LOCKEAN PRIVACY AND THE COURTS:

AN AVENUE FOR LGBT RIGHTS IN AMERICA

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**Abstract**

*In the United States, minorities consistently attempt to have their rights recognized within the Courts. One of these minorities, the LGBT community, has fought their specific type of oppression through different legal arguments – ranging from individual liberty guarantees to the condemnation of moral legislation. The variety of arguments and legal issues within LGBT cases has led to disagreements concerning the usefulness of each approach in obtaining the desired outcomes. I argue that the most successful and pragmatic route to equal rights for this community lies in the privacy arguments which have proven successful in the past. More specifically, advocacy for LGBT plaintiffs should be based in Lockean ideals concerning privacy. These ideals, properly understood, construct an umbrella under which the LGBT community may expect substantial progress in governmental recognition of its rights without negatively affecting their interests in equality.*

**Introduction**

 On June 26th of this year, the United States Supreme Court’s decision in the matter of *Windsor v. United States* was announced. The Lesbian, Gay, Bisexual, and Transgender Community rejoiced at the Court’s decision, which found unconstitutional the third section of the Defense of Marriage Act. By striking down DOMA’s definition of marriage as a, “legal union between one man and one woman,”[[1]](#footnote-1) the Court has recognized the right of those within the community to be married before the federal government. This decision has also ushered in a new era of extensive LGBT litigation.[[2]](#footnote-2) While scholars have discussed past LGBT-related decisions and the arguments used by both the litigants and the Court in said decisions, scholars have not discussed the usefulness of these same arguments in light of the Court’s decision in *Windsor.* It is the purpose of this paper to examine the influence of the legal arguments endorsed by these scholars in light of *Windsor* and to expand upon the argument that has been most persuasive in order to offer a more advantageous argument for future LGBT litigants. Specifically, this work will endorse privacy-based legal arguments, as they have been most influential on the Court in the past, and will advise that these arguments should be grounded in Lockean ideals, as some have been in the past, to ensure substantial progress for the LGBT community.

This paper will be divided into three sections. The first section of this work will focus on the question: *What legal arguments do scholars believe have worked in the past?* Previously, scholars have discussed the legal arguments used in cases concerning queer rights. Scholars have debated the legitimacy, thought processes behind, and success rates of different legal arguments used by LGBT litigants before *Windsor.* Most of these articles were written in the aftermath of *Lawrence v. Texas,* the case in which the United States Supreme Court ruled that state sodomy laws prohibiting same-sex intercourse were unconstitutional. By examining these articles, one may separate the scholars into contrasting schools of thought.

There are two schools of thought within the literature: one that is against using the privacy argument and one that advocates the use of the privacy argument. This work will present the first school of thought, composed of scholars who are against using the privacy argument, in two separate factions. The first faction in this school believes that the privacy argument only serves to undermine the LGBT community’s ideals concerning equality. This faction’s solution, using a rational basis argument, will then be addressed. The second faction in the first school believes that arguments that focus on ‘liberty,” not privacy, have been and would be more successful at obtaining favorable results for LGBT litigants. The second school of thought advocates for the continued use of the privacy argument. Finally, this section will conclude with a brief explanation of why the second school of thought is more persuasive.

The next section will address the question: *Which of the legal arguments above have previously proved significant in obtaining favorable outcomes in LGBT cases?* This section will dissect the privacy-based legal arguments used by the Court in LGBT-related cases, including *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2003). Most important, the case of *Windsor v. United States* (2013), which has not been previously addressed in the contextual scholarly literature, will be discussed. In order to understand why privacy-based legal arguments proved most influential on the Court, the language and arguments in each of the opinions will be examined. The implications of *Windsor,* analyzed collectively with *Bowers* and *Hardwick*, allow one to conclude that a certain understanding of privacy-based legal arguments is most significant in obtaining favorable outcomes in LGBT-related cases.

