persons have found that their "coming out" has increased their privacy,[148] same-sex marriage advocates will realize that an open dialogue with explicit privacy arguments will grant the very privacy and equality rights that they aim to achieve via marriage. Specifically, arguments relating to the zonal, decisional, and relational rights to privacy promote equality for same-sex and opposite-sex couples alike by transforming the marital zone into a more egalitarian space, applying the power of *stare decisis* to all citizens, and respecting the romantic relationships between two individuals, regardless of their sex.

Marriage provides a zone of privacy to the coupling of two individuals into which the government may not intrude; depriving this right from same-sex partners relegates such persons to a lower status than their heterosexual counterparts. This right to zonal privacy is, in the words of Justice Douglas, "older than the Bill of Rights—older than our political parties, older than our school system."[149] The American judicial system codifies this zone in its civil and criminal courts, from protecting confidences between married couples to freeing a person from testifying against her spouse. The state's exclusion of queer individuals from this zone and its privileges imposes a inferior status upon such persons.

Of course, as demonstrated by feminist critics, the zone of privacy surrounding marriage can be problematic, but extending that space to include same-sex couples would transform the zone itself. Feminists criticize zonal privacy for reflecting and perpetuating the sex hierarchy that persists in society, but no such hierarchy exists within same-sex partnerships. This is not to say that same-sex partnerships always function with complete equality, as power struggles may occur within any relationship, but that "queering" the zone will promote equality between heterosexual couples by transforming it into a sex-equal space. By not following the patriarchal model for marriage, a dominant man paired with a subservient woman, same-sex couples offer an equality-based alternative for patterning the marriage relationship. Recent psychological research supports this notion, revealing that same-sex couples "have a greater awareness of equality in a relationship than

148. *See* Chad Graham, *Mary Cheney is Missing*, THE ADVOCATE, Apr. 13, 2004, at 33. Chrissy Gephardt, openly lesbian daughter of former House Minority Leader and Democratic Presidential candidate, Dick Gephardt, states, "I have found that by being public, I have more of my privacy than you would imagine. . . . The cards are on the table; there's nothing to hide."

149. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

straight couples;"[150] this awareness may explain why same-sex couples exhibit more affection, humor, and honesty than their opposite-sex counterparts.[151] Expanding the zone into a more equal space and providing such positive examples of true partnership would, as MacKinnon advocates, "explode the private."[152] Thus, granting the protective zone of marital privacy to same-sex couples would not only promote the equality of queer people by giving them the same rights and privileges as heterosexuals, but it would also advance feminist principles by transforming the marital zone into a more egalitarian space.

Asserting the right to decisional privacy further advances the case for legalizing same-sex marriage because it places the claim within the Supreme Court's history for upholding such a right. The reproductive rights cases in the mid-twentieth century, specifically *Griswold* and *Roe*, interpreted the right of privacy as "the right to have the state *not* make decisions about one's familial relationships—whether and whom to marry, whether and when to have children."[153] By placing themselves in this continuum, same-sex marriage advocates gain the gravity of precedent and link their case to the evolution of the Supreme Court's doctrine. As a natural progression of the Court's previous decisions, same-sex marriage loses its taint as a threat to foundational truths. Instead, such unions will be recognized as protected by those very truths, just as other personal decisions are protected. This recognition again underscores the equality claim because it forces the government to respect the familial decisions made by same-sex couples just as much as it does the decisions made by opposite-sex couples.

By arguing for the right to relational privacy, the right to choose and form one's own intimate relations with others, marriage advocates would simultaneously decrease the general public's sexualization of same-sex couples, thereby bolstering their claim for equality. As the *Bowers* opinion illustrated, people often regard same-sex attraction and relationships in terms of sexual acts, not romance, trust, or love. Professor Josephine Ross attributes this sexualization to the historic fact that "gay relationships existed outside marriage, and marriage is 'what makes

150. Press Release, University of Washington, Gay/lesbian couples can teach heterosexuals (Oct. 23, 2003), *at* http://www.queermarriage.com/index.php?content=showNews&nID=28.

151. *Id.*

152. MACKINNON, *supra* note 32, at 191.

153. William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1524 (1994).

sex legitimate.'"[154] Such thinking leads to the reality that "gay love is understood as the equivalent of gay sex,"[155] which in turn "is perceived as profane, in contrast to marriage, which is perceived as sacred."[156] Indeed, one appeal of the right to marry to same-sex couples is the relational privacy that it provides: "Many gay couples long for the privacy shield which will allow them to hold themselves out to the world as a couple, without having to answer questions about what they do in bed and how often."[157]

Forcing the general populace to focus on relational privacy rights for same-sex couples pushes the public to look beyond sexual acts and to expose itself to the love, trust, and companionship that same-sex couples share. Queer rights activists already have initiated this shift by promoting positive media portrayals, such as the heartwarming image of Lyon and Martin embracing after receiving a marriage license in San Francisco. Legal advocates need to follow this example, and, as seen from the increasing inclusion of intimate details from plaintiffs' lives from the *Baker* to the *Goodridge* briefs, it seems as if they have begun to do so. Such work must continue because advancing this right to relational privacy supports the claim of equality among people of all sexualities. Same-sex couples will never garner the same respect and rights as opposite-sex couples unless their partnerships are viewed and understood as deeply felt, loving, and interdependent as those shared by opposite-sex partners. Perhaps complete equality in the eyes of the public will come only after the legalization of same-sex marriages, as the current exclusion sexualizes same-sex couples, but incorporating the relational privacy argument now will hasten the equality between heterosexual and homosexual couples later.

Incorporating privacy-based arguments in order to promote equality not only advances the queer rights movement, but also enables the feminist movement to resolve its troubled relationship with the privacy doctrine. Reconciliation with the historically problematic doctrine is necessary because such a significant proportion of the laws that disparately impact women, such as those concerning rape, domestic abuse, and reproductive freedoms, are based upon it. It is unlikely that courts will discard such powerful precedents in favor of equality-based rulings, so the next-best alternative is to incorporate the positive attributes of the

154. Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. Rev. 1657, 1659 (2002).

155. *Id.*

156. *Id.* at 1659–60.

157. *Id.* at 1671.

privacy doctrine into equality-based cases. Reva Siegel encourages exactly that, pushing advocates "to identify the peculiar strengths of privacy discourse and to articulate privacy-based claims in ways that complement, rather than contradict, equality-based arguments. . . ."[158] Elizabeth Schneider also supports developing the privacy doctrine in positive ways that feminists can rely upon, calling for a "right to privacy which is not synonymous with the right to state noninterference with actions within the family, but which recognizes the affirmative role that privacy can play. . . ."[159] Thus, by transforming the marital zone, placing same-sex marriage into the historical development of privacy, advancing the precedents set by the Supreme Court, and emphasizing the relationships shared by queer couples, the privacy doctrine not only fortifies the case for same-sex marriage; it also invigorates and flexes equality-based arguments.

V. Conclusion

Due to the influential feminist criticisms against the privacy doctrine and the devastating *Bowers* decision, same-sex marriage advocates resisted formulating privacy-based arguments to support their cases for equality. The movement responded by shifting its focus and transforming notions of privacy into concepts of liberty. Such a transformation proved costly, as the proponents gave up the substantial weight of historic precedent and tolerated an erroneous perception of accepted inferiority. Since the Supreme Court's decision in *Lawrence*, the queer rights movement may recover those claims. By restoring zonal, relational, and decisional privacy rights to queer individuals and couples, *Lawrence* enables advocates to rely upon those concepts when arguing for marriage equality. The queer rights movement must do exactly that, as inserting these essential notions of privacy into the case for legalizing same-sex marriage will advance legal precedent and promote equality for all couples, regardless of sex. ♣

158. Siegel, *supra* note 63, at 69.
159. Schneider, *supra* note 48, at 998.