Having addressed why I believe the privacy argument has proven most persuasive in the past, this work will proceed to the question: *How can the LGBT movement obtain favorable outcomes in the future?* I will begin this section with a brief analysis of Lockean ideals concerning privacy in order to show that the Court’s understanding of an individual’s right to privacy (especially in LGBT related cases) is rooted in these Lockean ideals. I further contend that, if the LGBT community is to succeed in their litigation endeavors, they must adhere to and expand upon the Court’s Lockean-based understanding of an individual’s right to privacy. Finally, I will respond to the criticisms of those scholars who are against using the right to privacy approach in LGBT cases in the context of this endorsed Lockean-based privacy argument.

**I.**

**Destroying the Wall: Differing Views on Influential Precedent in Past LGBT Cases**

A. Problems With Privacy & The Alternatives

 In the first school of thought, scholars speak against the “right to privacy” approach taken in past litigation. The first faction in this school believes that the privacy argument serves to undermine ideals concerning equality and does not encompass or guarantee the rights LGBT litigants are attempting to obtain (Barnett, 2003; Bedi, 2006; Franke, 2004). In his work *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete,* Sonu Bedi claims that the privacy argument should be abandoned in light of the Court’s decision in *Lawrence v. Texas.[[3]](#footnote-3)* Bedi claims that the use of this legal principle is “not only problematic,” but also has little support within the Constitution itself [[4]](#footnote-4) and creates a discriminatory condition of “tolerance” when discussing LGBT rights.[[5]](#footnote-5) “Tolerance” perpetuates that idea that the Court is allowing behaviors that they do not agree with and, by doing so, they condemn the LGBT community. This notion of tolerance, many scholars agree, is also problematic, as it serves to contrast homosexual and heterosexual relationships – labeling heterosexuals as “normal” and homosexuals as “the other” (Bedi, 2006; Franke, 2004; Spindelman, 2004). The application of the right to privacy in LGBT cases, these scholars argue, allow the state to degrade homosexual relationships as “deviant.” [[6]](#footnote-6) The Court, by only tolerating homosexuality in private, “has implicitly labeled [their] ‘life-style’ abnormal and shameful.”[[7]](#footnote-7) By arguing for LGBT rights under the legal principle of privacy, then, a precedent is created which “renders certain normative heterosexual couples as [the precedent’s] primary reference point.”[[8]](#footnote-8) Therefore, homosexual relationships are treated just as heterosexual relationships are only to the extent that they are similar to heterosexuals.[[9]](#footnote-9) Tolerance, then, labels LGBT individuals unequal before the law. Lior Strahilevitz, another scholar, blatantly summarizes this flaw by stating: “Privacy protections create winners and losers.”[[10]](#footnote-10)

 In this faction, there are also those who oppose using the right to privacy to support LGBT legal claims for different reasons. In the article *The Domesticated Liberty of Lawrence v. Texas,* Katherine M. Franke argues that the unwanted effects in privacy related positions on the LGBT community are not limited to ideals of “tolerance,” but also in the “domesticated liberty” precedent creates. Franke states: “The Court relies on a narrow version of liberty that is both geographized and domesticated – not a robust conception of sexual freedom or liberty, as is commonly assumed.”[[11]](#footnote-11) By allowing this narrow view of liberty, the Court only allows LGBT citizens their liberties in the home and labels them unequal in the public sphere. Franke also claims that, in *Lawrence,* the Court “brings to bear a form of liberty that favors ‘respect for [gay men’s] private lives,’ over ‘the right to one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”[[12]](#footnote-12) By setting privacy precedents dependent upon an individual’s identification with the LGBT community, many believe that a domesticated and narrow sense of liberty will evolve – leading to unfavorable future results in cases concerning more public matters (Bedi, 2006; Franke, 2004; Spindelman, 2004). There is already evidence of this effect. In an article written by Anita L. Allen, Allen claims that this narrow approach to liberty has rendered privacy arguments useless in obtaining favorable outcomes for LGBT litigants in a large variety of cases, because said cases concern rights which are more public in nature (i.e. same sex marriage or employment discrimination).[[13]](#footnote-13)The aforementioned consequences have convinced those within this faction to abandon arguments concerning privacy for those they feel more adequately address the needs of the community.

 Only one of previously mentioned scholars in this first faction has explicitly endorsed an alternative to the privacy argument for litigants in the LGBT community. Sonu Bedi encourages liberals to, “stick with a conception of rational review that prohibits appeal to mere morality.”[[14]](#footnote-14) Through a rational review argument, an individual may argue that restrictions on their liberties are irrational, as they serve no legitimate state interest. Bedi claims that such a rational review standard was constructed in the Supreme Court’s decision in *Lawrence* (although it is not entirely prominent), and that the Court would recognize this precedent as a legitimate avenue for LGBT individuals to have their rights recognized.[[15]](#footnote-15) Further, this author claims that the repudiation of moral legislation, “at the very least… secures the liberty we previously and problematically protected via the right to privacy.”[[16]](#footnote-16) Therefore, Bedi advocates rational review centered rhetoric in order to obtain favorable outcomes without the disparaging side effects of “tolerance” or “domesticated liberty” mentioned by him and others within the faction. I believe it is likely that other scholars within this faction would agree to use this type of legal argument, as it addresses their concerns.

The second faction in the anti-privacy school of thought claims that legal precedents concerning liberty were the most influential in past decisions and, therefore, would be the most practical for promoting equality for the LGBT community in the future. In his article *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, Randy E. Barnett argues that the Supreme Court, in its decision to strike down state sodomy laws, was focused on protecting “liberty” rather than an individual’s right to privacy.[[17]](#footnote-17) The right to privacy, Barnett claims, is an insubstantial part of the Court’s opinion and he insists that the majority opinion relies heavily on a “presumption of Constitutionality” for cases involving “fundamental rights.”[[18]](#footnote-18) Barnett states: “Justice Kennedy… is employing what I have called a ‘presumption of liberty’ that requires the government to justify its restriction on liberty, instead of placing the burden on the citizen by requiring the citizen to establish that the liberty being exercised is somehow ‘fundamental.’”[[19]](#footnote-19) Representing “nothing shy of a Constitutional revolution,” the author states that Justice Kennedy’s opinion created ideals of “personal liberty,” unbound by the “private zone” liberty restrictions placed on a citizen’s right to privacy.[[20]](#footnote-20) Barnett and those within this faction contend that an individual’s right to privacy only exists under this overarching view of liberty set up by Kennedy in *Lawrence.* Other scholars agree with Barnett’s anti-privacy focused conclusion (Bedi, 2006; Franke, 2004) and, what they consider to be *Lawrence’s* “liberty” focused precedent. This factions’ recommendation for future cases, one could assume, would focus on exploiting the government’s inability to legitimately restrict LGBT citizens’ personal liberties – an argument which they believe will guarantee more favorable outcomes.[[21]](#footnote-21)

The rational review strategy endorsed by Bedi and this “liberty” focused analysis by Barnett are the only two alternatives to privacy clearly mentioned by scholars in this school of thought. Those within this school may feel that these solutions would be an adequate way to ensure favorable results in the future uncharacterized by the negative consequences of arguing an inherent right to privacy.

B. The Privacy Argument

The next school of thought includes those scholars who advocate for the continued use of the privacy argument in LGBT litigation efforts. In his article *Gay-Rights as a Particular Instantiation of Human Rights,* Vincent J. Samar argues that the equal protection clause allows “privacy interpreted in the right sense… to be protected.”[[22]](#footnote-22) Samar claims that the Supreme Court, in *Lawrence v. Texas*, was most interested in protecting individual liberty and, therefore, it chose an overarching legal principle (privacy) which “guarantees autonomy by providing individuals with the opportunity to perform private acts.”[[23]](#footnote-23)\* Some believe that this inherent right to privacy, created in natural law, is the very foundation for all of our legal rights – separating us from a public sphere of control to a private sphere of freedom (Allen, 2012). Further, by acknowledging the privacy rights of an LGBT individual in *Lawrence*, the Court has bestowed upon those in this community the virtue of being human and deemed privacy advantageous avenue for future litigation.[[24]](#footnote-24) By allowing an encompassing and expanding base of individual liberties, the Court promotes the use of privacy in future cases concerning diverse LGBT issues.

In his article *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights,* Richard A. Epstein argues that “privacy claims really involve a composite of claims that are based on the exercise of personal liberty.”[[25]](#footnote-25) Epstein is not the only scholar to believe that a citizen’s right to privacy encompasses essential aspects of personal liberty (Allen, 2012; Samar, 2001; Wardenski, 2005). This understanding of the right to privacy most prominently protects an individual’s “intimate decisions” (Allen, 2012; Epstein, 2002; Samar, 2001). Later in his article, Epstein lists “three facets of privacy,” which offer a holistic view of this legal principle and allows one to answer whether the state may justify restrictions on the LGBT community underneath said principle.[[26]](#footnote-26) First, the right to privacy creates places of greater liberty (labeled “zones”) that, at the very least, protect consensual homosexual acts in private.[[27]](#footnote-27) The scholar Wardenski also believes that these “zones,” which privatize certain liberties, allows the LGBT community to claim that “sexual identity is a core part of human existence.”[[28]](#footnote-28) Wardenski believes this to be true, because the Court decided that homosexuality could not be Constitutionally prohibited in private and because the argument used, privacy, labels all that is protected by this legal principle an *essential liberty.[[29]](#footnote-29)* The second facet in Epstein’s work concludes that the state may only infringe upon an individual’s privacy in favor of associated rights if there are threats to third parties.[[30]](#footnote-30) The final component to this view of privacy is also the most important, concluding that the right to privacy protects the autonomy of the individual. Simply put, “individuals [under this principle] are entitled to ‘freedom to choose how to conduct their lives’”[[31]](#footnote-31) (Allen, 2012; Epstein, 2002; Hagland, 1993; Samar, 2001; Wardenski, 2005). Understood in the context of *Lawrence,* this school of thought’s view of privacy as a useful and effective tool in arguing for LGBT litigants in the Courts is most supported in the evidence, as I elaborate below.

The arguments which advocate using the right to privacy as a legitimate venue for LGBT equality are the most persuasive because past opinions have focused almost entirely on an individual’s right to privacy and because it protects the autonomy of the individual. It now becomes important to ask: *How has the privacy argument worked well, and how can it be used in future litigation?* I wish to expand upon the concept of privacy and recommend a path for future litigants in this community. It is the main purpose of this work to argue that those fighting for LGBT equality in the Courts should use Lockean ideals to reshape privacy-based legal arguments, as it would assure the most favorable outcomes for future cases and encompass the rights the LGBT community is attempting to obtain without the previously mentioned negative consequences.

**II**

**The Court’s Privacy**

 This section of the work will dissect three of the most prevalent LGBT-related Court cases in the United States: *Bowers v. Hardwick* (1986), *Lawrence v. Texas* (2003), and *United States v. Windsor* (2013). It is abundantly clear, when reading these cases, that the privacy argument is the most debated legal principle by both the litigants and justices. By reading each opinion in sequential order, one may also see that the privacy argument has evolved to form a foundation that LGBT individual’s liberties rest upon. While scholars have discussed the privacy argument’s usefulness and implications on the LGBT community in the past, the case if *United States v. Windsor* has not been addressed in the scholarly discussion. In dissecting these cases, I will discuss language from the Court’s opinions in order to assess which privacy-based arguments have proven most influential and useful in obtaining favorable outcomes for LGBT litigants. The discussions show how the Court has expanded ideals concerning privacy in order to incorporate the liberties and rights of LGBT individuals.

 In 1986, the Supreme Court upheld state sodomy laws that prohibited same-sex intercourse in the case of *Bowers v. Hardwick.* Although the LGBT litigants in this case were unsuccessful in obtaining a favorable outcome, I believe both the majority and dissenting opinions offer insights into the Court’s understanding of the privacy argument. In the majority opinion, Justice White stated that the right to privacy only protected those “fundamental liberties,” which are “deeply rooted in this Nation’s history and traditions.”[[32]](#footnote-32) Along with their historical interpretation of what constitutes a fundamental liberty under the right to privacy, the majority also contended that previous privacy related precedents were attached to familial and free speech rights.[[33]](#footnote-33) Because they concluded that neither of these rights are attached to homosexual sodomy, the majority upheld state sodomy laws that prohibited same-sex intercourse.[[34]](#footnote-34) What is perhaps most telling, though, is that the majority spent its entire argument attempting to debunk the privacy-based legal reasoning of the LGBT litigants. Although this is true, the most relevant and precedential arguments concerning privacy are established in the dissenting opinion written by Justice Blackmun. Relying on an overarching view of privacy, Blackmun stated that, “this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”[[35]](#footnote-35) The dissent also stated that the majority relied too much on moral judgments, and used the precedents outlined in *Roe v. Wade* to conclude that moral legislation could not impede upon an individual’s right to privacy.[[36]](#footnote-36) Further, the dissent concluded that the LGBT litigant’s, “privacy and […] right to intimate association does not depend in any way on his sexual orientation.” The dissent’s opinion concludes by summarizing their ideals concerning an individual’s right to privacy:

‘Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.’ […] We protect those rights [because] they form so central a part of an individual’s life. [The] concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’[[37]](#footnote-37)

It is this overarching view of privacy, set up in Blackmun’s dissent, that became most influential on future cases before the Court. It is important to note that this view, which focuses entirely on an individual’s right to live their lives, allowed future LGBT litigants a foundation on which to claim their liberties and rights. Seventeen years elapsed before the Supreme Court would hear another case concerning sodomy laws that prohibited same-sex intercourse.

 In the case of *Lawrence v. Texas*, the Supreme Court struck down state sodomy laws that prohibited same-sex intercourse. Justice Kennedy, delivering the opinion of the Court, stated: “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”[[38]](#footnote-38) The majority opinion, not surprisingly, mirrors Blackmun’s dissent in *Bowers* and focused on ideals concerning an individual’s autonomy promised by the right their privacy. Justice Kennedy states: “It is the promise of the Constitution that there is a realm of personal liberty which the government may not enter.”[[39]](#footnote-39) This “realm” is the same “private sphere” mentioned in Blackmun’s dissent in *Bowers*. It is this understanding of privacy that led the Court to conclude that, “The State cannot demean a homosexual person’s existence or control their destiny” by making their private conduct a crime.[[40]](#footnote-40) These statutes, the Court declared, attempt to control individual’s behaviors, “in the most private of places, the home. These statutes seek to control a personal relationship that […] is within the liberty of persons to choose.” [[41]](#footnote-41) Justice Kennedy further expanded an individual’s right to privacy in these statements. By expanding upon and explaining Blackmun’s “private sphere,” the Court concluded that privacy not only protected sexual acts; it protected relationships between homosexual individuals and the right for all within the community to “choose their destiny.” A LGBT individual’s autonomy was, and still is, grounded in this overarching privacy foundation which protects their liberties. In his dissent, Scalia claimed that the majority’s reasoning would “have far reaching implications beyond this case.”[[42]](#footnote-42) He was right.

 In 2013, the case of *United States v. Windsor* was decided by the Supreme Court. Edith Windsor had sued the United States, claiming that Section 3 of the Defense of Marriage Act, which defined marriage as a legal union between one man and one woman, was unconstitutional because it violated her Fifth Amendment right to due process. The Court agreed. Relying on the precedent from *Lawrence*, Justice Kennedy (again delivering the opinion of the Court) once more expanded the privacy argument. In his opinion, Kennedy states that *Lawrence* protected one of many “[elements] in a personal bond that is more enduring.”[[43]](#footnote-43) Because the Court believed marriage has private implications and interferes with the ability of same-sex couples to have a family (perhaps the most important entity protected by the right to privacy), they ruled that the federal government must acknowledge same-sex marriages.[[44]](#footnote-44) In this case, a LGBT individual’s right to privacy was expanded to protect an individual’s liberties that were both public and private in nature. Because an LGBT individual’s right to privacy ensured and protected their liberties, the Court was able to rule Section 3 of DOMA unconstitutional “as a deprivation of the liberty of the person protected by the Fifth Amendment of the U.S. Constitution.”[[45]](#footnote-45) It is important to note that without the privacy-based foundation the liberties of LGBT individuals (including the right to marry) would not have been acknowledged and, therefore, could not have been protected.

 While it is obvious that the privacy argument has played an influential role on the Court in LGBT-related cases, the evolution of the argument may not be as noticeable. Blackmun set a privacy-based foundation which promoted the protection of LGBT individual’s rights in a specific sphere, which was then expanded by Kennedy in *Lawrence* to emphasize the autonomy of the individual and overturn *Bowers.* Finally, Kennedy expanded the argument even further to ensure that even the semi-public rights and liberties of LGBT individuals were protected under the Constitution. This evolution also allows one to understand which ideals concerning privacy have been most persuasive on the Court.

**III**

**Lockean Privacy Ideals and LGBT Litigation**

In this section, I contend that future LGBT litigation efforts must be grounded in Lockean ideals concerning privacy. These ideals have already proven influential on the Court and allow an avenue for substantial progress without undermining the LGBT community’s devotion to equality.

In order to understand how Lockean ideals concerning privacy have influenced the Court in the cases above, it becomes necessary to briefly discuss Locke’s views on privacy. In his *Second Treatise of Government,* Locke contends that the family was the first society and that it existed in a private state of nature.[[46]](#footnote-46) In this natural state, individuals have complete autonomy over themselves and may form private societal connections.[[47]](#footnote-47) Although this is true, Locke concludes that public political societies are still needed to protect the original autonomy and liberty of an individual in the private state of nature.[[48]](#footnote-48) Individuals enter into a public political society by giving up their rights to execute the law of nature while also retaining their natural rights.[[49]](#footnote-49) Because the public political society’s purpose is to protect the individual’s autonomy and liberty in private, a government may not intrude in the private sphere without providing a legitimate and significant state interest. Lockean ideology, then, establishes a clear line between the public political sphere and the private sphere it is created to protect. Because the Court recognizes these principles that lay at the foundation of our democracy, the privacy-based legal reasoning used by the justices mirror that of this Lockean ideology. This is especially true in LGBT related Court cases.

In Blackmun’s dissent in *Bowers*, he contended that “the Constitution embodies a promise that a certain *private sphere* [emphasis added] of individual liberty will be kept largely beyond the reach of government.”[[50]](#footnote-50) Lockean principles concerning the purpose of the public sphere and its separation from the private sphere are exemplified in this statement. Blackmun goes on to state: “[The] concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to political society as a whole.’”[[51]](#footnote-51) Like Locke, Blackmun understands that the private sphere protects the autonomy and liberty of the individual. Lockean-like ideals also proved influential in the Court’s decisions in *Lawrence* and *Windsor.* In *Lawrence,* Justice Kennedy again mentioned a “realm of personal liberty which the government may not enter.”[[52]](#footnote-52) This “realm” is Locke’s private sphere. Further, Kennedy mentions that the state may not “control” a LGBT individual’s destiny by “control[ing] a personal relationship.”[[53]](#footnote-53) These arguments mimic Lockean privacy ideals concerning the autonomy of the individual and the individual’s right to make private societal connections. Because these Lockean-grounded privacy arguments proved influential, the Court overruled its decision in *Bowers* and set an overarching privacy precedent for *Windsor*. Expanding on past precedent, the Court in *Windsor* ruled that the right to privacy encompassed personal bonds and the familial rights of an individual.[[54]](#footnote-54) This correlates very closely with Lockean views on privacy and its foundation in the family. By rooting their reasoning in Lockean privacy ideals the Court has expanded an individual’s right to privacy in these decisions.

Those arguments which mirror Lockean ideals concerning privacy have proven most beneficial in obtaining favorable outcomes for LGBT litigants in the past. In order to ensure substantial progress in the future, the LGBT community needs to continue framing their legal arguments in these principles. Further, those who advocate for LGBT rights in the Courts need to continue expanding upon these principles by arguing for Locke’s overarching view of privacy. By doing so, these arguments may create an umbrella to fight for and keep safe those liberties LGBT individuals still struggle to obtain.

Many of the previously mentioned concerns of those scholars in the first school can be addressed by using Lockean ideals to construct an overarching view of privacy in future cases. First, the right to privacy understood in Lockean terms would not promote ideals of “tolerance,” as the right to privacy would apply to all individuals independent of their sexual orientation.[[55]](#footnote-55) Further, because Lockean privacy ideals create a foundation that encompasses all individual liberties, protecting certain liberties under the right to privacy would not degrade these liberties by labeling them “tolerable.” If the privacy argument is framed in Lockean ideals, the liberties protected by privacy would not be domesticated, as the right to privacy would encompass liberties both inside and outside of the home. That a Lockean view of privacy would not domesticate liberties is already evidenced by the Court’s decision in *Windsor*. Privacy arguments framed in Lockean ideals would not only allow substantial progress in LGBT litigation, but also address the previous concerns of scholars in the field.

**Conclusion**

 Before the Court’s decision in *Windsor*, there were conflicting views on the usefulness of the privacy argument in LGBT related Court cases. While some contended that arguing for an LGBT individual’s right to privacy did not guarantee favorable outcomes, others claimed that the use of the privacy argument had harmful side effects on the community’s struggle for equality. None the less, the privacy argument has proved most persuasive in past Court decisions. The legal reasoning of the Court in these past cases mirrors Lockean ideals concerning privacy and the autonomy of the individual in the private sphere. Using Lockean-based privacy arguments would also address the concerns of previous scholars. Therefore, I advise LGBT litigants to ground privacy arguments in Lockean ideals in order to ensure substantial progress for their community.

In this paper, I have carefully tailored the right to privacy for the queer community specifically and acknowledge that many concerns of Feminist Scholars are not addressed. In light of these concerns, I only endorse the privacy argument to protect individual liberties so long as it does not threaten third parties.[[56]](#footnote-56) However, a further examination of this work’s argument may prove useful in reshaping a privacy argument that would not be harmful to women. It is my belief that an appropriate understanding of an individual’s right to privacy could have far reaching effects.

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1. Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 and 28 U.S.C. §1738C. [↑](#footnote-ref-1)
2. Lila Shapiro, “Marriage Equality Lawsuits After DOMA Arise In South, Midwest, As Gay Rights Groups Urge Caution,” *Huffington Post,* July 31, 2013, accessed November 12, 2013*, http://www.huffingtonpost.com/2013/07/31/ marriage-lawsuits-doma.* [↑](#footnote-ref-2)
3. Sonu Bedi, “Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete,” *Cleveland State Law Review* 53 (2006): 447.

\*\**Lawrence v. Texas*, again, is the case in which the Supreme Court declared state sodomy laws that prohibited same sex intercourse unconstitutional [↑](#footnote-ref-3)
4. Ibid., 448 [↑](#footnote-ref-4)
5. Ibid., 449 [↑](#footnote-ref-5)
6. Ibid., 449 [↑](#footnote-ref-6)
7. Ibid., 451 [↑](#footnote-ref-7)
8. Katherine M. Franke, “The Domesticated Liberty of *Lawrence v. Texas*,” *Columbia Law Review* 104, no. 5 (2004): 1415. [↑](#footnote-ref-8)
9. Ibid., 1419 [↑](#footnote-ref-9)
10. Lior Jacob Strahilevitz, “Toward a Positive Theory of Privacy Law,” *Harvard Law Review* 126 (2013): 2010. [↑](#footnote-ref-10)
11. Franke, 1400. [↑](#footnote-ref-11)
12. Ibid., 1404

\*\* It is important to note that the first Court quotation comes from Kennedy’s opinion in *Lawrence* and the second is from *Planned Parenthood v. Casey,* a privacy case unrelated to the LGBT community [↑](#footnote-ref-12)
13. Anita L. Allen, “Privacy Torts: Unreliable Remedies for LGBT Plaintiffs,” *California Law Review* 98 (2010): 1711-1712. [↑](#footnote-ref-13)
14. Bedi, 448.

\*\* Under a rational review standard, the government is required to show that a restriction on an individual’s liberties serves a “legitimate” state interest and does not include questions of morality. [↑](#footnote-ref-14)
15. Ibid., 462 [↑](#footnote-ref-15)
16. Ibid., 454 [↑](#footnote-ref-16)
17. Randy E. Barnett, “Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*,” *Boston University Law Review* 3, no. 13 (2003): 1.

\*\* See also *Lawrence v. Texas and the New Law of Gay Rights,* Arthur S. Leonard [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. Ibid., 14 [↑](#footnote-ref-19)
20. Ibid., 8 [↑](#footnote-ref-20)
21. Ibid., 19 [↑](#footnote-ref-21)
22. Vincent J. Samar, “Gay-Rights as a Particular Instantiation of Human Rights,” *Albany Law Review* 64, no. 3 (2001): 1009. [↑](#footnote-ref-22)
23. Ibid., 1014

\*\* It is import to note that this school’s argument is the opposite of that used by scholars in the second faction of the first school, who believed that an overarching view of liberty encompassed an individual’s right to privacy. [↑](#footnote-ref-23)
24. R. Douglas Elliot and Mary Bonauto, “Sexual Orientation and Gender Identity in North America: Legal Trends, Legal Contrasts,” *Journal of Homosexuality* 48 (2005): 94. [↑](#footnote-ref-24)
25. Richard E. Epstein, “Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights,” *University of Chicago Legal Forum* 73 (2002): 96. [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)
27. Ibid., 97 [↑](#footnote-ref-27)
28. Joseph J. Wardenski, “A Minor Exception?: The Impact of *Lawrence v. Texas* on LGBT Youth,” *Northwestern Law Review* 95, no. 4 (2005): 1410. [↑](#footnote-ref-28)
29. Ibid. [↑](#footnote-ref-29)
30. Epstein, 98. [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. Justice White, Bowers v. Hardwick, 478 U.S. 186 (1986) [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. It is important to note that Justice Powell, in a concurring opinion, stated that imposing prison sentences on the individuals found guilty of same-sex sodomy could create serious 8th Amendment issues. [↑](#footnote-ref-34)
35. Justice Blackmun, Bowers v. Hardwick, 478 U.S. 186 (1986) [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. Justice Kennedy, Lawrence v. Texas, 539 U.S. 558 (2003) [↑](#footnote-ref-38)
39. Ibid. [↑](#footnote-ref-39)
40. Ibid. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Justice Scalia, Lawrence v. Texas, 539 U.S. 558 (2003) [↑](#footnote-ref-42)
43. Justice Kennedy, United States v. Windsor, 133 S. Ct. 2675 (2013) [↑](#footnote-ref-43)
44. Ibid. [↑](#footnote-ref-44)
45. Ibid. [↑](#footnote-ref-45)
46. John Lock, “Second Treatise of Civil Government” (1690), Sec. 77-83. [↑](#footnote-ref-46)
47. Ibid., Sec. 81 [↑](#footnote-ref-47)
48. Ibid., Sec. 87 [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. Justice Blackmun, Bowers v. Hardwick, 478 U.S. 186 (1986) [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Justice Kennedy, Lawrence v. Texas, 539 U.S. 558 (2003) [↑](#footnote-ref-52)
53. Ibid. [↑](#footnote-ref-53)
54. Justice Kennedy, United States v. Windsor, 133 S. Ct. 2675 (2013) [↑](#footnote-ref-54)
55. See the above discussion over Blackmun’s dissent in *Bowers*, in which he stated: “privacy and […] the right to intimate association does not depend in any way on his sexual orientation.” [↑](#footnote-ref-55)
56. See the above discussion concerning Epstein’s work. [↑](#footnote-ref-56)